

Discrimination in the provision of banking and financial services to older people

NOVEMBER 2008

In August 2008 the Loddon Campaspe Community Legal Centre published a report (the Report) entitled: *Responding to the financial abuse of older people – Understanding the challenges faced by the banking and financial services sector*. The Report examines areas of potential legal liability that banks may incur in reporting suspected financial abuse of elderly customers by third parties. This paper, addressing the issue of discrimination in the provision of banking and financial services to older people, is supplementary to and should be read in conjunction with the Report.

This supplement has been published in response to an issue raised by the Australian Bankers Association in their submission to the 2007 Commonwealth Parliamentary Inquiry into Older People and the Law which had not been addressed in the Report:

Banks also need to be very careful not to discriminate against people on the grounds of age or disability... Elder financial abuse is a complex situation and it requires subjective judgements. In identifying it, a person is placed in the position of having to evaluate whether, on the particular facts before them, the transaction is a legitimate transaction or one that is improvident but nevertheless agreed to by the older person or is an abuse of a trust relationship. I am sure you would appreciate that they are very difficult judgement calls for people to make.¹

Discrimination in the provision of banking and financial services to older customers

Background

The banker-customer relationship is covered by the Commonwealth and various State anti-discrimination law regimes, which prohibit, relevantly, discrimination on the grounds of age and disability.

The description of necessary ingredients for financial abuse of elderly people by the Banking and Financial Services Ombudsman (as it was formerly known) in *Bulletin 56: Financial Abuse of the vulnerable older person*², makes it clear that the triggers include not simply a person's age, but also whether a person might be vulnerable because of an incapacity. Accordingly, concerns about abuse due to an older person's incapacity, may not just involve potential issues of age discrimination but also of disability discrimination.

Any additional steps or security measures taken to identify and respond to potential abuse, which caused delay to the ability to pay for utilities and other necessities, or which disclosed a customer's personal information, may be regarded as a potential detriment for the purposes of anti-discrimination law. This means that any specific response to the financial abuse of elderly people, regardless of how well intentioned, must be careful so as to reduce the risk of the banks having discrimination complaints brought against them.

Forms of discrimination

In broad terms, any attempt to treat someone differently because of either their age or an actual or a perceived disability, raises the possibility that the treatment may result in a complaint of age or disability discrimination.

The *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) both make discrimination in the provision of banking and financial services unlawful. Similar provisions exist in each of the equivalent State Acts³. The framework of each of the Acts is essentially the same:

It is unlawful for a person who provides services to discriminate against another person on the ground of the other person's age or disability:

- (a) by refusing to provide the other person with those services; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those services; or
- (c) in the manner in which the first-mentioned person provides the other person with those services.

A complaint of discrimination is lodged with the Australian Human Rights Commission, where it will proceed to a conciliation conference. If the matter cannot be resolved through conciliation, a complainant may commence proceedings before the Federal Court or Federal Magistrates Court.

Discrimination can take place in two forms, known as direct and indirect discrimination.

- (a) **Direct discrimination** occurs when someone is treated less favourably than others in the same circumstances, because of their age or disability.

An example of this might arise from a policy decision to delay automatically the execution of apparently valid mandates of any customers over the age of 65, so as to verify the transaction.

If the same delay does not occur to customers in the same situation but who are under the age of 65, and such delay was found by a Court to be less favourable treatment, then the policy would be unlawful discrimination.

- (b) **Indirect discrimination** occurs when an unreasonable condition is imposed, which although it appears to apply across the board, has a disproportionately adverse impact on people because of their age or disability.

An example of this might be where any account which is the subject of an Enduring Power of Attorney (Financial) automatically has additional conditions imposed on it by the bank before transactions are permitted. Although this policy is

not directly triggered by age or disability, the reality is that most customers with an Enduring Power of Attorney (Financial) in place have done so because of age or disability, so that the policy will substantially affect older or incapacitated customers more than other customers. If the additional conditions were held by a Court to be unreasonable in the circumstances, then the policy would be unlawful discrimination.

Reducing the risk of a complaint of discrimination

Any positive steps which are taken by a bank to respond to the financial abuse of elderly people must be careful to avoid being seen as discriminatory.

In terms of direct discrimination, the answer is for a bank to respond to the behaviour on an account, rather than to a customer's age or disability. Any account where the sorts of activities identified above have been observed, should be treated in the same way, regardless of a customer's age or disability.

If a bank chooses only to act on such behaviour because of the customer's age or specific disability, questions of disability discrimination will arise. Similarly, direct discrimination may be avoided if any new express contractual terms which promote the detection and prevention of abuse, are included in all accounts which might involve transactions by another person on the account holder's behalf, rather than only being included in the accounts of people of a particular age or with a particular type of disability.

It is more likely that responses to financial abuse will create issues of indirect discrimination. The sorts of situations which may give rise to the potential for financial abuse will occur in instruments which are more likely to exist because of a person's age or disability - such as Enduring Powers of Attorney (Financial) or Administration Orders.

Ultimately, questions of indirect discrimination usually come down to whether the arrangements are reasonable in the circumstances. Banks can increase the likelihood that any policy responses to financial abuse of elderly people are seen as reasonable by ensuring that any policy which is put in place:

- is not too onerous on customers and does not unnecessarily inconvenience customers;
- is based on genuine issues of concern;
- is a proportionate response to that concern; and
- is accompanied by a staff education program and protocol which makes clear that discrimination is unacceptable.

Exemption in the case of “positive discrimination”

Where positive steps which are taken by a bank are discriminatory, certain statutory exemptions may operate to effectively permit such discrimination.

The *Age Discrimination Act 2004* exempts actions which would in other contexts be discriminatory if the actions provide a bona fide benefit to persons of a particular age or are intended to meet a need that arises for persons of a particular age or are intended to reduce a disadvantage experienced by persons of a particular age⁴.

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The Loddon Campaspe Community Legal Centre
is a program of the Advocacy and Rights Centre Ltd

ISBN 978-0-9805078-3-6

In other words, the *Age Discrimination Act* recognises that in order to minimise discrimination the special needs and requirements of specific age groups may need to be taken into account to promote equality of opportunity and adequately provide for those people who are vulnerable to exploitation.

There is a reasonable expectation that banks will offer products that will serve the best interests of customers who are disadvantaged and particularly vulnerable to exploitation. This is consistent with research that shows that older people in particular rely upon their banks to provide them with assistance and guidance in the management of their financial affairs. There is also an expectation that the bank will play a different and positive role where there is evidence of disadvantage.

Accordingly, statutory exemptions in favour of positive discrimination will, in all likelihood, operate to permit special measures, especially where such measures have been knowingly and voluntarily approved by the customer through express contractual terms, where:

- the products and services offered to older customers and the mechanisms that may be employed to supervise their banking transactions are for their bona fide benefit; or
- are motivated by a sense of social responsibility to meet a need arising out of the age of this demographic; or
- reduce a disadvantage experienced by this demographic.

¹ Commonwealth of Australia (2007) *Older People and the Law*, pp. 40-1 quoting Mr Ian Gilbert, Australian Bankers Association, Proof Transcript of Evidence, 17 August 2007, p. 60.

² December 2007, p. 6.

³ Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1998 (Tas); Discrimination Act 1991 (ACT); Equal Opportunity Act 1984 (SA); Equal Opportunity Act 1995 (Vic); Equal Opportunity Act 1984 (WA).

⁴ *Age Discrimination Act* 2004 (Cth) s33. Compare *Disability Discrimination Act* 1992 (Cth) s 45.