

Responding to the financial abuse of older people

Understanding the challenges faced by the banking and financial services sector

AUGUST 2008



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Foreword

The Australian Network for the Prevention of Elder Abuse (ANPEA) is a national network of agencies committed to reducing the level of abuse of older Australians. It has a diverse membership from government, legal, academic, community and health organisations.

Members of ANPEA have observed the growing incidence of financial abuse of older Australians and in particular amongst older single women. Several factors are driving the growing incidence of elder financial abuse: the unprecedented projected growth in the numbers of people 75 plus over the next three decades, the increasing wealth of older Australians and the growing numbers of people with dementia.

Statistics from each of the telephone information and referral services around the country are indicating that financial abuse constitutes up to 50 per cent of reported cases of abuse perpetrated against older Australians. Yet it is the form of abuse that policing, judicial and health systems find it most difficult to adequately respond to. Much of the abuse is hidden and evidentiary difficulties and family attitudes result in a low level of prosecution of offenders. In this context preventative and protective strategies are essential elements of an adequate response.

The banking and financial service sectors in a number of overseas countries are responding to this emerging problem for their clients and it is pleasing to see the Australian sector taking a more active role. There are legal, procedural and attitudinal issues to be addressed in the development of a coherent strategy for addressing financial abuse of older Australians. ANPEA is very encouraged by the recent pronouncements by the Australian Bankers' Association about addressing this form of abuse and the initiative to which this report seeks to contribute.

This report offers one of the more comprehensive analyses of the challenges, legislative constraints and opportunities for addressing financial abuse for the banking and financial sector in Australia that I have seen. The Commonwealth Government has legislative responsibility for banking in Australia and the challenges facing the industry highlighted in this report require national debate and a national response. ANPEA is committed to engaging in this debate and contributing towards an adequate response to elder abuse in Australia.

The suggestions and recommendations in this report are based on a grounded understanding of legislative opportunities and constraints that exist and draw on some of the initiatives that have been implemented overseas. I am pleased to commend the report to the banking and financial services sector.

Associate Professor Gerry Naughtin

National Convenor

Australian Network for the Prevention of Elder Abuse

August 2008

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Preface

In a paper given in November 2005 to the Banking and Financial Services Ombudsman Annual Conference entitled *Uncovering elder abuse: powers of attorney, administration orders and other issues for banks*, Julian Gardner, the then Public Advocate, Victoria, highlighted the important role that banks can play in identifying and protecting their customers against elder financial abuse.¹ Mr Gardner observed that banks and financial services occupy a privileged position in the financial affairs of their customers and, as had been recognised in other jurisdictions, ‘have the potential to be the “first line” of defence against abuse by identifying the abuse at its outset, before the elder’s assets have been dissipated’.²

In response to submissions of a similar nature made by Mr Gardner and others to the 2007 Commonwealth Parliamentary Inquiry into Older People and the Law, the House of Representatives Legal and Constitutional Affairs Committee made the following recommendation in its report *Older people and the law*:

Recommendation 5

*The Committee recommends that the Australian Government work in cooperation with the banking and financial sector to develop national, industry-wide protocols for reporting alleged financial abuse and develop a training program to assist banking staff to identify suspicious transactions.*³

In December 2007, the Banking and Financial Services Ombudsman issued BFSO Bulletin 56: *Financial abuse of the vulnerable older person* in response to the expectations, raised by the report *Older people and the law*, that the financial services industry could do more to protect its older and vulnerable customers against potential loss. BFSO Bulletin 56 deals not only with the nature and warning signs of financial abuse but also with the principles relevant to determining the allocation of liability for the potential loss and the development of national protocols and training programs for staff in identifying and responding promptly to prevent loss.

If Recommendation 5 of *Older people and the law* is to be taken seriously, Australian legislatures and the banking and financial sector will have to identify and overcome significant challenges and constraints – practical, commercial and legal. For example, what are the consequences for the bank if it intervenes and questions the customer’s warrant because the transaction is out of the ordinary or there are signs that the customer does not understand or has not agreed to the warrant? What precisely is the bank’s responsibility to intervene in the interests of its elderly and vulnerable customers in such instances?

In July 2007, a specialist Older Persons Legal Program of the Bendigo based Loddon Campaspe Community Legal Centre developed a project brief to identify the challenges and constraints faced by the banking and financial sector in responding to the financial abuse of their older customers. The brief also aimed to research best practice standards

to reduce the incidence of elder financial abuse. The project has given birth to this report: *Responding to the financial abuse of older people: understanding the challenges faced by the banking and financial services sector.*

This report does a number of things.

- It asks whether the Code of Banking Practice provides the model for imposing higher standards of responsibility on banks to act more protectively towards their older and more vulnerable customers.
- It looks at representative transactions and the role of the Victorian Office of the Public Advocate in investigating these and other cases where there is abuse.
- It examines the relationship between banks and their customers and the restraints that operate by virtue of privacy laws, banks' contractual duty of confidentiality and the laws of defamation that limit the ability of banks and the financial sector to engage with third parties in response to instances of suspected financial abuse of older people.
- It looks at the risks for banks if they move outside the parameters of the traditional banker-customer relationship and question the customer's mandate in such cases.
- It canvases proposals for mitigating these risks and shows how industry practice has changed in other international jurisdictions where the concerns of the banks have been addressed in the interests of encouraging a more protective approach towards the older or vulnerable customer.
- It considers the legislative reform that will be necessary to encourage or mandate the reporting of financial abuse.
- Finally, the report makes specific recommendations for law reform and the changes required within the industry, for improving staff training to identify and respond to financial abuse and for promoting further research.

The Loddon Campaspe Community Centre commends the banking and financial services sector for its growing response to community concerns that more should be done to stem the rising tide of financial abuse of older people. It trusts that this report will clarify the challenges and constraints facing banks and financial services in responding to the financial abuse of their older customers and suggest constructive responses to these issues.

Peter Noble

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August 2008

1. Introduction and Scope

This report examines areas of potential legal liability banks may incur in reporting suspected financial abuse of elderly customers by third parties.

The report focuses on the relationship between a bank and its customers in relation to ordinary deposit accounts and everyday transactions. It does not consider transactions such as loans or financial advice, insurance or other banking products, and it should be noted that the findings would be substantially different in relation to such banking products.

This report does not examine schemes that have been established in some international jurisdictions for reporting and investigating instances of financial abuse and how similar measures might operate in Australia. Rather, it looks at the capacity of banks and other financial institutions to respond to financial abuse identified in the banking transactions of older customers and the legal constraints on banks and financial institutions if the response necessarily involves third parties or requires third party intervention.

The breadth of what may constitute financial abuse makes defining it a complex task. Financial abuse has been variously defined as:

- (a) *'any act or omission that results in harm to an older person which occurs in a relationship where there is an implication of trust';*⁴
- (b) *'the illegal or improper exploitation or use of funds or resources of the older person';*⁵
- (c) *'illegal or improper exploitation by using funds, property, or other assets of a vulnerable adult for personal gain irrespective of detriment to the vulnerable adult';*⁶
- (d) *'when a person illegally or improperly uses the resources of an incapacitated or dependent adult for the profit or advantage of someone other than the adult'.⁷*

The Banking and Financial Services Ombudsmen ('BFSO') considers that the necessary ingredients of financial abuse of elderly persons are as follows:

- (e) *'the direct or indirect use of the funds, assets, accounts or facilities;*
- (f) *by a third party;*
- (g) *of an older person;*
- (h) *who is vulnerable because of incapacity, or dependence on or trust in a third party (which, together with detriment would make the conduct improper); or*
- (i) *which is illegal conduct (e.g. forgery or fraud); and*
- (j) *which is to the detriment or potential detriment of the older person and to the gain of another person.'*⁸

Although each of the above definitions has its own advantages, we prefer the BFSO definition because it is specific to the banking context and requires actual or potential detriment (one of the other definitions states that there can be abuse irrespective of detriment of the vulnerable person; we do not agree with that statement). Therefore, the BFSO definition is adopted for the purpose of this report.

The law is stated as at 18 April 2008.

2. Glossary

In this report:

- **‘Abuse’** means:
 - (a) the direct or indirect use of the funds, assets, accounts or facilities;
 - (b) by a third party;
 - (c) of an older person;
 - (d) who is vulnerable because of incapacity, or dependence on or trust in a third party (which, together with detriment would make the conduct improper); or
 - (e) which is illegal conduct (e.g. forgery or fraud); and
 - (f) which is to the detriment on potential detriment of the older person and to the gain of another person.⁹
- **‘ASIC Act’** means the *Australian Securities and Investments Commission Act 2001* (Cth).
- **‘BFSO’** means the Banking and Financial Services Ombudsman.
- **‘Code’** means the Code of Banking Practice.
- **‘EPAF’** means Enduring Power of Attorney (Financial).
- **‘Guardianship Act’** means the *Guardianship and Administration Act 1986* (Vic).
- **‘Instruments Act’** means the *Instruments Act 1958* (Vic).
- **‘NPP’** means the National Privacy Principles set out in the Privacy Act 1988 (Cth).
- **‘OPA’** means the Victorian Office of the Public Advocate.
- **‘Privacy Act’** means the *Privacy Act 1988* (Cth).
- **‘VCAT’** means the Victorian Civil and Administrative Tribunal.
- **‘VCAT Act’** means the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

3. Summary of Findings

3.1 Conclusions

The Code of Banking Practice

The Code does not impose any specific positive obligations on banks which have adopted the Code to identify and report instances of abuse. Instead, it reinforces existing legal obligations on banks which may be triggered by instances of abuse (for example, notice of undue influence). Some of its broader standards (such as para 2.2 of the Code) may also potentially be expanded to address issues involving abuse.

Reporting suspected abuse to the Office of the Public Advocate

A key concern of banks and their staff in accessing the jurisdiction and services of the OPA in the case of suspected financial abuse is the confidentiality of transactions between the bank and the client.¹⁰ There is a reticence amongst banks to report suspicious transactions to VCAT or the OPA for fear of violating obligations of privacy.¹¹ Further, if allegations made in reports by the bank are found to be false, the possibility of a legal suit being brought by the accused arises.

Privacy law

Under the current Australian privacy framework, financial institutions have a positive obligation not to breach the NPPs but do not have any reliable overall protection from liability for disclosing a customer's personal information to third parties in suspected cases of abuse. The difficulty in identifying and recognising abuse, coupled with the uncertainty of protection against breaches of privacy laws, could lead to financial institutions being reluctant to report even if there are grounds for suspicion of abuse.

The most effective method to address concerns of privacy breach in the context of suspected abuse is to use a combination of prior written consent, voluntary reporting and the introduction of immunity provisions.

Adoption of these strategies will minimise the risk of breaching any privacy principles and encourage financial institutions to report suspected abuse and encourage a culture of abuse prevention. The provision of information on the risks and the signs of abuse to both employees and customers of financial institutions will not only help reduce the likelihood of abuse but also change the expectations of customers of the way financial institutions deal with such abuse.

Confidentiality

Banks have a common law duty of confidentiality to their customers (including elderly customers) as outlined in *Tournier's* case, which is qualified by four exceptions which may be applicable in the context of reporting suspected abuse. Other laws and codes also

impose an obligation to protect a customer's confidential information. The EFT Code requires participating institutions to protect consumer privacy; the ASIC Act requires financial institutions to promote the protection of consumer interests and the BFSO scheme reinforces the common law position of protection of customer confidentiality.

The banker–customer relationship

Legal commentary and judicial authority indicate that the ordinary relationship of the banker and customer is one of debtor and creditor and is not fiduciary in nature.

However, certain circumstances may give rise to a fiduciary relationship between banker and customer and usually involve the bank advising its client with respect to lending and potential transactions the client may be considering.

A bank can reduce the risk of abuse and protect itself from breaching its duties to its customers by including terms and conditions in its contract with its customers to allow questioning of mandates and/or allow a delay in carrying out apparently valid mandates on suspicion of abuse. Banks can also educate their customers and staff in recognising and dealing with suspected abuse.

Defamation

An allegation of abuse may form the basis of an action in defamation. This is particularly so given the broad meaning of 'publication' (including all forms of communication) and the objective test that applies. There are a number of defences available to a financial institution of which, with regard to the topic at hand and the banker-customer relationship, the defence of 'qualified privilege' is particularly pertinent. To minimise the risk of a defamation action succeeding, a financial institution should use its best endeavours to ensure that any abuse it plans to report is substantially true and based on proper material and information, bearing in mind that, ultimately, a court will decide this by reference to objective standards.

3.2 Recommendations

On the basis of our research as identified in this report we recommend consideration of the following reforms:

- (a) the Code to be amended to require adopting banks to implement appropriate training for all staff of a financial institution, including to:
 - (i) recognise signs of abuse, recognise the common profile of a vulnerable customer and/or potential abusers;
 - (ii) understand protocols to deal with suspected abuse; and
 - (iii) understand enduring powers of attorney and administration orders made by tribunals;
- (b) possible amendment to relevant legislation and codes (including the Code, and the Privacy Act), to protect financial institutions from any suit of defamation,

or breach of contract or confidentiality or interference with privacy if they report suspected abuse in good faith;

- (c) the Australian Bankers' Association to consider whether it should:
 - (i) amend the Code to include new or separate standards and contractual terms for consumer banking services (including basic savings and investment products) to or for elderly customers;
 - (ii) conduct research on overseas trends and experiences to enhance the value of the review.

In addition we commend consideration of all of the reforms proposed by the House of Representatives, Standing Committee on Legal and Constitutional Affairs,¹² and particularly:

- (d) the Australian Government provide funding mediation and dispute resolution services to assist older people to resolve financial disputes involving abuse.
- (e) the Australian Government provide funding to the Australian Network for the Prevention of Elder Abuse.
- (f) the members of the Australian Guardianship and Administration Committee examine the Western Australian legislation relating to reporting by banks and other financial institutions of suspected abuse to the Public Advocate and Advocate, and develop similar initiatives for consideration by their respective state and territory governments.
- (g) the Australian Government or the Australian Bankers' Association provide funding and appoint or establish an agency to be responsible for monitoring abuse, developing solutions to combat abuse and providing a focal point to address the issue of abuse.
- (h) the Australian Government examine a rebate scheme for legal fees for older Australians to improve access to legal services.
- (i) the Australian Government require that 10 per cent of Commonwealth funding to the Legal Aid Commissions be utilised for assisting older Australians with legal matters that otherwise qualify for legal aid assistance.
- (j) the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.
- (k) the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus on older people.
- (l) the Australian Government establish a resource service for older people, accessible through a single contact point, such as an 1800 telephone number, that can provide assistance to older people in identifying the legal services that are available to them.

Further, that the assistance service be supported by a media education campaign to alert older people to their legal rights and to advertise the availability of legal assistance.

4. Code of Banking Practice

4.1 Summary

The Code has been reviewed to determine whether it imposes any specific positive obligations on banks which have adopted the Code to either:

- (a) identify and/or report instances of abuse; or
- (b) provide products or services to elderly customers to protect them against potential abuse.

4.2 The Code

The Code is the voluntary code of practice published by the Australian Bankers' Association setting out standards of good banking practice with respect to banks' dealings with their customers or potential customers.

Most Australian banks have adopted the Code; however some have adopted the Code on a conditional basis.

The Code is subject to an independent review at least every three years (para 5 of the Code), with the Viney Review of 2001 being the most significant review undertaken so far.

4.3 Potentially relevant provisions of the Code

In our view, there are no provisions in the Code imposing specific positive obligations on banks which have adopted the Code to either identify and report instances of abuse or provide products to elderly customers which protect them against abuse.

In reaching the above conclusion, we are mindful that:

- (a) there is a provision in the Code which pertains to the elderly (although not in the specific context of abuse); and
- (b) there are other provisions which, although they do not pertain specifically to the elderly, could potentially be relevant in scenarios involving abuse.

Paragraph 6 of the Code, which pertains to the elderly, provides as follows:

Elderly customers and customers with a disability

We recognise the needs of elderly customers and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services.

The intention underlying the introduction of Paragraph 6 of the Code appears to have been to ameliorate the difficulties elderly and disabled customers have when using technologies such as 'ATMs, telephone banking or internet banking'.¹³ As a result, this

paragraph is directed more towards physical access to services and does not directly address the issue of abuse or impose positive obligations on banks to address that issue.

Although the Code does not currently address the issue of abuse directly, there is an argument (which we note for completeness but do not agree with) that the issue of abuse is addressed by implication on account of paragraph 6 of the Code, which could be construed as requiring (or at least providing a basis for) the reporting of abuse by banks to relevant authorities.

Our conclusion does not mean that banks may not be otherwise required by the Code to address the issue of abuse, only that no specific positive obligations are imposed by the Code. The Code does contain general provisions which may sometimes be relevant in contexts involving abuse, in particular the obligation on the part of banks which have adopted the Code to:

- (a) act fairly and reasonably (para 2.2);
- (b) comply with all relevant laws relating to banking services (para 3.1) (e.g. a bank may be under a duty to investigate an apparently valid mandate where a withdrawal is made by an elderly customer who is accompanied by and directed and influenced by a carer or family member);¹⁴
- (c) exercise the care and skill of a diligent and prudent banker before offering or giving a person a credit facility (or an increase in a credit facility) (para 25) (e.g. a bank may not be exercising the requisite level of care and skill where it lends to an elderly customer in circumstances involving abuse where the customer has limited capacity to repay the loan); and
- (d) refrain from accepting a person as a co-debtor under a credit facility where it is clear, on the facts known to the bank, that the person will not receive any direct benefit under the facility (para 26) (e.g. an elderly person is made a co-borrower in circumstances where the direct and only benefit of the loan is received by the elderly person's child).

However, the above provisions apply far more widely than just in cases involving abuse. As a result, the presence of those provisions in the Code does not specifically alert bankers of their obligations, nor elderly customers of their rights, in scenarios involving abuse.

In conclusion, although the Code does not impose any specific positive obligations on banks which have adopted the Code to identify and report instances of abuse:

- (a) it reinforces existing legal obligations on banks which may be triggered by instances of abuse (for example, notice of undue influence); and
- (b) some of its broader standards (such as para 2.2) may potentially be expanded to also address issues involving abuse.

5. Office of the Public Advocate

5.1 Summary

This section considers the financial vulnerability of elderly persons, focusing on those who are subject to Enduring Powers of Attorney (Financial) or Administration Orders, and discusses the role of the Victorian Office of the Public Advocate in preventing and addressing financial abuse of these members of the community. In particular, this section will look at the role of banks in identifying and reporting suspected instances of financial abuse of elderly clients, and at the ramifications for banks of reporting this suspected abuse. Whether or not banks are subject to obligations of confidentiality and whether they are immune from any potential legal action stemming from their reporting will be addressed in part 6 below.

The focus of this section is on the role and powers of the Victorian OPA. A table summarising equivalent bodies, legislative provisions and administrative powers in other States and Territories is attached at Schedule 1.

5.2 The OPA – roles, obligations and powers

- (a) The OPA *'aims to promote and protect the rights and dignity of people with disabilities'* in Victoria.¹⁵ Although the OPA sits within the Department of Justice, it is independent of government and reports to the Victorian Parliament. The OPA has a statutory responsibility to protect the rights of people with a disability, as well as legal powers to make enquiries on behalf of people with disabilities in response to concerns about their safety or interests. These powers and responsibilities are conferred on the OPA by the Guardianship Act and the Instruments Act.
- (b) Under section 16 of the Guardianship Act the powers and duties of the OPA include, amongst other things:
 - (i) making applications to VCAT for the appointment of a guardian or administrator or the rehearing or reassessment of a guardianship order or an administration order;
 - (ii) submitting reports to VCAT on any matter referred to the OPA for a report by VCAT; and
 - (iii) investigating any complaints or allegations that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship.¹⁶
- (c) Under schedule 1, clause 35 of the VCAT Act, VCAT may refer any matter relating to a proceeding under the Guardianship Act or part XIA of the Instruments Act to the OPA for investigation and report. The OPA is then obliged to investigate and report to VCAT on that matter, and VCAT is not permitted to determine a question referred to the OPA under this clause before receiving and considering the OPA's report.

- (d) Section 16(1)(ha) of the Guardianship Act prescribes that the OPA has the power, for the purposes of an investigation into a complaint regarding exploitation or abuse of a person, to require a person, government department, public authority, service provider, institution or welfare organisation to provide information.¹⁷ This power is limited by section 4(2) of the Guardianship Act, which requires that the person must have a disability; that is: ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’.¹⁸ As age is not considered a disability in this definition, the OPA may not have the power to investigate a complaint or allegation of exploitation or abuse of an elderly person in the absence of any of the defined disabilities even though the elderly person may nonetheless be disadvantaged. For example, an elderly person with no disabilities who is being exploited by his or her children who exert emotional pressure on the elderly person would not give rise to the OPA having any powers to investigate the matter.
- (e) The VCAT Act provides that the OPA may intervene at any time and is entitled to be joined as a party in any proceeding under the Guardianship Act¹⁹ or Part XIA of the Instruments Act.²⁰

5.3 Enduring Power of Attorney (Financial)

- (a) An Enduring Power of Attorney (Financial) (‘EPAF’) is a legal document by which a person (‘Donor’) appoints another person (‘Attorney’) to be given the power to make financial and legal decisions on the Donor’s behalf. Unless it is revoked by the donor (or by VCAT) an Enduring Power of Attorney, unlike a General Power of Attorney, continues to operate after the Donor has lost the capacity to make these decisions independently.²¹
- (b) This section of the report will be limited to consideration of EPAFs and the powers to make financial and legal decisions that they confer. An Enduring Power of Attorney (Medical Treatment) or an Enduring Power of Guardianship should be put in place if the Donor wishes to have medical or lifestyle decisions made for them.
- (c) The advantage of an EPAF is that an individual can appoint a person that they trust to act as their Attorney. This person need not be a family member, it could be a trustee company or a professional such as an accountant or lawyer. The extent of an Attorney’s power is determined by the Donor, who must be 18 years or over and have the capacity to make the appointment, at the time of signing the legal document.²² The Donor can also choose when the EPAF will come into effect: immediately; on a particular date; after a particular occurrence; or when he or she loses capacity.²³
- (d) Unfortunately, however, EPAFs do not provide a guarantee against abuse and in fact they are highly susceptible to misuse by Attorneys.²⁴ There are no formal structures for monitoring the decisions of Attorneys and, unless they are required to do so by the Guardianship List, the Attorney will not have to submit any regular forms or reports outlining the decisions they have made or demonstrating how they have acted in the Donor’s best interests.²⁵

5.4 Administration orders

- (a) If the person requiring assistance in decision-making has already lost the capacity to appoint an Attorney, an application can be made to the VCAT Guardianship List to have an Administrator appointed.
- (b) In this situation, the decision-making powers of a 'represented person' are conferred on an 'Administrator'. Similarly to an Attorney under an EPAF, an Administrator's role is to make financial and legal decisions in relation to banking, property and paying bills rather than medical or lifestyle choices. If there is not a family member, friend or legal professional who is suitable to act as Administrator, VCAT can appoint State Trustees as an independent administrator.
- (c) An Administrator has an obligation to act in the represented person's best interests,²⁶ and is required to report to VCAT on a regular basis to lodge an account of the represented person's finances. VCAT also has the power to reassess and revoke the Administrator's appointment.²⁷

5.5 Informal relationships of trust in relation to banking and financial transactions

- (a) Informal relationships of trust are also a potential source of financial abuse for older members of communities. By way of example, a study conducted in Queensland which surveyed 3466 people aged 65 and over showed that, while 16.8 per cent of older people surveyed received formal financial assistance (in the form of an EPAF or an Administration Order), 87 per cent of those surveyed received informal financial assistance including:
 - (i) use of ATM or PIN;
 - (ii) internet and telephone payments;
 - (iii) completing cheques and making withdrawals; and
 - (iv) making payments with the older person's money.²⁸
- (b) Although these informal relationships are more difficult for the OPA or banks to detect and/or report, they should be kept in mind when developing legislative and policy reforms. There is also a role for the OPA and banks in regard to these relationships in that, if abuse of informal relationships of trust is detected and reported, the OPA can apply to VCAT to have an Administrator appointed if it believes the elderly person no longer has the capacity to make financial and legal decisions for themselves.

5.6 The role of the OPA in cases of financial abuse of elderly persons

- (a) As discussed above, the OPA investigates and intervenes in cases of exploitation, neglect and abuse of people who have a disability. In general, it is elderly persons with a disability, who may have accumulated substantial wealth and assets over the years, who are most likely to be subject to financial abuse.
- (b) Financial abuse can exist in either a Donor and Attorney relationship or a represented person and Administrator relationship, or as mentioned above, in informal relationships of trust. Examples of financial abuse are numerous and varied. Those relevant to banking and financial services include:
- (i) taking or misusing money;
 - (ii) withholding knowledge about or permission in regard to money or property;
 - (iii) forging or forcing an older person's signature;
 - (iv) abusing joint signatory authority;
 - (v) misusing ATM or credit cards;
 - (vi) cashing cheques without permission or authorisation;
 - (vii) misappropriating funds from a pension;
 - (viii) using an authorised power of attorney otherwise than in the best interest of the older person;
 - (ix) denying access to money or property; and
 - (x) getting an older person to act as guarantor knowing that they have not made an informed decision.²⁹
- (c) If any of these forms of financial abuse are brought to the attention of the OPA (the problematic nature of these crucial steps of detection and reporting is discussed below), it can respond through investigations and/or bringing it to the attention of VCAT.³⁰ The OPA currently operates in accordance with the following procedures:³¹
- (i) where a person contacts the OPA alleging financial abuse, the person can remain anonymous but no guarantee of confidentiality can be given by the OPA due to the rules of natural justice, which require that a party be made aware of a complaint against them and be given the opportunity to present their version of the events;
 - (ii) the OPA's files are exempt from the *Freedom of Information Act* 1982 (Cth) but the OPA has a discretion to disclose information, although such discretion is rarely exercised due to a concern for preserving the complainant's confidentiality (an OPA file may, however, be viewed by the Victorian Ombudsman);
 - (iii) the OPA has an obligation to apply natural justice and so must make interested persons aware of any allegations made against them. Although the OPA can often achieve this without disclosing its source, the interested person may

nevertheless be able to guess the source of the information, especially where the information is known only to a limited number of people;

- (iv) if the OPA provides a report to VCAT regarding a matter that is before VCAT, the OPA may seek an order that the report, or part thereof, be treated as confidential and not disclosed to parties (the Victorian Civil and Administrative Tribunal Rules r 6.23 sets out the grounds for seeking confidentiality) but the OPA does not control that decision;
 - (v) applications made to VCAT which contain allegations are, in the OPA's view, litigation and so any defamatory material is governed by absolute privilege;
 - (vi) if VCAT refers a matter to the OPA, the officers of the OPA are acting under the authority of VCAT and are subject to the secrecy provisions of the VCAT Act (this ensures that the material is subject to the defence of absolute privilege in relation to defamation under section 27 of the Defamation Act 2005 (Vic) ('Defamation Act')); and
 - (vii) when a person makes statements directly to the OPA alleging abuse which may be seen as defamatory of a person, the reporter may also be able to avail themselves of the defence of qualified privilege under section 30 of the Defamation Act.
- (d) In the case of suspected abuse by an attorney, the Donor of an EPAF may apply to VCAT for the appointment of an Administrator and make a concurrent application under section 125V of the Instruments Act for an order that the OPA investigate the Attorney's conduct. However, section 125V of the Instruments Act would not operate if the EPAF has already been revoked.³²

5.7 Victorian Civil and Administrative Tribunal ('VCAT') – Guardianship List

- (a) The VCAT Guardianship List deals with guardianship, administration, powers of attorney and related matters. The Guardianship List can, on its own initiative³³ or on an application by the OPA³⁴ (amongst others) under the Instruments Act, make a decision to revoke or suspend³⁵ an EPAF if it finds that the Attorney is acting improperly or not in the Donor's best interests. In addition, the Guardianship List can:
- (i) give directions or make recommendations to the Attorney;
 - (ii) vary the effect of the EPAF;
 - (iii) give advisory opinions; or
 - (iv) require the Attorney to lodge accounts or have accounts examined or audited.³⁶
- (b) Anyone who has a genuine interest in the Donor's or represented person's welfare can ask the VCAT to consider the actions of the Attorney or Administrator.

If, upon hearing the evidence, the Guardianship List is satisfied that the Attorney or Administrator is not acting in the Donor's or represented person's best interests, it can revoke the EPAF or Administration Order. VCAT also operates a 24-hour emergency service and can appoint an Administrator to make financial and legal decisions if the EPAF or Administration Order is cancelled.

5.8 The role of banks in reporting elder financial abuse

- (a) The two key problems in ensuring the financial safety of the elderly are, firstly, detecting the abuse, and secondly, finding someone that is prepared to take action by bringing the abuse to the attention of the OPA or VCAT. Julian Gardner, the former Victorian Public Advocate, states that *'the fundamental problem with financial abuse is lack of detection'*.³⁷ He quotes a study by the American Bar Association that noted *'banks have the potential to be the "first line" of defence against financial abuse, by identifying the abuse at its outset, before the elder's assets have been dissipated'*.³⁸ The key role for banks is the observation of behaviours that point to the possibility of financial abuse, including:
- (i) an unusual volume of banking activity;
 - (ii) banking activity that is inconsistent with the client's usual practices;
 - (iii) sudden increases in debt when the older person appears to be unaware of the transactions;
 - (iv) withdrawal of funds by someone else handling the person's affairs where there is no perceivable benefit to the account holder; or
 - (v) implausible reasons for banking activity being given by either the older person or by someone accompanying them.³⁹

5.9 Confidentiality and immunity from liability for banks

- (a) A key concern of banks and their staff in accessing the jurisdiction and services of the OPA in the case of suspected financial abuse is the confidentiality of transactions between the bank and the client.⁴⁰ There is a reticence amongst banks to report suspicious transactions to VCAT or the OPA for fear of violating obligations of privacy.⁴¹ Further, if allegations made in reports by the bank are found to be false, the possibility of a legal suit being brought by the accused arises.
- (b) The non-binding Australian Bankers' Association Code of Banking Practice ('Code'), to which all major banks in Australia are signatories,⁴² recognises *'the needs of elderly customers and customers with a disability to have access to transaction services'* and commits to taking *'reasonable measures to enhance their access to those services'*.⁴³ In terms of reporting obligations, however, clause 22 of the Code refers to banks' duties under the *Privacy Act 1988* (Cth) ('Privacy Act') and to their

'general duty of confidentiality' to the customer. Exceptions to this duty of confidentiality under the Code include:

- (i) where disclosure is compelled by law;
 - (ii) where there is a duty to the public to disclose; and
 - (iii) where disclosure is made with the customer's express or implied consent.
- (c) As the law currently stands, reporting of suspected financial abuse is not statutorily compelled. There may, however, be scope for the argument that there is a public duty to disclose this abuse of elderly members of the community to the OPA. Obtaining express or implied consent is problematic in the context of elderly persons, particularly those with Attorneys or Administrators, due to their incapacity to make legal and financial decisions. Banks' concerns with these obligations of confidentiality and the restrictions on disclosure of personal information under the Privacy Act and the National Privacy Principles are a significant obstacle to encouraging banks and their staff to report suspected financial abuse of elderly Victorians.
- (d) At this point in time there is also no statutory immunity from suit for a person who approaches the OPA with concerns that a person is being financially abused. The VCAT Act provides for the confidentiality of proceedings by prohibiting persons from publishing or broadcasting or causing to be published or broadcast any report of a proceeding under the Guardianship Act or Part XIA of the Instruments Act (regarding EPAs) that identifies, or could reasonably lead to the identification of, a party to the proceeding.⁴⁴ These provisions, however, do not alleviate banks' fears of potential legal liability stemming from reporting suspected financial abuse, particularly given that it is often difficult to conceal the identity of the person who made the initial complaint throughout the course of proceedings.

5.10 Policy initiatives and legislative reform

- (a) In the United States almost every State recognises financial abuse or exploitation as a reportable form of elder abuse and imposes obligations upon banks and financial institutions to report concerns of this abuse.⁴⁵ Forty-nine States encourage voluntary reporting of suspected financial abuse of elderly persons by including immunity provisions in their adult protective services laws for good faith reports, and three States identify banks as mandatory reporters of suspected financial abuse.⁴⁶
- (b) In Victoria, Gardner recommended cooperative voluntary initiatives with the banking industry, including training bank personnel to recognise signs of financial abuse and developing internal protocols in banks to deal with suspected abuse (such as requiring bank employees to report suspected abuse to the branch manager for determination according to a consistent standard of assessment).⁴⁷ It is also strongly arguable that banks would be less reticent to report suspected abuse early in the piece, before funds are substantially reduced, if legislative reform was undertaken to protect them from any suit that might stem from such reporting.

6. Privacy Law

6.1 Introduction

There are potential Australian privacy law implications where a corporation, including a financial institution, discloses personal information relating to a customer who is a natural person to a third party.

We review below the Australian privacy law framework as it applies to the reporting of abuse by financial institutions to Australian government agencies, Australian welfare organisations or other third parties located in Australia.

We will also provide a brief overview of how other jurisdictions address this issue and suggest some alternative ways of addressing privacy issues in the context of reporting abuse in the Australian legal environment.

6.2 Legislative framework

The main privacy legislation, the *Privacy Act 1988* (Cth) ('Privacy Act') came into force in 1989, mainly regulating Commonwealth government agencies (private sector organisations were regulated in limited areas such as the handling of credit information and tax file numbers). Amendments were made to the Act in 2000 to extend its application to include the private sector. The Privacy Act contains two sets of privacy principles: the Information Privacy Principles (not relevant for present purposes as they apply only to Commonwealth and ACT government agencies) and the National Privacy Principles (which apply to the private sector). The National Privacy Principles are examined in more detail below.

The Privacy Act regulates the handling of 'personal information'. 'Personal information' is defined in the Privacy Act to mean:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

This broad definition of personal information includes information such as the name, age, address and other contact details of a natural person customer.

For the sake of completeness we note that the Privacy Act does not just regulate the handling of personal information by organisations through the NPPs: Part IIIA of the Privacy Act amongst other things regulates how credit providers (such as financial institutions) disclose personal information contained in 'reports' relating to an individual's credit worthiness. 'Report' is broadly defined to mean a credit report or 'any other record or information, whether in a written, oral or other form, that has any bearing on an individual's credit worthiness, credit standing, credit history or credit

capacity'.⁴⁸ As a result, any financial institution seeking to report abuse to a third party in a manner which relevantly discloses personal information relating to a person's credit worthiness will need to be mindful of Part IIIA of the Privacy Act. For present purposes we will confine our discussion to the NPPs, as a financial institution's report of abuse to a third party need not necessarily include information having a bearing on a person's credit worthiness.

6.3 National Privacy Principles

The National Privacy Principles⁴⁹ ('NPPs') are potentially applicable to financial institutions disclosing personal information about customers to third parties where abuse is suspected. The NPPs contain 10 principles which relate to the collection, use and disclosure, data quality, data security, access to, correction of and transborder data flow of, personal information, and specific principles regulating private sector organisations' collection of sensitive information, use of Commonwealth government identifiers and an individual's rights to deal anonymously with organisations whenever possible. The application of the NPPs depends on the type of organisation, the nature of the information, the way the information is handled and the application of privacy codes.

6.4 Application to financial institutions

The 10 NPPs apply to organisations and regulate the way personal information may be collected, used, or disclosed by them. 'Organisation' is broadly defined and includes individuals, bodies corporate, partnerships, other unincorporated associations and trusts but excludes small business operators, registered political parties, Commonwealth agencies and State or Territory authorities or prescribed instrumentalities (section 6C). Financial institutions, being bodies corporate (which are not small business operators) would fall within the definition of an organisation and the NPPs would therefore apply to them.

A financial institution will be affected by the NPPs as *personal information* of a customer (e.g. name, contact details, at a minimum) will be passed to a third party in order to report abuse.

Any perceived vulnerability to abuse or the context in which such perception arose is likely to be an 'opinion' of the financial institution or its staff about that customer and is therefore also personal information. In summary, therefore, a financial institution which reports suspected abuse of a customer to, for example, the OPA will be disclosing 'personal information' about that customer.

6.5 National Privacy Principle 2: Use and Disclosure

National Privacy Principle 2: 'Use and Disclosure' is the most relevant NPP in relation to the disclosure of a customer's personal information to a third party by way of reporting suspected abuse.

NPP 2.1 states that an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection, unless a relevant exception applies.

The primary purpose for the collection of a natural person customer's personal information by a financial institution is likely to be to facilitate the provision of financial services to that customer.

We consider that a financial institution's disclosure of a customer's personal information to a third party (with the intention of protecting the customer from abuse) is not for the primary purpose of providing financial services to that customer.⁵⁰ As a result, the disclosure of the customer's personal information to a third party in such circumstances would contravene NPP 2 unless one of the relevant exceptions applies.

6.6 National Privacy Principle 2: Exceptions

NPP 2 provides a number of exceptions permitting use and disclosure of personal information for secondary purposes. The exceptions relevant to abuse are listed below.

(a) Related purpose – NPP 2.1(a)

A disclosure of personal information for a secondary purpose is permitted (in this case disclosure of customer information and suspected abuse to a third party) if the secondary purpose is related to the primary purpose and the customer would reasonably expect the financial institution to use or disclose the personal information for that secondary purpose.

A related secondary purpose is something that arises in the context of the primary purpose.⁵¹ A disclosure is reasonably expected in this context if the disclosure is expected by a customer with no special knowledge of the industry or activity involved.⁵² (An example of where this exception may apply is the disclosure of a customer's personal information to an external auditor of the financial institution for auditing purposes).

At present in Australia, an elderly customer of a financial institution is unlikely to be aware of, or have any expectations relating to, a financial institution's standard response to any suspected abuse. It is therefore unlikely that the reporting of abuse will be permitted under this exception, currently.

A financial institution or the industry as a whole can, of course, inform its customers of the way it deals with suspected abuse, thus changing the reasonable expectations of customers over time and making this exception applicable in the future.

(b) Consent – NPP 2.1(b)

Prior consent from the customer, especially in written form, is perhaps the most effective method for financial institutions to remove any risk of breaching NPP 2

in reporting abuse to a third party. Such consent would normally be sought at the beginning of the financier-customer relationship or when any new applications, etc. are completed by the customer in taking up products from the financial institution from time to time.

The Federal Privacy Commissioner has noted that an individual's consent to a particular use or disclosure may be express or implied, and that implied consent could arise where consent may reasonably be inferred from the conduct of the individual and the organisation. For example, if a financial institution publicises the way it deals with suspected abuse (e.g. by reporting the suspicion to the OPA) it may be possible to infer the individual's consent to such disclosures if the individual is given an opportunity to opt out which is clearly presented and easy to take up.

The Federal Privacy Commissioner's Guidelines suggest that where the disclosure of personal information has serious consequences for an individual, it would ordinarily be more appropriate for an organisation to seek express consent from the individual.⁵³ The reporting of abuse of a customer to a third party (e.g. the OPA) is likely to have serious consequences for the individual concerned (e.g. it could potentially affect their health and safety at the hands of the alleged abuser or at least their ongoing relationship with that person who may be their only relative or carer). It is therefore more appropriate for a financial institution to seek express consent from a customer to disclose their personal information to the relevant authorities if abuse is suspected.

(c) Reporting suspected unlawful activity – NPP 2.1(f)

A financial institution is permitted to disclose a customer's personal information to a third party if it has reason to suspect that unlawful activity has been, is being or may be engaged in, and the use or disclosure of the customer's personal information is a necessary part of its investigation of the matter or reporting its concerns to relevant persons or authorities.

The exception is likely to afford financial institutions protection from NPP 2 requirements as its operation only requires a financial institution to have a 'reason to suspect'. However, this exception requires a factual basis for suspecting unlawful activity,⁵⁴ i.e. that some identifiable act or omission that is expressly prohibited by Commonwealth, State or Territory law has occurred, is occurring or may occur. This suggests a need to clearly identify the nature of the suspected 'unlawful activity'. For example, a person may accompany an elderly customer to a bank teller to transfer a large sum of money from the customer to that person in circumstances where the customer appears not to be allowed to decide or speak for themselves. In this situation, criminal activity may be in progress (e.g. obtaining financial advantage by deception, if the customer was deceived into believing the other person was acting for the customer's benefit), and we consider the bank's disclosure of personal information to a third party such as the police would be permitted under this exception.

It is important to note that the disclosure must be a necessary part of the financial institution's investigation of the suspected abuse or the reporting of its concerns to relevant persons or authorities such as enforcement bodies, agencies and regulatory authorities, government departments and a relevant industry ombudsman. We consider the OPA would be a 'relevant person or authority' because the OPA could assist the elder abuse victim by protecting their civil rights and/or by giving advice where the older customer is under a disability. We have not reviewed in detail whether the OPA's equivalent bodies in jurisdictions other than Victoria have similar investigative powers to the OPA in Victoria. But a quick review of the comparable legislation in certain of the other jurisdictions revealed that the Queensland Adult Guardian and the Western Australian Public Advocate each has similar (but less extensive) powers to the OPA in relation to investigations, whereas the New South Wales Office of the Protective Commissioner does not have an investigatory role.

(d) Required or authorised by law – NPP 2.1(g)

There is an exception in NPP 2 where use or disclosure of personal information is required or authorised by or under law.⁵⁵ This includes both statute and common law at both Federal and State level. We are not aware of any existing laws which specifically require or authorise a financial institution to initiate a disclosure of a customer's personal information (to third parties such as the OPA) due only to abuse.

The OPA can investigate allegations of abuse,⁵⁶ including elder abuse, and has the power to require persons, including institutions such as financial institutions, to provide information to the OPA.

If a third party makes allegations of abuse to the OPA and the OPA then requires information from a financial institution, that financial institution would be able to disclose that information (including personal information) to the OPA on the basis that such disclosure is 'required by law' for the purpose of the exception to NPP 2. But a financial institution cannot (of its own accord and in the absence of a legally binding request by the OPA) disclose personal information to the OPA, including in relation to the elder or the accused.

(e) Enforcement bodies – NPP 2.1(h)

NPP 2.1(h) permits a financial institution to disclose personal information if it reasonably believes the disclosure is necessary for:

- (i) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposing a penalty or sanction;⁵⁷ or
- (ii) the prevention, detection or remedying of seriously improper conduct;⁵⁸ or
- (iii) various other matters (not relevant for present purposes) including protection of the public revenue, confiscation of proceeds of crime, preparation for court proceedings, etc.,

by or on behalf of an enforcement body. An ‘enforcement body’ includes all State and Territory police forces as well as the Australian Federal Police, and any Federal, State or Territory government agency to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or is a prescribed law (‘authorised government agency’). The Victorian Office of the Public Advocate and equivalent State and Territory bodies would be ‘enforcement bodies’ if they perform functions under a law that imposes relevant penalties or sanctions in relation to the abuse or that is a prescribed law. Even if the relevant Guardianship Act did not impose relevant penalties or sanctions, that Act could be prescribed under the Privacy Act.

The financial institution must make a written note of any disclosure of personal information made under this exception.

A financial institution’s ‘reasonable belief’ in this context is a belief that might reasonably arise in the circumstances based on the facts of the situation.⁵⁹ A disclosure of personal information to an enforcement body is ‘reasonably necessary’ only if the enforcement body cannot carry out its functions without that information.

A financial institution’s reporting of a reasonably suspected abuse of its customers to police is permitted by NPP 2.1(h)(i) if the personal information disclosed by the financial institution is reasonably necessary to assist the police in preventing or detecting any act that is a criminal offence or breaches a law imposing a penalty or a sanction. This exception is similar to the unlawful activity exception described above but:

- (i) is confined to criminal offences or breaches of a law imposing a penalty or sanction; and
- (ii) is available only if the disclosure is made to an enforcement body.

NPP 2.1(h)(ii) will permit a financial institution to report reasonably suspected abuse if the disclosure is reasonably necessary for the prevention, detection or remedying of seriously improper conduct. Seriously improper conduct refers to breaches of standards of conduct associated with a person’s duties, powers, authority and responsibilities, including abuse of power.⁶⁰ In the example discussed in relation to the unlawful activity exception above, if the person exploiting the elderly customer was their nurse or carer, this exception would in our view operate to permit reporting of the suspected abuse to police.

(f) Summary of exceptions in NPP 2.1

Consent is one of the best ways to avoid breach of NPP 2 and can be obtained by a financial institution from its customers. In the absence of consent:

- (i) personal information may be disclosed for a reasonably expected purpose related to the purpose of providing financial services; the reporting of abuse is

currently unlikely to satisfy the conditions for the exception to apply because financial institutions have not created the relevant reasonable expectation;

- (ii) disclosure where the suspected abuse involves unlawful activities is also permitted but only if it is a necessary part of the financial institution's investigation of the suspected abuse and is disclosed to relevant authorities;
- (iii) disclosure is also permitted where it is required or authorised by law;
- (iv) disclosure to prevent, detect or investigate criminal offences, seriously improper conduct or breaches of law imposing penalties or sanctions is also permitted if there is a reasonable belief on the part of the financial institution that the disclosure of personal information is reasonably necessary for such prevention, detection or investigation by or on behalf of an enforcement body.

The exceptions to NPP 2 will protect a financial institution from contravening NPP 2 when disclosing personal information in relation to suspected abuse in some, but not all, situations. There is no reliable blanket exception specifically referring to abuse which can be relied on by a financial institution in all circumstances.

6.7 Consequences of breach

An individual may complain to the Privacy Commissioner about any privacy grievances the individual has. The Privacy Commissioner has wide powers to investigate such a complaint, including the power to direct the parties to attend a conference to give evidence. The Commissioner can, amongst other things, make a declaration that the complainant is entitled to a specified amount of compensation. The determinations or declarations of the Privacy Commissioner are not binding or conclusive and the parties can appeal to the Federal Magistrates Court or the Federal Court for a *de novo* hearing.

6.8 Overseas experience

As discussed in section 4.10(a) above, most jurisdictions in the United States impose obligations on banks to report concerns regarding abuse. These jurisdictions have varying reporting regimes which may include voluntary reporting or mandatory reporting requirements and the provision of immunity provisions for reporting entities.⁶¹ Below are two examples of how overseas jurisdictions deal with abuse.

(a) California, USA

In California, the issue of abuse is addressed by the *Elder Abuse and Dependent Adult Civil Protection Act* ('Elder Act'). The Elder Act defines an 'elder' as a person 65 and over and a 'dependent adult' as a person between 18 and 64 years. The Elder Act also defines 'financial abuse' as where any person or entity (and those who assist) takes, secretes, appropriates or retains real or personal property of an elder or dependent adult with the intention to wrongfully use or defraud.

Reporting requirements are in two categories: mandated or non-mandated.

A mandated reporter is any person who has assumed full or intermittent care or custody of an elder. Financial institutions are unlikely to be mandated reporters under this definition. Failure of a mandated reporter to report financial abuse is a misdemeanour. This positive obligation to report is onerous but does eliminate any privacy concerns as it is required by law.

All other persons who know, or reasonably suspect elder abuse was or is in progress, including financial institutions and their employees, are non-mandated reporters. There is no requirement for non-mandated reporters to report elder abuse but if a report is made, it must be made to designated agencies. A non-mandated reporter does not incur civil or criminal liability for reporting unless the report was false and the non-mandated reporter knew it to be false. Implicitly, the non-mandated reporter should be able to demonstrate that 'reasonable suspicion' exists.

Whilst the Californian model gives clear legislative protection for disclosure (and for some, a requirement to disclose), the protection from breaching privacy laws still require some conditions to be met, such as a demonstrable 'reasonable suspicion'. It is, however, often an exercise of judgement as to whether something ought to be reported. For example, an apparently improvident transaction may have been freely agreed to by the elder (which would not be elder abuse) or it may have been a misuse of a trust relationship (which is elder abuse).

(b) Saskatchewan, Canada

The Royal Canadian Mounted Police in Saskatchewan, Canada, took a different approach and developed a form letter that seniors can sign to authorise the relevant financial institution to contact them before processing a transaction. The main features of the form letter are:

- (i) permission given to the financial institution and its employees to monitor accounts and other financial instruments with that financial institution;
- (ii) permission given to the financial institution and its employees to raise concerns with the customer about the nature of any transaction, with the option of emphasis on particular types of risks, such as elder or financial abuse;
- (iii) permission given to the financial institution and its employees to advise the police at the financial institution's discretion; and
- (iv) reservation of the customer's right of final decision on all aspects of their financial affairs.

The Saskatchewan model has several advantages. First, it addresses any potential privacy concerns of a financial institution directly by obtaining the customer's consent, presumably prior to any disclosure of information. There remains some privacy risk if the report to the police also contains another person's personal information (such as a suspect's name and other details) and that person has not given consent for the disclosure.

Second, it provides for a financial institution to contact the customer directly as part of the process of identifying potentially fraudulent transactions. In Australia, disclosure of a customer's own personal information to that customer is treated as access by the customer of their personal information held by the financial institution. Access to personal information is governed by NPP 6, which does not prohibit a financial institution from disclosing a customer's personal information to that customer. From a privacy point of view, it is therefore not necessary to obtain a customer's consent to contact the customer and disclose personal information of that customer.

Third, it authorises the financial institution to disclose relevant personal information to third parties at their discretion. This gives the financial institution some freedom to decide if the circumstances warrant reporting to the police or other relevant third parties.

Three further improvements can be made to such a consent letter.

- (i) The letter should not restrict reporting to police and should ideally specifically include other relevant agencies, such as the OPA in the Australian context.
- (ii) The letter should clearly state that the financial institution may disclose relevant *personal information* to the agencies described.
- (iii) The letter should clearly state at the outset that the consent given by the customer may be retracted at any time.

A financial institution may also wish to consider notifying the customer of its intention to report suspected financial or elder abuse prior to filing such a report, giving the customer an opportunity to object to the financial institution doing so. This may, however, be inappropriate in some circumstances; for example, when the suspected abuser can find out about the report from the customer.

Saskatchewan also addresses financial and elder abuse in another way. The *Public Guardian and Trustee Act* (Saskatchewan), Ch P-36.3, was amended on 1 February 2005 to introduce sections 40(7) to 40(9) inclusive. These amendments give the public guardian and trustee the power to investigate allegations of financial abuse of a 'vulnerable adult', including the power to examine records and request any information and explanations from any person. The amendments do not, however, protect the person making the allegations from breaches of privacy law.

(c) Identifying financial and elder abuse

One of the challenges facing financial institutions in both California and Saskatchewan is the difficulty of identifying and recognising financial abuse.⁶² Although there are common 'red flags' which a financial institution's staff may become aware of,⁶³ as well as other potential warning signs,⁶⁴ there is no definitive process of clearly identifying elder abuse. To address this issue, the California Bankers Association compiled an 'Elder Abuse Training Book' and a training video

to assist bank employees in identify the indicators of elder abuse. These indicators remain, however, inconclusive and a judgement call must be made as to whether there is reasonable suspicion of financial or elder abuse in each case.

(d) Immunity provisions

Legislative amendments to give a reporter or reporting entity immunity from civil or criminal liability would encourage financial institutions to report suspected financial abuse. Except for South Dakota,⁶⁵ jurisdictions in the United States have immunity provisions designed to encourage reporting abuse by an individual. Some of the United States experiences in relation to immunity provisions are highlighted below.

- (i) Immunity provisions should be effective for both civil and criminal liability.
- (ii) Immunity provisions should only be effective when the reporting person acts in good faith.
- (iii) Immunity should apply to the person who reports the suspected abuse and should extend to include the employer entity and related entities⁶⁶ when an employee reports suspected abuse.⁶⁷
- (iv) Immunity provisions should apply to both federal and state laws.
This is necessary to prevent a bona fide reporter being immune in one jurisdiction but not in another.

6.9 Conclusion

A financial institution which discloses personal information of a customer to a third party may be in breach of NPP 2. Exceptions to NPP 2 may, in some circumstances, apply. Some of these exceptions may be applicable to disclosures relating to abuse but their applicability can only be determined on a case by case basis. Under the current Australian privacy framework, financial institutions therefore have a positive obligation not to breach the NPPs but do not have any reliable overall protection from liability for disclosing a customer's personal information to third parties in suspected cases of abuse. The difficulty in identifying and recognising abuse, coupled with the uncertainty of protection against breaches of privacy laws, could lead to financial institutions being reluctant to report even if there are grounds for suspicion of abuse.

The risks that financial institutions may be liable for breaches of the NPPs in the abuse context can be mitigated by:

- (a) prior written consent of the customer to whom the personal information relates;
- (b) imposition of a mandatory reporting mechanism which will trigger the exception for disclosures required or authorised by law (NPP 2.1(g));

- (c) legislative amendments similar to the Californian model for non-mandated reporters which protect voluntary reporting of suspected abuse from civil and criminal liability (this might be achieved in part by prescribing each State and Territory's Guardianship Act under the Privacy Act); and/or
- (d) legislative amendments to incorporate similar immunity provisions giving immunity to reporters (including their employer entities and related entities) from civil or criminal liability as a result of the reporting of suspected abuse.

Mandatory reporting tends to be either too broad in its terms⁶⁸ or too narrow,⁶⁹ both of which will reduce its effectiveness in targeting abuse. The most effective method to address concerns of privacy breach in the abuse context is to use a combination of prior written consent, voluntary reporting and the introduction of immunity provisions.

Voluntary reporting will give some protection to financial institutions against privacy liabilities, as a statutory right to voluntarily report may be regarded as an 'authorisation' by law (NPP 2.1(g)). If the voluntary reporting is based on the Californian model for non-mandated reporters, the express statutory immunity from civil and criminal liability will encourage financial institutions to report suspected abuse.

A prior written consent from the customer gives a financial institution protection from privacy claims as it can (depending on its terms) allow the disclosure to be made in the context of the abuse. However, this protection is limited to the disclosure of personal information relating to a person who has consented and will not provide a financial institution any protection from breaching privacy law if it discloses the personal information of another person, such as the details of a suspected abuser.

The introduction of specific immunity provisions at both State and Federal level will encourage reporting by banks in good faith of any suspected abuse and will eliminate any concern that the protection is somehow limited or subject to other conditions.

Adoption of these strategies will minimise the risk of breaching any privacy principles and encourage financial institutions to report suspected abuse and encourage a culture of abuse prevention. The provision of information on the risks and the signs of abuse to both employees and customers of financial institutions will not only help reduce the likelihood of abuse but also change the expectations of customers of the way financial institutions deal with such abuse. This in turn will provide financial institutions with further protection from breaching NPP 2 under the related purpose exception.⁷⁰

7. Confidentiality

7.1 Summary

- (a) Obligations of confidentiality owed by banks to customers arise under:
 - (i) common law – contractual duty of confidentiality;
 - (ii) equity;
 - (iii) voluntary industry codes – including the Code of Banking Practice (discussed in section 4 of this report) and the Electronic Funds Transfer Code; and
 - (iv) the Privacy Act (discussed in section 6 of this report).
- (b) Consumer protection laws insofar as they relate to ‘financial services’ are also relevant – Part 2 Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’).
- (c) Dispute resolution: in addition to complaint handling through banks’ own formal complaint resolution procedures *and* by the Privacy Commissioner, there is also the Banking and Financial Services Ombudsman scheme (‘BFSO scheme’).

7.2 Contractual duty of confidentiality

- (a) This is also expressed as the common law duty in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461. The duty of confidence imposed upon bankers in relation to their customers arises out of contract and is founded on the historical expectations of banks that they will keep their customers’ personal and financial information secret. It is an implied term of the contract between a bank and its customer that the bank has a qualified obligation of confidentiality.
- (b) Bankes LJ in *Tournier* stated that the qualifications can be classified under four heads – i.e. a bank must not disclose customer information except where:
 - (i) disclosure is under compulsion by law;
 - (ii) there is a duty to the public to disclose;
 - (iii) the interests of the bank require disclosure; or
 - (iv) the disclosure is made by the express or implied consent of the customer.
- (c) The ‘interests of the bank’ has been quite narrowly defined and it includes such matters as disclosures necessary in court documents in order to commence proceedings to recover a debt.
- (d) Lord Atkin LJ in *Tournier* noted that the duty extends to:
 - (i) the state of the account (whether there is a debit or credit balance and the amount of the balance);

- (ii) the transactions that go through the account;
 - (iii) the securities, if any, given in respect of the account; and
 - (iv) information which arises out of the banking relations of the bank and the customer.
- (e) It has been suggested that the rule in *Tournier* is more restrictive than the Privacy Act in its approach to the disclosure of consumer credit information (although its application is broader than the Privacy Act as it relates to all customer information).⁷¹ We agree with this suggestion, as the rule in *Tournier* has fewer exceptions qualifying the duty of non-disclosure than the qualifications available under the Privacy Act⁷² and applies to all customer information, not just to personal information (as in the case of the Privacy Act).

7.3 Equity

- (a) The equitable action for breach of confidence is based upon the principle that the person who has received information in confidence shall not take unfair advantage of it (*Seager v Copydex Ltd* [1967] 1 WLR 923).
- (b) The principle is that the court will ‘restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged’ (*Lord Ashburton v Pape* [1913] 2 Ch 469 at 475, per Swinfen Eady LJ).
- (c) In *Fraser v Evans* [1969] 1 All ER 8, Lord Denning made the following comments in respect of the jurisdiction of the court to restrain a breach of confidence: ‘These cases show that the court will, in a proper case, restrain the publication of confidential information. The jurisdiction is based, not so much on property or on contract, but rather on the duty to be of good faith. No person is permitted to divulge to the world information which he has received in confidence, unless he has just cause or excuse for doing so.’
- (d) Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 set out the elements which are necessary to succeed in an action for breach of the equitable obligation of confidence:
 - (i) the information is of a confidential nature;
 - (ii) that information is communicated in circumstances importing an obligation of confidence; and
 - (iii) there is an unauthorised use of that information (i.e. without the consent of the person entitled to the confidence) to the detriment of the party who communicated it.
- (e) Regarding the first element, determining whether information is of a confidential nature is a question of fact in each case. However, the courts have held that information which is public or common knowledge, easily accessible from public sources or which is trivial will, in the usual case, not be regarded as confidential.

Additionally, the following particular circumstances have been held relevant to the question (*Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, per Fullagar J):

- (i) the amount of money and effort expended to acquire or develop the information and the amount of money, effort or risk which would be required by others to acquire or duplicate the information;
 - (ii) the extent of measures taken to guard the secrecy of the information;
 - (iii) the extent to which the information is generally available;
 - (iv) whether it was plainly made known that the material in question was regarded as confidential;
 - (v) whether the usages and practices of the industry support the assertion of confidentiality;
 - (vi) the value of the information; and
 - (vii) the extent to which the information is known outside the relevant business and by employees and others in the relevant business.
- (f) Regarding the second element, the relevant test has been described as follows: 'if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence' (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 per Megarry J).

It should be noted that the third element has two parts: first, there must be unauthorised use of confidential information; and second, that use must be detrimental to the party – who is, in this context, the elderly customer. Authorised use is generally for the limited purpose for which the information was disclosed.⁷³ There is, however, authority that other considerations such as public safety may be taken into account when considering what is 'authorised use'.⁷⁴ But we consider that where a bank reports suspected abuse, the disclosure is likely to be unauthorised unless the bank had previously obtained consent from the customer.⁷⁵ Regarding the second part of the third element (use must be detrimental to the customer) there are Australian authorities that suggest detriment to the plaintiff is not required,⁷⁶ but even in cases where the courts have said detriment is required, a mere desire to avoid criticism or embarrassment is sufficient to establish that the plaintiff has suffered detriment.⁷⁷

7.4 Electronic Funds Transfer Code

- (a) While membership of the Electronic Funds Transfer Code ('EFT Code') is voluntary, financial institutions that adopt the EFT Code are required to reflect the requirements of the EFT Code in their written terms and conditions with customers, thus making the terms contractually binding.

- (b) The EFT Code seeks to protect consumers by:
- (i) requiring disclosure of information to consumers before they first use a new form of electronic banking (clauses 2 and 12);
 - (ii) protecting consumers' privacy (Part C);⁷⁸ and
 - (iii) detailing complaints investigation and dispute resolution processes (clauses 10 and 19).

7.5 ASIC Act

- (a) ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system (section 12A(2)). It also has the function of monitoring and promoting market integrity and consumer protection in relation to the payments system by promoting (section 12A(3)):
- (i) the adoption of approved industry standards and codes of practice;
 - (ii) the protection of consumer interests;
 - (iii) community awareness of payments system issues; and
 - (iv) sound customer-banker relationships, including through:
 - A. monitoring the operation of industry standards and codes of practice; and
 - B. monitoring compliance with such standards and codes.
- (b) Part 2 Division 2 of the ASIC Act deals with unconscionable conduct and consumer protection in relation to financial services (which includes lending and credit). The meaning of 'financial services' is contained in section 12BAB of the ASIC Act and extends to the following:
- (i) providing financial product advice;
 - (ii) dealing in a financial product;
 - (iii) making a market for a financial product;
 - (iv) operating a registered scheme;
 - (v) providing a custodial or depository service;
 - (vi) operating a financial market or clearing and settlement facility;
 - (vii) providing a service that is otherwise supplied in relation to a financial product;
- or
- (viii) engaging in conduct of a kind prescribed in regulations made for the purposes of section 12BAB.
- (c) A 'financial product' includes any deposit taking facility of a bank in the course of its banking business (section 12BAA(7)(h)) and also credit facilities (section 12BAA(7)(k)).

7.6 BFSO scheme

- (a) The BFSO scheme is a self-regulatory scheme, monitored by ASIC, and provides an independent avenue of redress for bank customers who have complaints about their banks. Membership of the BFSO scheme by banks is voluntary.
- (b) Under the BFSO scheme's Terms of Reference:
- (i) the Banking and Financial Services Ombudsman ('BFSO') can consider disputes which relate to any act or omission by a financial services provider relating to the provision of financial services, including acts or omissions relating to confidentiality, and, in the case of individual disputant, privacy (clauses 2.1 and 3.1);
 - (ii) disputes are resolved having regard to law, applicable industry codes or guidelines, good industry practice, and fairness (clause 7.1); and
 - (iii) a determination by the BFSO will be binding on a financial services provider only if the disputant accepts the decision (clause 1.6).
- (c) The BFSO recently released BFSO Bulletin 56, addressing the issue of abuse of the vulnerable older person. The Bulletin noted the qualifications to the common law duty of confidentiality articulated in *Tournier's* case.⁷⁹ In particular, the Bulletin noted the BFSO's view that arguably it is in the bank's interests to disclose confidential information where fraud is a real possibility. The Bulletin also noted that the Code contains an express acknowledgement⁸⁰ of a bank's common law duty of confidentiality and the qualifications in *Tournier's* case.⁸¹ In the BFSO's view, it is unclear whether a bank is entitled to the *Tournier's* case exceptions if the information is disclosed to a family member who is neither an Attorney nor an Administrator.⁸² The BFSO also noted that a bank's duty of confidentiality does not prevent it giving customers information about relevant agencies or seeking direct consent of the customer to notify third parties.⁸³

7.7 Conclusion

Banks have a common law duty of confidentiality to their customers (including elderly customers) as outlined in *Tournier's* case, which is qualified by four exceptions which may be applicable in the context of reporting suspected abuse. Other laws and codes also impose an obligation to protect a customer's confidential information. The EFT Code requires participating institutions to protect consumer privacy; the ASIC Act requires financial institutions to promote the protection of consumer interests and the BFSO scheme reinforces the common law position of protection of customer confidentiality.

8. The Banker–customer Relationship

8.1 Introduction

This section addresses the nature and content of the relationship between a bank and its customers, including:

- (a) any fiduciary relationship which may exist between them in relation to everyday banking and, if such a relationship exists, the effect reporting of potential abuse would have on that relationship;
- (b) the tension between a bank’s obligation to honour a customer’s mandate (i.e. instruction) and its duty, in certain circumstances, to question an apparently valid mandate;
- (c) the obligation of a bank when effecting transactions initiated by a representative of a customer, not the customer themselves; and
- (d) the ability of banks to protect themselves from suit by including appropriate provisions in their terms and conditions, staff and customer education, etc.

8.2 Summary

- (a) In relation to everyday banking, the relationship between a banker and customer lies essentially in contract.
- (b) It has been expressly stated and repeatedly upheld by the courts that the relationship between a banker and customer is that of a debtor and creditor as distinct from one of trustee and beneficiary, thus not giving rise to a fiduciary relationship.
- (c) Nevertheless, although the banker and customer relationship is not one of the accepted fiduciary relationships, there are situations that may give rise to a fiduciary relationship. These situations usually arise in relation to lending, guarantees and investments and particularly when the bank takes on an advisory role and creates an expectation in the client that the bank is acting in the customer’s interests. Although these scenarios are unlikely to be relevant to the scope of this project, an analysis of the case law in this area is provided for completeness.
- (d) In circumstances of suspected abuse, banks are often in conflict between their duty to honour a customer’s mandate and their duty to question apparently valid mandates in some circumstances. Banks have a duty to question apparently valid mandates where there is a serious or real possibility that a customer may be defrauded and banks cannot turn a blind eye to relevant facts. The complexity of identifying abuse may (understandably) cause banks to be cautious in deciding to question a transaction on the basis of suspected abuse.

- (e) Where a representative of a customer operates an account or signs cheques, the bank risks being unable to debit the customer's account if the representative's actions are in fact not authorised by the customer. Banks can generally mitigate this risk by requiring all additional signatories to complete an application form to be added to the account with the usual requirement that the customer consents to it. Banks are also required under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to verify the identity of anyone operating an account, including additional signatories.⁸⁴
- (f) Banks can protect themselves in a number of ways including:
 - (i) inclusion of terms and conditions that allow banks to question apparently valid mandates;
 - (ii) inclusion of terms and conditions that allow banks to delay execution of mandates on suspicion of abuse or other improper conduct;
 - (iii) educating customers on the danger and signs of abuse; and
 - (iv) educating staff with direct contact with customers on ways to identify suspected abuse, the process of querying a customer mandate and advice and support available to both the customer and staff.

8.3 Nature of the banker and customer relationship

- (a) The relationship between banker and customer lies essentially in contract. Therefore, there must be an intention to contract. The customer, by opening an account with a bank and depositing money into that account, creates a contractual relationship where the bank is the debtor of the customer for the money deposited. The balance standing to the credit of a customer in a savings or deposit account is a debt due to the customer, and the amount is not held by the bank as trustee or bailee unless so agreed.
- (b) The banker and customer contract has been regarded as having been well defined by the decision of the House of Lords in *Foley v Hill* (1848) 2 HL CAS 28, which made it clear that the relationship is that of a debtor and creditor as distinct from one of trustee and *cestui que trust*. This case concerned a joint account kept at the bank whereby the banker had agreed to pay 3 per cent interest, but there had not been any interest paid or credited to the account for over six years. The issue arose partly as to whether the Statute of Limitations was a bar to the demand and partly on whether the relation between a banker and those who deposit money with him is one of debtor and creditor and therefore not a fit subject for a suit in equity. Although lengthy, the following passages from this decision are useful as they reflect the reasoning for the basis that the bank and customer relationship is one of debtor and creditor:

Money when paid into a bank, ceases altogether to be the money of the principal ...; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of

being under the control of the banker; it is then the banker's money, he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor.⁸⁵

8.4 Fiduciary relationship may arise in certain circumstances

- (a) Although the banker and customer relationship is founded in contract and is essentially one of debtor and creditor, a fiduciary relationship may arise in certain circumstances. These circumstances generally arise in relation to lending or guarantee transactions and often where the bank advises its customer on the merit of particular transactions. It is noted that the scope of this project does not extend to investment advice or lending and guarantees. Nevertheless, for completeness, we have outlined the types of circumstances that may give rise to a fiduciary relationship between banker and customer.
- (b) In *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390 it was held that 'where a bank creates in its customer an expectation that it will advise in the customer's interest, it may become a fiduciary and occupy the position of an investment banker'. In this case, the appellants had relied extensively on the advice of the bank manager; the bank manager knew this and the owners of the hotel which the appellants intended to buy were also customers of the same bank. The principle was stated as:

A bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer, but it may have created in the customer the expectation that nevertheless it will advise in the customer's interest as to the wisdom of a proposed investment. This may be the case where the customer may fairly take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture. In such a way the bank may become a fiduciary and occupy the position ... of an investment adviser.

See also *Potts v Westpac Banking Corporation* (1993) 1 Qd R 135.

- (c) The fiduciary relationship arose because the bank, through its manager, had brought the parties together and the manager, on behalf of the bank, assumed the role of financial advisor and the respondent customers placed complete faith in their advisor.
- (d) The test has been described in *Timms v Commonwealth Bank of Australia* [2004] NSWSC 76 as:

The central test for the existence of fiduciary duty emerging from the joint judgment of Davies, Sheppard and Gummow JJ in Commonwealth Bank of Australia v Smith is whether the bank has, by its actions, engendered in the customer an expectation inconsistent with the bank's acting in its own interests to protect its position as lender. Such an expectation may arise where 'the customer may fairly take it that to a significant extent his interest is consistent with that of the bank in financing the customer for a prudent business venture'.

- (e) In *Golby v Commonwealth Bank of Australia* (1996) 72 FCR 134, further affirmed by the High Court ([1998] HCA 69), the creation of a fiduciary relationship was acknowledged to exist in certain circumstances; however, it was held that, in this case, no fiduciary duty arose.

Hill J held (at [136]) that:

A banker may owe a fiduciary duty to its customer, but a banker is not a fiduciary in every banker and customer transaction ... the relationship of banker and customer is not one of the accepted fiduciary relationships ... It is not a critical feature of a banker/customer relationship that the banker undertakes or agrees to act for or on behalf of or in the interests of its customer in the exercise of some power or discretion affecting the interests of the customer in a legal or practical sense ... Absent some special feature, there is no reason to erect a fiduciary relationship between banker and customer when that relationship is essentially founded in contract.

- (f) Therefore, although there may be occasions where the banker acts as trustee for the customer, it does not do so in the ordinary course of banking business. For example, in *Midland Bank Ltd v Conway Corp* [1965] 1 WLR 1165 it was held that where a bank received rent on behalf of the customer and paid it on behalf of the customer, the bank was not receiving the sums as agent or trustee.
- (g) More recently, in *Finding v Commonwealth Bank of Australia* [2001] 1 Qd R 168, the Supreme Court of Queensland Court of Appeal reaffirmed that banks owe no fiduciary or 'special duty' to customers. In this case, the appellants purchased a hotel from the respondent bank. The respondent did not disclose to the appellants that it held a valuation of the hotel in an amount substantially less than the sum they paid. The argument put forward on behalf of the customers was that their relationship with the bank gave rise to a fiduciary or special duty to divulge to the customers all that the bank knew about the hotel the Findings purchased with the bank loan.

In distinguishing *Commonwealth Bank of Australia v Smith* (see paragraph (b) above) the court held that 'none of the features of the relationship between the

appellants and the respondent, including its longevity and the dual role played by the respondent in the transaction, provided a sufficient basis on which to find that it was a fiduciary one’.

It was also held that ‘in circumstances in which there was no evidence that the appellants relied on the advice of the respondent in relation to the transaction, that they held any expectation that it would disclose information to them, or that it assumed the role of their adviser, no special duty of disclosure owed by the respondent to the appellants could be made out’.

The court also relied upon the decision of Branson J in *Truebit Pty Ltd v Westpac Bank* (unreported, Federal Court of Australia, NG 456 of 1996, 27 November 1997), where it was held that no fiduciary relationship arose in the circumstances of borrowing money from the bank as the bank at no stage created an expectation that it would provide such advice.

Despite the outcome, as with other cases in this area, it was accepted that although the law does not recognise the relationship of banker and customer as one of the accepted categories of fiduciary relationship, this does not mean that there will not be circumstances where such a relationship will arise.

8.5 Conclusion on fiduciary relationship

With regard to the project at hand, legal commentary and judicial authority indicate that the ordinary relationship of the banker and customer is one of debtor and creditor and is not fiduciary in nature.

However, certain circumstances may give rise to a fiduciary relationship between banker and customer and usually involve the bank advising its client with respect to lending and potential transactions the client may be considering.

Therefore, it can be said that in the context of everyday banking, the banker and customer relationship does not give rise to a fiduciary relationship. When issues arise as to the age, language skills, business skills and mental capacity of the customer, claims are usually based on misleading and deceptive conduct, unconscionable conduct or undue influence.

8.6 Duty to question a valid mandate

The Banking and Financial Services Ombudsman (‘BFSO’) highlights the potential conflict of duties when banks deal with its customers in that:

there is undoubtedly a tension between a bank’s obligation to make payment on its customer’s unambiguous written order and what may, in particular circumstances, be a duty to question an apparently valid mandate.⁸⁶

On the one hand, a bank has a duty under contract to repay the customer on the customer’s mandate, that is, the unambiguous written order of the customer.

Indeed, the duty to honour a customer's mandate in respect of his current account is 'sacrosanct'.⁸⁷ On the other hand, the bank has a duty to exercise reasonable care and skill when carrying out the customer's mandate. In some circumstances, therefore, a banker is required to question the validity of the mandate as part of its duty to exercise reasonable care and skill. In *Lipkin Gorman No 1*,⁸⁸ Allott J outlined five propositions of whether and when a bank should question an apparently valid mandate.⁸⁹ These propositions were, however, qualified by Parker LJ on appeal, stating that 'such cases must be approached with caution'.⁹⁰

Parker LJ went on to say that:⁹¹

The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility albeit not amounting to a probability that its customer might be being defrauded, or ... that there was a serious or real possibility that [a third party] was drawing on the [customer's] account and using the funds so obtained for his own and not the [customer's] or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry. He could not simply sit back and ignore the situation.

The BFSO suggested that bank officers are not expected to be detectives and can make the *prima facie* assumption that they are dealing with honest people unless the contrary is indicated,⁹² but they are not entitled to turn a blind eye to known facts that indicate a serious possibility that a customer is being defrauded.⁹³ The complexity of both the identification of potential abuse and the investigations of whether a bank had notice of abuse are recognised by the BFSO.⁹⁴

The complexity of identifying potential abuse and the conflict between a bank's duty to carry out the customer's mandate and the duty to question a suspicious but apparently valid mandate may (understandably) cause banks to be cautious in deciding to question a transaction on the basis of abuse. This may result in less abuse being challenged or identified.

8.7 Representative transactions

Before a bank acts on the instructions of a purported representative to operate the account of an elderly customer, it is in the interest of the bank to ensure that the purported representative has been properly appointed as the elderly customer's representative.

(a) Cheques

A cheque presented to a bank for payment is only a valid mandate to that bank if it was an instruction by the customer to pay the payee. Where a cheque is signed by a representative or attorney, the signature must also have the words 'for and on behalf of [the principal]' for it to be an effective mandate.⁹⁵ However, if the signer is not in fact a representative of the customer, the signer is personally liable for the cheque.⁹⁶

It is a common aphorism that banks have a duty to know or check a customer's signature but the principle is only that a bank must have a mandate to debit a customer's account and bears the risk of having to reverse a debit it makes without such a mandate.⁹⁷ The bank would not have a mandate where a cheque was forged, for example, or a person purported to sign an instrument on behalf of the customer but had no actual authority. Thus it is not a question of whether the bank owes any duty to a customer to verify the signature of a representative or the validity of that status. It is rather a question of whether a bank is prepared to take the risk of being unable to debit the customer's account for amounts that have been paid by it on cheques honoured.

It is therefore in the interest of the banks to ensure that any person signing a cheque as a representative of the customer has actual authority to do so.

(b) Accounts

Anti-money laundering law requires that the identity of any additional signatories to an account must also be verified.⁹⁸ Most banks have standard forms (additional signatory application forms) for the addition of a signatory to an account which requires both the signature of the account holder (customer) and the new signatory (representative).⁹⁹ Such a form acts as a mandate authorising the additional signatory to access the account. A bank's requirement for a formal process of adding a signatory to an account serves not only to protect the customer but also to protect itself from claims that the signatory did not have the authority of the customer. How a bank operates an account with an additional signatory will therefore usually depend on the terms and conditions as set out in the additional signatory application form.

Where the representative is authorised under a power of attorney, the powers of the attorney would be set out in the power of attorney. The bank is nonetheless required to verify the identity of the attorney before accepting the attorney's authority to operate the account. The bank may also have terms and conditions which require any additional account signatory to complete an additional signatory application form.

8.8 Can a bank mitigate these risks?

As discussed earlier, the banker-customer relationship is essentially a contractual relationship. In the absence of an express contract (written or otherwise), the contractual obligations of both parties are governed by the implied terms of the contract. These implied terms may be varied or removed by the parties agreeing to any express terms which are inconsistent with those implied terms. The issue of elder abuse may therefore be assisted by including express contractual terms to promote the detection and/or prevention of abuse. There are also other ways a bank may reduce its exposure to legal liability when dealing with suspected abuse. Some options to promote the detection and prevention of abuse are listed below.

- (a) A bank may incorporate a term which allows the bank to delay the execution of any apparently valid mandate of the customer. This gives the bank time to investigate any

suspicious transaction. These terms are especially useful in situations where a suspicious carer of the customer (who may also be a signatory to the account) withdraws money without the elderly customer being present. The terms would allow the bank time to contact the elderly customer to verify the transaction and remove any risk the bank may have of breaching its duty to carry out the customer's mandate.

(b) Vulnerable customers are often not aware of their vulnerability.

Educating elderly customers of:

- (i) the risks of possible abuse;
- (ii) the assistance that is available (such as the OPA); and
- (iii) information on how the bank is or could help prevent abuse

would not only reduce the risk of abuse occurring but will also assist the bank in obtaining consent to more effectively manage suspected abuse.

(c) Educating staff who have direct contact with vulnerable customers on:

- (i) how to identify and assess the signs of potential abuse;
- (ii) the resources available to assist in assessing abuse;
- (iii) the resources available both within the bank and externally that may assist the customer in the event of suspected abuse; and
- (iv) the process and procedures for handling suspected abuse.

8.9 Conclusion

Whether a bank's duty to inquire on suspicion of abuse outweighs its duty to carry out a customer's mandate depends on the circumstances of each case. However, in general, a bank can assume that it is dealing with honest people unless there are contrary indications but a bank is not entitled to ignore any such indications.

Where a representative of a customer operates an account or signs cheques, the bank is not required to verify the signature or the validity of the status of the representative but, if it does not complete such verifications, the bank risks being unable to debit the customer's account if the representative is not authorised by the customer. It is required under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to verify the identity of anyone operating an account, including representatives.¹⁰⁰ It is common for banks to require an additional signatory to apply to be a signatory of an account, with the customer also signing the application. This also acts as a consent of the customer for the addition of the signatory.

A bank can reduce the risk of abuse and protect itself from breaching its duties to its customers by including terms and conditions in its contract with its customers to allow questioning of mandates and/or allow a delay in carrying out apparently valid mandates on suspicion of abuse. Banks can also educate their customers and staff in recognising and dealing with suspected abuse.

9. Defamation

The purpose of this section is to address whether an action for defamation could be brought against a financial institution which makes an allegation of abuse against a person to a third party, including any defences available to the financial institution.

9.1 Background

The law of defamation is now uniform throughout Australia. Uniform defamation legislation came into operation on 1 January 2006 in all States. The legislation provides a remedy for injury to reputation caused by defamatory publication. This remedy previously existed in the slightly differing laws in all Australian jurisdictions which provided a remedy in damages for the publication of a disparaging statement about a plaintiff, that is, a statement likely to cause the ordinary, reasonable member of the community to think less of the plaintiff.

Some would argue that a law protecting reputation is outdated and should have no application to our modern way of life and communication. However, most people are affected by defamation at some stage in their lives. A good reputation can be damaged forever, depriving a person of relationships and opportunities. While freedom of speech is a fundamental human right, it is not absolute and must be balanced with other fundamental human rights such as protection from unjustified attack on reputation.

This is an important issue for a bank, which must balance the need to report abuse against the possibility of damaging a person's reputation forever. In doing so, a bank is exposed to a suit of defamation.

Should a bank be exposed to an action for defamation, there are a number of defences available to it. Before addressing those, however, we set out below the basic elements giving rise to a cause of action in defamation.

9.2 Common law test

The common law remains the necessary starting point in any discussion of the law of defamation because the legislation is largely premised on existing common law principles.

The cause of action for defamation is constituted by communicating something which is understood to be defamatory of a person, to someone other than that person. The act of communication of the defamatory meaning is known as 'publication'. The word has a technical meaning and is not limited to newspaper and periodical publications. A work of art, a wink or a nod may constitute publication.

The common law has formulated the test of what is defamatory by reference to an objective or reasonable standard. The following formulations have been applied:

- (i) *Parmiter v Coupland* (1840) 6 M&W 105; 151 ER 340: a publication is defamatory if without justification or lawful excuse, it is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule.
- (ii) *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) TLR 581: a publication is defamatory if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on the plaintiff's part.
- (iii) *Slim v Stretch* [1936] 2 All ER 1237: a publication is defamatory if it tends to lower the plaintiff in the estimation of right-thinking members of society in general.

9.3 Meaning of publication

The essential question is frequently not whether the plaintiff has been defamed, but whether the defendant can avail itself of a defence whereby the publication was lawful.

The criteria for publication are extremely broad and do not necessitate the bank actually publishing the person's name. Further, the test of whether a publication is defamatory is an objective one.

Whether publication has occurred is not determined by the fact that the plaintiff understood the publication to be defamatory. Nor is it determined by whether the persons to whom it is published actually understood it innocently or in a defamatory sense.

The test is whether the publication would have been likely to cause the ordinary reasonable man or woman to have thought the less of the plaintiff.

The process by which the jury decides whether the imputation is defamatory is described by Brennan J in *Reader's Digest Services Pty Ltd v Lamb*:

*[T]he issue of libel or no libel can be determined by asking whether hypothetical referees — Lord Selborne's reasonable men or Lord Atkin's right-thinking members of society generally or Lord Reid's ordinary men not avid for scandal — would understand the published words in a defamatory sense. That simple question embraces two elements of the cause of action: the meaning of the words used (the imputation) and the defamatory character of the imputation. Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation, being a standard common to society generally (*Miller v David, Myroft v Sleight, Tolley v JS Fry & Sons Ltd*).¹⁰¹*

9.4 Defences

A bank could avail itself of a number of defences for a claim against it in defamation.

A plaintiff will only succeed if three threshold conditions are established by the plaintiff:

- (a) the matter complained of is defamatory of the plaintiffs;
- (b) the matter complained of was published by the defendant; and
- (c) the matter complained of was of and concerning the plaintiff.

Amongst the defences available, for the purpose of this section, the following defences are most relevant and will be considered in turn:

- (a) justification;
- (b) contextual truth;
- (c) absolute and honest opinion;
- (d) honest opinion; and
- (e) qualified privilege.

In addition to the above, various other defences may be available in particular circumstances, including absolute privilege (a defence of absolute privilege is defined in the Uniform Acts).¹⁰²

9.5 Justification

At common law it is possible to successfully defend an action in defamation by establishing that the imputation in question is 'true in substance and in fact'. If this plea is made out, there can be no inquiry into the alleged malice or other conduct of the defendant. It is enough that the imputation was true.

These issues remain under statute, which adopts this common law position by providing a defence if the defendant proves that the defamatory imputations carried by the matter complained of are 'substantially true'.¹⁰³

There is also a provision that allows the defendant to raise as a defence – described as the defence of contextual truth – defamatory material present in the publication in question but not sued upon by the plaintiff.¹⁰⁴

Many of the difficult questions relating to the defence of justification arise from the requirement that the defendant establish the truth of the precise charge against the plaintiff. There are cases where the plaintiff and the defendant are in basic agreement on the charge and all that remains is a factual dispute as to its truth.

9.6 Contextual truth

A defence of contextual truth is defined in the Uniform Acts¹⁰⁵ as follows:

It is a defence to the publication of the defamatory matter if the defendant proves that --

- (i) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true; and*
- (ii) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.*

The defence entitles the defendant to defend the action by pleading the other imputations, and justifying them to bring about a just result so that an undeserving plaintiff, by reason of what was in fact published about the plaintiff, should not succeed.

9.7 Honest opinion

A defence of honest opinion is defined in the Uniform Acts.¹⁰⁶ A defence of honest opinion is available under the Uniform Acts in circumstances where the defendant demonstrates:

- (a) the material published was an expression of opinion rather than a statement of fact;
- (b) the opinion related to a matter of public interest;
- (c) the opinion is based on proper material, that is, material that is substantially true; or was published on an occasion of absolute or qualified privilege; or was published on an occasion that attracted the protection of statute concerning the publication of public documents or the fair report of proceedings of public concern.¹⁰⁷

An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if it might reasonably be based on such of the material as is proper material.

'Honest opinion' is defined in section 31 of the Uniform Acts (excluding NT) and is set out below:

(1) It is a defence to the publication of defamatory matter if the defendant proves that --

- (a) the matter was an expression of opinion of the defendant rather than a statement of fact; and*
- (b) the opinion related to a matter of public interest; and*
- (c) the opinion is based on proper material.*

(2) It is a defence to the publication of defamatory matter if the defendant proves that --

- (a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact; and*
- (b) the opinion related to a matter of public interest; and*
- (c) the opinion is based on proper material.*

- (3) *It is a defence to the publication of defamatory matter if the defendant proves that –*
- (a) *the matter was an expression of opinion of a person (the commentator), other than the defendant or an employee or agent of the defendant, rather than a statement of fact; and*
 - (b) *the opinion related to a matter of public interest; and*
 - (c) *the opinion is based on proper material.*
- (4) *A defence established under this section is defeated if, and only if, the plaintiff proves that –*
- (a) *in the case of a defence under subsection (1) – the opinion was not honestly held by the defendant at the time the defamatory matter was published; or*
 - (b) *in the case of a defence under subsection (2) – the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published; or*
 - (c) *in the case of a defence under subsection (3) – the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.*
- (5) *For purposes of this section, an opinion is based on proper material if it is based on material that –*
- (a) *is substantially true; or*
 - (b) *was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or*
 - (c) *was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.*
- (6) *An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.*

This honest opinion defence is defeated only if the plaintiff proves the opinion was not honestly held by the defendant at the time of the publication.

This is essentially the same defence as that of ‘fair comment’ under the common law. This common law defence is preserved by the Uniform Acts in circumstances where it would apply and the statutory offence is unavailable. Further, many of the common law authorities are still relevant to the statutory defence because it is premised on a number of common law concepts, in particular:

- (a) whether the material published was an expression of opinion as opposed to a statement of fact;
- (b) whether the opinion related to a matter of public interest;
- (c) whether the opinion is based on material that is substantially true (or on certain privileged material);

(d) whether the opinion was honestly held by the defendant at the time of publication.

The Uniform Acts also provide for a defence in the circumstances already referred to where the material was published by the defendant but the opinion was that of an employee or agent of the defendant, unless the plaintiff establishes that the defendant did not believe that the opinion was honestly held by the employee or agent at the time of publication. This is an expansion of the defence as it would operate under the common law where a defendant publisher would have a defence of fair comment if the requirements of the defence are otherwise satisfied and a servant or agent genuinely held the opinion in question.

In relation to the publication by the defendant of the comment of a stranger – a person other than the defendant or an employee or agent of the defendant – the Uniform Acts provide a defence, unless the plaintiff demonstrates that the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time of publication. This is probably an expansion of the common law position where there is authority to suggest that the defendant is effectively dependent on the state of mind of the commentator. There is, however, some doubt as to the common law position on this question.

9.8 Qualified privilege

Sometimes, it may be necessary to make defamatory statements in order to properly discharge one's legal, social or moral obligations or to protect one's own legitimate interests. More specifically, the justification is the 'public interest in permitting people to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect'.¹⁰⁸

On such occasions, the law confers a limited form of immunity generally referred to as the defence of qualified privilege. Qualified privilege is distinguishable from absolute privilege (discussed in detail below) which renders a person absolutely immune from liability for defamation irrespective of the motive.

9.9 Qualified privilege: the test

There are no fixed categories of occasions in which qualified privilege may arise as the circumstances in which the law recognises such occasions are difficult to identify and can 'never be catalogued or rendered exact'.¹⁰⁹

However, at common law, the general test to be applied in determining whether a particular occasion is privileged is whether the occasion is one where the person who made the communication had an interest or a duty, 'legal, social, or moral', to make it to the person to whom it was made, and the person to whom it was made had a corresponding interest or duty to receive it. Where the occasion of qualified privilege depends upon the publisher's duty and the recipient's interest, this reciprocity of duty and interest is essential.¹¹⁰

Where qualified privilege is pleaded, the material inquiry is whether the defamatory matter was published in the discharge of some public or private duty, whether legal or moral, or in the conduct of the publisher's own affairs in matters which the publisher is entitled to protect.¹¹¹

By its nature, an established relationship tends to involve reciprocal interests and/or duties. It has been observed that the law often attaches privilege more readily to communications within an existing relationship than those between strangers.¹¹² For example, in *Paschalidis v Yellow Corporation*, the court noted that 'at common law, a defamatory statement receives qualified protection when it is made in discharge of a duty or the furtherance or protection of an interest of the maker of the statement or some person with whom the publisher has a direct business, professional or social connection, and the recipient of the statement has a corresponding duty to receive or interest in receiving it'.¹¹³

Most of the cases of qualified privilege are ones in which the publisher seeks to rely upon the existence of a moral duty as a legal duty does not exist. The rationale is that, in ordinary affairs, there are few matters where one person is under a legal duty to communicate to another.¹¹⁴ However, a moral or social duty can be more controversial to identify than a legal duty, which is relatively straightforward. Generally, the legal test for determining the existence of a moral or social duty is what people of ordinary intelligence and moral principle would have done in the circumstances.¹¹⁵

9.10 Qualified privilege: public policy

Evaluating questions of duty or interest involves questions of public policy. In considering the legitimacy of the publisher's duty in making a statement and the recipient's reciprocal interest in receiving it, the courts have considered whether the publication or dissemination of information properly advances the 'common convenience and welfare of society'. The principle is that 'the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without malice notwithstanding that they involve relevant comments condemnatory of individuals'.¹¹⁶

This principle has been subject to criticism. Justice McHugh in *Bashford v Information Australia (Newsletters) Pty Ltd* said that the correct approach should be for a court to consider all the circumstances and ask whether the publisher in question had a duty to publish or an interest in publishing, rather than to ask whether the communication is for the 'common convenience and welfare of society'.

In particular, he noted that:

A plea that defamatory matter was published on an occasion of qualified privilege is a plea of confession and avoidance. It accepts that the communication is defamatory and that the defamatory matter may be false and that its publication had caused or may cause harm to the plaintiff. It confesses the publication of defamatory matter, but contends that the publication is immune from liability because the public interest

*requires that the duty and interest of the publisher and recipient should be preferred to the protection of the plaintiff's reputation.*¹¹⁷

9.11 Qualified privilege: the exception

The most common exception to the defence of qualified privilege is that it will not be available if the publication was motivated by malice, or an improper purpose,¹¹⁸ i.e. the protection of privilege is qualified because it is displaced by 'malice'. In this context, malice means a dominant improper motive, such as a desire to injure the person who is defamed or to advance the interests of the defendant by improper means. Thus, even if defamatory matter is proven to have been published on an occasion of qualified privilege, the defence will fail if the plaintiff proves that the defendant was motivated by malice.

To establish malice, it is therefore generally necessary to demonstrate that the defendant published with an absence of honest belief, or, put another way, recklessly – i.e., knowing it to be false or without caring whether it was true or false. It has been held that while recklessness as to whether the facts are true or not amounts to malice, 'mere carelessness, impulsiveness, vehemence of language, and even gross and unreasoning prejudice, do not'.¹¹⁹

However, honest belief does not preclude a finding of malice in all circumstances. Even a positive belief in the truth of what is published on a privileged occasion may not be sufficient to negate malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege exists. That is, the publication was actuated by a motive foreign to the privileged occasion¹²⁰ – for example, where the dominant motive which actuates the defendant is to give vent to personal spite or ill-will towards the person defamed.¹²¹

To destroy the qualified privilege the plaintiff must prove not only that an improper motive existed (evidencing malice) but also that malice was the sole or dominant motive for the defamatory publication. If a defendant's dominant motive was to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege, the defendant loses the benefit of the privilege despite any positive belief that the defamatory publication was true.¹²² Under the Uniform Acts there is an additional statutory defence of qualified privilege for the provision of certain information.¹²³

There is a defence if the defendant proves that (section 30(1)):

- (a) the recipient has an interest or apparent interest in having information on some subject; and
- (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

For the purposes of section 30(1), a recipient has an apparent interest in having information on some subject if, at the time of the publication, the defendant believes on reasonable grounds that the recipient has that interest (section 30(2)). In determining whether the conduct of the defendant is reasonable, a court may take into account (section 30(3)):

- (a) the extent to which the matter published is of public interest; and
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and
- (c) the seriousness of any defamatory imputation conveyed by the matter published; and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts; and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and
- (f) the nature of the business environment in which the defendant operates; and
- (g) the sources of the information in the matter published and the integrity of those sources; and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and
- (i) any other steps taken to verify the information in the matter published; and
- (j) any other circumstances that the court considers relevant.

As at common law, the defence will be defeated if the plaintiff proves that the publication was actuated by malice (section 30(4)).

9.12 Conclusion

An allegation of abuse may form the basis of an action in defamation. This is particularly so given the broad meaning of 'publication' (including all forms of communication) and the objective test that applies. There are a number of defences available to a financial institution of which, with regard to the topic at hand and the banker–customer relationship, the defence of 'qualified privilege' is particularly pertinent. To minimise the risk of a defamation action succeeding, a financial institution should use its best endeavors to ensure that any abuse it plans to report is substantially true and based on proper material and information, bearing in mind that, ultimately, a court will decide this by reference to objective standards.

10. Recommendations

On the basis of our research as identified in this report we recommend consideration of the following law reforms:

- (a) amendment of the Code to require adopting banks to implement appropriate training for all staff of a financial institution, including to:
 - (i) recognise signs of abuse, recognise the common profile of a vulnerable customer and/or potential abusers;
 - (ii) understand protocols to deal with suspected abuse; and
 - (iii) understand Enduring Powers of Attorney and administration orders made by tribunals;
- (b) possible amendment to relevant legislation and codes (including the Code, and the Privacy Act), to protect financial institutions from any suit of defamation, or breach of contract or confidentiality or interference with privacy if they report suspected abuse in good faith;
- (c) consideration by the Australian Bankers' Association of whether it should:
 - (i) amend the Code to include new or separate standards and contractual terms for consumer banking services (including basic savings and investment products) to or for elderly customers;
 - (ii) conduct research on overseas trends and experiences to enhance the value of the review.

In addition we commend consideration of all of the reforms proposed by the House of Representatives, Standing Committee on Legal and Constitutional Affairs¹²⁴, and particularly:

- (d) the Australian Government provide funding mediation and dispute resolution services to assist older people to resolve financial disputes involving abuse.
- (e) the Australian Government provide funding to the Australian Network for the Prevention of Elder Abuse.
- (f) the members of the Australian Guardianship and Administration Committee examine the Western Australian legislation relating to reporting by banks and other financial institutions of suspected abuse to the Public Advocate and Advocare, and develop similar initiatives for consideration by their respective state and territory governments.
- (g) the Australian Government or the Australian Bankers' Association to provide funding and appoint or establish an agency to be responsible for monitoring abuse, developing solutions to combat abuse and providing a focal point to address the issue of abuse.

- (h) the Australian Government examine a rebate scheme for legal fees for older Australians to improve access to legal services.
- (i) the Australian Government require that ten per cent of Commonwealth funding to the Legal Aid Commissions be utilised for assisting older Australians with legal matters that otherwise qualify for legal aid assistance.
- (j) the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.
- (k) the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus upon older people.
- (l) the Australian Government establish a resource service for older people, accessible through a single contact point, such as an 1800 telephone number, that can provide assistance to older people in identifying the legal services that are available to them.

Further, that the assistance service be supported by a media education campaign to alert older people to their legal rights and to advertise the availability of legal assistance.

Notes

1. 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.
2. Gardner, above n 1, quoting National Centre on Elder Abuse, *Can bank tellers tell – banks reporting abuse of the elderly*, (2003), .
3. House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, Parliament of the Commonwealth of Australia, September 2007
4. Julian Gardner, Public Advocate for Victoria, *Submission to the Inquiry into Older People and the Law*, 1 December 2006].
5. World Health Organisation, *World report on violence and health* (2002).
6. National Center on Elder Abuse, US Administration on Aging, *Major types of elder abuse* (definition of financial or material exploitation), <http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basics/Types_Of_Abuse.aspx>.
7. Maine Reporting Project for Financial Institutions, *Fighting financial exploitation*, Key terms, 'Financial exploitation', <<http://maine.gov/dhhs/beas/apsQuickreference.doc>>.
8. Banking and Financial Services Ombudsman (BFSO), *Bulletin 56: Financial abuse of the vulnerable older person*, December 2007, p. 6.
9. BFSO, above n 8.
10. See section 7 of this report.
11. See section 6 of this report.
12. House of Representatives Standing Committee, above n 3.
13. Richard Viney, *Review of the Code of Banking Practice: Final report*, October 2001, p. 35 (<<http://www.reviewbankcode.com/pdfs/FinalReport.pdf>>, accessed 26 March 2008).
14. See section 7.6 of this report for a discussion on the duty to question a mandate.
15. Office of the Public Advocate, *About us*, <<http://www.publicadvocate.vic.gov.au/About-us.html>> (at 21 November 2007).
16. See section 6.6(d) of this report for a discussion of whether a bank can initiate a complaint or allegation itself or whether privacy law issues prevent banks from doing this.

17. If a bank is required to provide personal information of a customer to the Public Advocate under s 16(1)(ha) of the Guardianship Act, that bank will not be in breach of NPP 2, as disclosure will be required by law. See also section 6.6(d) of this report for a discussion of the privacy impact of s 16(1)(ha).
18. *Guardianship and Administration Act* 1986 (Vic) ss 3(1) and 4(2).
19. *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) Sch 1, cl 33.
20. *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) Sch 1, cl 41.
21. *Instruments Act* 1958 (Vic) s 115.
22. Office of the Public Advocate (OPA), fact sheet: *Enduring Power of Attorney (Financial)* (2007). See also Victoria Legal Aid (VLA) and OPA, *Take control: A guide to powers of attorney and guardianship*, 9th edition (2006).
23. *Instruments Act* 1958 (Vic) s 117. See also VLA and OPA, above n 23, p. 16.
24. See Gardner, above n 1.
25. See VLA and OPA, above n 23, p. 50. Under s 125D of the *Instruments Act* 1958 (Vic) an Attorney is required to keep and preserve accurate records and accounts of all dealings and transactions made under the EPAF.
26. *Guardianship and Administration Act* 1986 (Vic) s 49(1).
27. Office of the Public Advocate, fact sheet: *Administration* (2007).
28. Gardner, above n 1, citing the study by Cheryl Tilse et al, *Ageing and Society* 25 (2005), 215.
29. Gardner, above n 1.
30. *Instruments Act* 1958 (Vic) s 125V provides that the Public Advocate can make an application to VCAT for a declaration, order, direction or recommendation about any matter or question relating to the scope of an Attorney's powers under an EPAF or the exercise of any power by an Attorney under an EPAF.
31. As set out in the OPA's letter to the Loddon Campaspe Community Legal Centre dated 23 April 2007.
32. There are no specific provisions in the Instruments Act or the Guardianship Act that directly aid a person seeking damages and restitution against an Attorney who has acted unlawfully. As a result, the donor will need to bring separate civil proceedings to claim any damages as a result of an Attorney's conduct. Section 125V of the Instruments Act can be used to assist in such proceedings by obtaining a VCAT order to the OPA to investigate the matter (which gives the OPA the authority to obtain access to any relevant documents).
33. *Instruments Act* 1958 (Vic) s 125X.

34. *Instruments Act* 1958 (Vic) s 125V.
35. *Instruments Act* 1958 (Vic) s 125Z.
36. *Instruments Act* 1958 (Vic) ss 125Z, 125ZA and 125ZB. See also VLA and OPA, above n 23, p. 50.
37. Gardner, above n 1.
38. Gardner, above n 1, citing Hughes, above n 2.
39. Gardner, above n 1, citing Hughes, above n 2.
40. See section 7 of this report.
41. See section 6 of this report.
42. Signatories to the Code of Practice include: Australia and New Zealand Banking Group; Bank of Queensland Limited; Bank of Western Australia; Bendigo and Adelaide Banks; Citibank Australia; Commonwealth Bank of Australia; HSBC Bank Australia Limited; ING Bank (Australia) Limited; National Australia Bank Limited; St George Bank Limited; Suncorp Metway Limited; and Westpac Banking Corporation: see Australian Bankers' Association, *Banks that have adopted the Code of Banking Practice*, <<http://www.bankers.asn.au/Default.aspx?ArticleID=460>> (at 22 November 2007).
43. Australian Bankers' Association, *Code of Banking Practice*, cl 6. The Code is considered in more detail in section 3 of this report.
44. *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) Sch 1, cl 37(1).
45. Hughes, above n 2, p. 9.
46. Hughes, above n 2, p. 9.
47. Gardner, above n 1, citing Hughes, above n 2.
48. See Privacy Act s 18N(9).
49. *Privacy Act* 1988 (Cth), Sch 3.
50. There is an argument that it is the financial institution's responsibility to act only on a valid mandate and that, as a result, it is very relevant for the institution to identify where its customer is not genuinely mandating a transaction of their own free will. But we consider this to be insufficient to justify reporting of suspected abuse to a third party as being for the purpose of 'providing financial services' to the institution's customer.
51. Federal Privacy Commissioner, *Guidelines to the National Privacy Principles*, September 2001, p. 35.
52. Federal Privacy Commissioner, above n 52, p. 36.

53. Federal Privacy Commissioner, above n 52, p 37.
54. Federal Privacy Commissioner, *Unlawful activity and law enforcement*, Information Sheet 7 – 2001.
55. A disclosure is ‘authorised’ if the organisation disclosing the information has some discretion as to whether or not to make that disclosure: Federal Privacy Commissioner, above n 55.
56. The OPA has the power to investigate allegations of persons under inappropriate guardianship or persons being exploited or abused or in need of guardianship. See Guardianship Act, s 16(1)(h). See also section 5.2(d) of this report.
57. NPP 2.1(h)(i).
58. NPP 2.1(h)(iv).
59. Federal Privacy Commissioner, above n 55.
60. Federal Privacy Commissioner, above n 55.
61. Hughes, above n 2, p. 9.
62. See, for example, K. H. Wilber and S. L. Reynolds (1996), ‘Introducing a framework for defining financial abuse of the elderly’, *Journal of Elder Abuse and Neglect*, 8(2), p. 76.
63. Such as erratic banking activity, the customer withdrawing large sums secretly or the customer appearing to have health or other issues.
64. Such as a noticeable change in the customer’s appearance or the customer bringing strangers into the financial institution to assist in conducting business.
65. South Dakota has a limited immunity provision which applies only to institutions and ‘any employee, agent or member of a medical or dental staff thereof’ who report abuse. See Hughes, above n 2, p. 10.
66. Related entities should also receive immunity in the case where, for example, different subsidiaries of a bank provide some of the personal information that is reported.
67. For example, in Texas, the statute provides that an ‘employer whose employee [who makes a report of suspected abuse] is immune from civil or criminal liability on account of an employee’s report, testimony, or participation in any judicial proceedings arising from a petition, report, or investigation’. See TX HUM RES §48.054(d).
68. For example, it may prevent a reporting person from making a discretionary judgement as to whether any abuse is suspected. Mandatory reporting may cause an entity to over-report for fear of being penalised for failing to report.

69. Mandatory reporting may give reporters an impression that only those matters that are specifically required to be reported are relevant and they may therefore fail to exercise judgement as to whether any other factors should be considered.
70. The Banking and Financial Services Ombudsman issued its Bulletin 56, *Financial abuse of the vulnerable older person*, in December 2007 and addressed issues of privacy and confidentiality on pp. 21 and 22. Most of the privacy issues discussed in Bulletin 56 have already been discussed above, except that the Bulletin suggests obtaining early consent to notify 'named, trusted third parties' of suspicious account activities where the third party cannot operate the account. An example of such a third party may be a trusted relative who may have access to view account information but is not permitted to operate the elder's account.
71. K. Wills, 'Privacy of debtors' information' in *Australian Consumer Credit Law*, LexisNexis, [17.075].
72. See the exceptions regarding NPP 2 (use and disclosure) discussed in section 6.5 of this report.
73. See F. Gurry, 'Breach of confidence' in P. D. Finn (ed.), *Essays in Equity*, Law Book Co, Sydney, 1985, p. 116; *Telstra Corp Ltd v First Netcom Pty Ltd* (1997) 148 ALR 202; *Cornelius v De Taranto* [2002] EMLR 6.
74. *Smith Kline and French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1991) 20 IPR 643. This is a case where the Department used the information provided in one pharmaceutical company's application to assess another pharmaceutical company's drugs and the first pharmaceutical company argued that the Department was only authorised to use the information to assess its own products but not the second company's products.
75. Our view is based on the assumption that any report of suspected abuse will necessarily entail the bank's disclosure of information of a confidential nature; in particular, information relating to the operation of a customer's account (see section 6.2(d) above). For example, if a bank teller observes that a third party is exerting undue pressure on a customer to withdraw money and makes a report of suspected abuse, that report will include information in respect of the operation of the customer's account and is therefore information of a confidential nature.
76. See *NRMA Ltd v Geeson* (2001) 39 ACSR 401; and *NP Generations Pty Ltd v Feneley* (2001) 80 SASR 151.
77. For example, *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51–52; *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353 at 454. Compare: *NRMA Ltd v Geeson* (2001) 39 ACSR 401.
78. This is an overlap of a bank's obligations under the Privacy Act, further discussed in section 6 of this report.

79. BFSO, above n 71, p. 21.
80. Australian Bankers' Association, *Code of Banking Practice* cl 22.
81. BFSO, above n 71, p. 21.
82. BFSO, above n 71, p. 22.
83. BFSO, above n 71, p. 22.
84. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 6 (table 1 items 2 and 3) and Part 2.
85. *Foley v Hill* (1848) 2 HL Cas 28 at 35 per Lyndhurst LC.
86. BFSO, above n 71, p. 14.
87. *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 418, per May LJ.
88. *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 331 at 349, per Alliot LJ.
89. '(1) a bank is entitled to treat the customer's mandate at its face value save in extreme cases; (2) a bank is not obliged to question any transaction which is in accordance with the mandate, unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention; (3) it follows that if a bank does not have reasonable grounds for believing that there is fraud it must pay; (4) mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate; (5) a bank is not required to act as an amateur detective.'
90. *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 439, per Parker LJ. Parker LJ also said, at 439, that expressions 'such as that a paying bank must pay under its mandate save in extreme cases, or that a bank is not obliged to act as an amateur detective, or that suspicion is not enough to justify failing to pay according to the mandate, or other like observations which are to be found in the cases, are no more than comments on particular facts or situations and embody in my view no principles of law. Furthermore, what would or might have been held to be a breach of duty at one time may not be a breach of duty at another.'
91. *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 441, per Parker LJ.
92. BFSO, above n 71, p. 14; see also *Macmillan Inc v Bishopgate Investment Trust plc* (No 3) [1995] 1 WLR 978 per Bowen LJ and Steyn J.
93. BFSO, above n 71, p. 14; see also *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 409 at 437, per Parker LJ.
94. BFSO, above n 71, p. 23.
95. *Cheques Act 1986* (Cth) s 33(1).

96. *Cheques Act* 1986 (Cth) s 33(2)(a)(i).
97. Compare: *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 666 per Kerr J.
98. *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) s 6 (table 1 items 2 and 3) and Part 2.
99. See for example: http://www.citibank.com.au/global_docs/pdf/RC_Additional_Signatories.pdf (accessed 9 April 2008).
100. *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) s 6 (table 1 items 2 and 3) and Part 2.
101. *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 per Brennan J at 505–6; *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at 745; *Sim v Stretch* (1936) 52 TLR 669 at 671; *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 260; *Byrne v Deane* [1937] 1 KB 818 at 833; *Miller v David* (1874) LR 9 CP 118; *Myroft v Sleight* (1921) 90 LJKB 883; *Tolley v JS Fry & Sons Ltd* [1930] 1 KB 467 at 479.
102. *Defamation Act* 2005 (NSW) s 27; *Defamation Act* 2005 (Vic) s 27; *Defamation Act* 2005 (Qld) s 27; *Defamation Act* 2005 (WA) s 27; *Defamation Act* 2005 (Tas) s 27; *Defamation Act* 2005 (SA) s 25; *Defamation Act* 2006 (NT) s 24; *Civil Law (Wrongs) Act* 2002 (ACT) s 137.
103. NSW, Vic, Qld, WA and Tas Acts, s 25; SA Act s 23; ACT Act s 135; NT Act s 22.
104. NSW, Vic, Qld, WA and Tas Acts, s 26; SA Act s 24; ACT Act s 136; NT Act s 23.
105. NSW, Vic, Qld, WA and Tas Acts, s 26; SA Act s 24; ACT Act s 136; NT Act s 23.
106. NSW, Vic, Qld, WA and Tas Acts, s 31; SA Act s 29; ACT Act s 139B; NT Act s 28.
107. NSW, Vic, Qld, WA and Tas Acts, ss 28 and 29; SA Act ss 26 and 27.
108. *Horrocks v Lowe* [1975] AC 135 at 149.
109. *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193 at 196.
110. *Adam v Ward* [1917] AC 309; [1916-17] All ER Rep 157; *Mowlds v Fergusson* (1940) 64 CLR 206; [1941] ALR 238.
111. *Toogood v Spyring*, *Roberts v Bass*, *Bashford v Information Australia (Newsletters)* and *Adam v Ward* are all leading authorities for this proposition.
112. *Kearns v General Council of the Bar* [2003] 2 All ER 534 at 547.
113. [2005] SASC 151.
114. *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193 at 255–6.
115. *Watt v Longsdon* [1930] 1 KB 130.

116. *Henwood v Harrison* (1872) LR 7 CP 606 at 622.
117. *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193.
118. *Calwell v Ipec* (1975) 135 CLR 321; 7 ALR 553.
119. *Reynolds v. Times Newspapers Limited and Others* [1998] 3 All ER 961.
120. *Roberts v Bass* (2002) 212 CLR 1 at 31.
121. *Horrocks v Lowe* [1975] AC 135 at 150.
122. *Horrocks v Lowe* [1975] AC 135.
123. *Defamation Act* 2005 (NSW) s 30; *Defamation Act* 2005 (Vic) s 30; *Defamation Act* 2005 (Qld) s 30; *Defamation Act* 2005 (WA) s 30; *Defamation Act* 2005 (Tas) s 30; *Defamation Act* 2005 (SA) s 28; *Defamation Act* 2006 (NT) s 27; *Civil Law (Wrongs) Act* 2002 (ACT) s 139A.
124. House of Representatives Standing Committee, above n 3.

Schedule 1: Office of the Public Advocate – other State and Territory equivalents

Jurisdiction	Governing body	Powers (conferred by legislation)	Avenue of relief	Differences to the Victorian Office of the Public Advocate
Victoria	Office of the Public Advocate	<i>Guardianship and Administration Act</i> 1986 (Vic) section 15 <i>Instruments Act</i> 1958 (Vic) section 125V	Victorian Civil and Administrative Tribunal (VCAT)	
New South Wales	Office of the Protective Commissioner	<i>Powers of Attorney Act</i> 2003 (NSW) <i>Protected Estates Act</i> 1983 (NSW)	New South Wales Guardianship Tribunal	The Office of the Protective Commissioner provides financial management services to people with disabilities but it does not have an 'investigatory' role.
Queensland	Office of the Adult Guardian Public Advocate	<i>Powers of Attorney Act</i> 1998 (Qld) <i>Guardianship and Administration Act</i> 2000 (Qld)	Ombudsman Guardianship and Administration Tribunal	The equivalent statutory powers are shared between two statutory bodies: the Office of the Adult Guardian and the Office of the Public Advocate. The Public Advocate is an independent statutory officer who identifies widespread situations of abuse, exploitation or neglect of people with impaired capacity and reports these findings to State Parliament. It does not deal with individual cases; rather, it looks at widespread deficiencies in institutions and systems that affect a large number of people with impaired capacity (i.e. systemic advocacy). The Adult Guardian, also an independent statutory officer, has powers including to investigate individual cases and to act as guardian.

Schedule 1: Office of the Public Advocate – other State and Territory equivalents *continued*

Jurisdiction	Governing body	Powers (conferred by legislation)	Avenue of relief	Differences to the Victorian Office of the Public Advocate
Western Australia	Office of the Public Advocate	<i>Guardianship and Administration Act</i> 1990 (WA)	State Administrative Tribunal	The WA Public Advocate is an independent statutory officer to promote and protect the ' <i>rights, dignity and autonomy</i> ' of people with decision-making disabilities and to reduce their risk of neglect, exploitation and abuse. The powers and function of the WA Public Advocate are generally similar to those of the Victorian Public Advocate, save that the investigative power is broader as it may initiate investigation of the circumstances of people for whom an application for guardian or administrator is made to the State Administrative Tribunal. The WA Public Advocate also provides advisory services to the general public.
South Australia	Office of the Public Advocate	<i>Guardianship and Administration Act</i> 1993 (SA)	Guardianship Board Administrative Division of the District Court of South Australia	The Office of the Public Advocate takes on some individual advocacy work but is mainly concerned with systems advocacy. It can undertake its own investigations into the circumstances of a person who is believed to have a mental incapacity and is at risk in some way (not just when requested by the Guardianship Board). There is a Review Committee chaired by an independent Chairperson and with members from a range of backgrounds, including the general public.

Schedule 1: Office of the Public Advocate – other State and Territory equivalents *continued*

Jurisdiction	Governing body	Powers (conferred by legislation)	Avenue of relief	Differences to the Victorian Office of the Public Advocate
Tasmania	Office of the Public Guardian	<i>Guardianship and Administration Act 1995</i> (Tas) <i>Powers of Attorney Act 2000</i> (Tas)	Guardianship and Administration Board	<p>The Tasmania Office of Public Guardian is set out to promote, speak for, and protect the rights and interests of people with disabilities, and acts as the guardian of people with disabilities when appointed by the Guardianship and Administration Board.</p> <p>Its powers and functions are similar to those of the Victoria Public Advocate. However, it has to report to the Minister and is subject to the control or directions of the Minister.</p>
Australian Capital Territory	Office of the Public Advocate	<i>The Public Advocate Act 2005</i> (ACT) <i>Guardianship and Management of Property Act 1991</i> (ACT)	Guardianship and Management of Property Tribunal	<p>The Public Advocate in ACT has a broader client base compared to the other states and territories, which includes children, young people and adults in the community who suffer from a condition or situation that makes them potentially vulnerable to abuse, exploitation or neglect.</p> <p>The Public Advocate has powers including acting as guardian if so appointed and general power to investigate if needs arise. For systemic matters, the Public Advocate must refer them to Human Rights Commission for consideration.</p> <p>The Public Advocate reports to the Minister.</p>

Schedule 1: Office of the Public Advocate – other State and Territory equivalents *continued*

Jurisdiction	Governing body	Powers (conferred by legislation)	Avenue of relief	Differences to the Victorian Office of the Public Advocate
Northern Territory	Office of the Public Guardian	<i>Adult Guardianship Act</i> 1988 (NT)	The Local Court (<i>Adult Guardianship Act</i> 1988 (NT) s 8)	<p>The Northern Territory does not have a Public Advocate but it does have an Office of the Public Guardian.</p> <p>The Office of the Public Guardian can apply for guardianship orders, provide reports to the court, make representations to the court, act as guardian and other functions conferred to it by law. Guardianship Panels are appointed by the Minister to provide advice and make recommendations to the Court in relation to the issue of guardianship orders. Although the Office of the Public Guardian and the Guardianship Panel both have investigative powers for the purpose of reporting to the court, they only have that power if so ordered by the court.</p>

