

**Every Customer Counts; Better  
Banking for Vulnerable Customers  
Guideline**

**Legal Aid NSW submission to  
Australian Banking Association**

*May 2019*

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**Legal Aid**   
NEW SOUTH WALES

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited, pro bono legal services and 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services.

Legal Aid NSW welcomes the opportunity to make a submission to the Australian Banking Association's consultation, 'Every Customer Counts; Better Banking for Vulnerable Customers.' Should you require any further information, please contact:

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## Introduction

Legal Aid NSW welcomes the opportunity to comment on the development of the proposed industry guideline to support vulnerable customers (**Guideline**). We support the development of the Guideline, which presents an opportunity to provide clear expectations around how banks should deal with vulnerable customers.

Our responses to the numbered questions in the consultation paper are set out below.

## Part 4 Background and framework of guideline

### Question 4.1.3(1) – statement of guiding principles

Legal Aid NSW agrees that the guiding principles contained in the Banking Code of Practice 2019 should underpin the Guideline.

## Part 5 Communications

### Question 5.2(1) – definition of vulnerability

Legal Aid NSW endorses the further amendments to Chapter 14 proposed in the Royal Commission Recommendation 1.8.

In addition, as discussed below, we propose that the definition of vulnerability should include a reference to people in prison and people on refugee visas, within the first five years of their arrival in Australia. This would recognise, and draw attention to, the specific and often acute challenges these groups experience.

#### *Prisoners*

Serious financial issues are very common among people in prison,<sup>1</sup> and are often compounded by difficulty contacting and interacting with banks. Prisoners have no or very limited internet access and limited phone access. Prisoners have calls restricted to a limited list of numbers, and are not permitted to call 1800 numbers. Calls time out after 8 minutes. This makes it extremely difficult for people in prison to contact their bank without assistance.

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<sup>1</sup> Almost all clients of Legal Aid NSW's dedicated Prisoners Legal Service are experiencing financial hardship. The Law and Justice Foundation noted that "virtually all" prisoners interviewed for its study on prisoners' legal needs were in debt (Law and Justice Foundation, *Taking Justice Into Custody: The Legal Needs of Prisoners* (2008)).

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Many prisoners lack access to personal paperwork, so are unable to provide details like their bank reference number. They also have difficulty accessing identification documents, such as a driver's licence or birth certificate. As a result, even when prisoners are able to contact their bank, they are often unable to complete their enquiry.

Financial Counselling Australia found that these issues contribute to many people leaving prison in a far worse financial situation than when they entered it.<sup>2</sup>

#### *People on refugee visas, within their first five years of arrival in Australia*

People on refugee visas, within the first five years of their arrival in Australia, also face specific vulnerabilities. They may be completely unfamiliar with the system of banking in Australia, and may speak little or no English.

Legal Aid NSW proposes that banks should have a positive obligation to use an independent interpreter to assist these customers. This could be a professional interpreter or a member of staff.

#### Question 5.2(2) – defining ‘extra care’ and other terms

In our view the term “extra care” clearly communicates to banks and customers that particular attention should be paid to customers and their transactions when there are indicators of vulnerability. A non-exhaustive list of examples of how banks can take extra care would also be useful.

We have not identified any additional terms requiring definition in this context. The term “vulnerable customer” is widely understood in the community. It is sufficiently broad and puts banks and customers on notice that particular care and attention is required for customers in this circumstance.

#### Question 5.3.2 (1) – provision of explanations

Legal Aid NSW supports banks making available an explanation of their commitment to vulnerable customers. This document must be easy for customers to understand in order to be helpful. To achieve this, the document should be short, clearly formatted and easy to read. It should be written in plain English and available in other community languages. Alternative versions should be produced for people who have difficulty reading and understanding written information. It should also be “user-tested” to ensure that customers understand it.

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<sup>2</sup> Financial Counselling Australia, ‘Double Punishment: How people in custody pay twice’ (May 2018).

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## Question 5.3.2 (2) – information to be included in explanations

In addition to the examples listed, we suggest that the commitment document should include:

- information and contact details of free and independent financial counselling services. This could be included in the ‘support services and how to get more help’ section
- information about how banks approach situations involving domestic and family violence.

## Question 5.3.2 (3) – practical information for customers

The commitment document should contain contact telephone numbers and details of relevant websites so customers can easily act on the information provided.

## Part 6 Product service and design

### Question 6.1.2(1) – considering vulnerable customers when designing products and services

Legal Aid NSW agrees that practical measures for considering vulnerable customers in product design should be included in the Guideline. These could include the specific measures outlined below.

#### *Accept signed authorities to communicate with and release information to Legal Aid NSW solicitors*

Legal Aid NSW solicitors frequently assist vulnerable people with credit and debt issues. Our solicitors have ongoing problems with banks refusing to recognise authorities signed by our clients, permitting banks to communicate with and release information to the solicitor. These authorities are provided to the bank along with a letter on Legal Aid NSW letterhead and are accepted by most other entities.

Banks often refuse to accept our clients’ authorities, or request that our client provide various other personal information or attend a branch in person, or that the solicitor provide identification. In some instances our solicitors have had to apply to the Australian Financial Complaints Authority (AFCA) to access documents and information on behalf of our client. This process can be very time consuming and frustrating for our clients and solicitors.

We submit that banks should recognise our clients’ signed authorities permitting banks to communicate with and provide information to Legal Aid NSW. This would help both banks and Legal Aid NSW to assist vulnerable customers.

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### *Recognise prisoners' identification card as a valid form of identification*

As set out in response to question 5.2(1) above, many prisoners lack access to formal identification documents and bank details such as customer and account reference numbers. Existing service designs do not adequately provide for access by prisoners, who are often unable to complete enquiries with their bank, such as cancelling third party authorities or requesting hardship arrangements.

Legal Aid NSW solicitors frequently assist prisoners with regard to credit and debt matters, and experience significant difficulties in communicating with banks on behalf of our clients. Banks regularly refuse to recognise written authorities provided by clients to their Legal Aid NSW solicitors, even when accompanied by a photocopy of the "prisoner identification card" and a covering letter on Legal Aid NSW letterhead.

Prisoner identification cards are issued by Corrective Services NSW, and prisoners in NSW are required to carry them on their person. The cards vary between prisons but each card refers to Corrective Services NSW, has the prisoner's photograph, name, date of birth and MIN (Master Index Number).

Legal Aid NSW submits that banks should recognise a prisoner identification card as a valid form of identification for customers who are in prison. If required, bank staff could confirm that a customer is a NSW prisoner by contacting Corrective Services NSW Sentence Administration. If there is concern about accepting prisoner identification cards as a valid form of identification, we submit that, at a minimum, they should be accepted when accompanied by a covering letter on Legal Aid NSW letterhead.

This is a practical measure that would make a tangible difference in assisting vulnerable customers in prison to interact with their bank.

#### **Case Study**

Caleb was in prison in regional NSW and attempted to negotiate with his bank, without success, to cancel a third party authority that he had previously given to his nephew, Arthur. Under the third party authority Arthur was able to access Caleb's bank account and conduct transactions. Caleb had grave concerns that Arthur was withdrawing money for his own benefit.

Caleb sought assistance from Legal Aid NSW. Caleb provided a written authority to the Legal Aid NSW solicitor, a photocopy of his "prisoner identification card" and the required third party authority cancellation form. The Legal Aid NSW solicitor sent the documents, under cover of a letter on letterhead, to Caleb's bank. However, the bank refused to accept the Authority and declined to act. The Legal Aid NSW solicitor then physically attended the local branch of Caleb's bank, and presented the documents to the manager. Only then was she able to cancel Arthur's access to Caleb's account. This process took some time and during that period Arthur had access to Caleb's account.

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### *Closer scrutiny of credit applications in family violence situations*

The design of credit approval processes should include a greater focus on victims of domestic violence. We suggest that banks should more closely scrutinise applications for credit, particularly online applications, where a bank is on notice of domestic or family violence and/or separation and divorce. This could include a more thorough fraud check when an application for credit is received, and high-level training of bank staff to manage the impact of debt in domestic violence situations.

We commonly see situations of financial abuse, including the following typical scenarios:

- The perpetrator of domestic violence uses their partner's identification documents to fraudulently apply online to obtain a loan in their partner's name, for the perpetrator's benefit
- The victim of domestic violence is a co-borrower with the perpetrator, but receives no benefit from the loan. Legal Aid NSW assisted the victim to reduce their liability under the loan using the ABA Industry Guideline: "Financial abuse and family and domestic violence policies". However, the victim remains on the loan as the co-borrower and they are reliant on the bank's commitment not to enforce the loan against them at a later date.
- The perpetrator attempts to fraudulently obtain a loan in their partner's name, but is unsuccessful. Their attempt leaves their partner with a number of credit enquires on their credit report, which adversely affects their credit score. There is not currently a streamlined way of remedying the situation for the victim beyond requesting that each credit provider tell the credit reporting company to remove the credit enquiry.

### Question 6.3(1) – Actions in response to identifying vulnerability

Some of the ways in which banks can take extra care if potential vulnerability is identified include:

- explaining to vulnerable customers the types of assistance the bank can provide
- requiring a higher level of verification of certain transactions, such as significant cash withdrawals, before they are processed
- applying greater scrutiny to requests to appoint a third party authority who will be able to access and conduct transactions on a vulnerable customer's account
- providing an independent interpreter to customers who are not adept in English. This could be a professional interpreter or a member of staff
- regularly training bank staff on the ABA Industry Guideline "Protecting vulnerable customers from potential financial abuse"

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## Question 6.3(1) – Proactively identifying vulnerable clients through data analysis

As discussed below, it is preferable for banks to ask customers for their consent before recording personal information about their vulnerability. Banks should inform customers how this information will be recorded and used, and who will be able to access it.

Proactive identification through data analysis would raise concerns about recording personal information without the customer's consent. In addition, such situations require particular sensitivity, respect for the customer's privacy and autonomy, and an awareness of the prejudice or perceived prejudice that could arise from recording the information. Further comments on privacy and data handling are outlined below under Part 7.

## Part 7 Data and systems

### Question 7.1.2(1) – recording information with consent

Banks should record information about customer vulnerability, with the express consent of the customer. This information should only be used to assist the vulnerable customer with their banking needs.

If a customer consents to the recording of a vulnerability, banks could record a “flag” on their system to alert bank staff of a customer's vulnerability. This should include a reference to the nature of the customer's vulnerability as defined in Chapter 14 section 38 of the Code.

Banks should record information about the nature of the customer's vulnerability, including whether the vulnerability is likely to be ongoing, and how this impacts on the customer's ability to use the banking service. When a vulnerability is recorded, the record should include information about the steps the bank can take to assist the vulnerable customer, and detailed information about any third party representative that has been appointed by the customer. This information could help to minimise the risk of fraud against vulnerable customers and minimise the risk of financial abuse.

It is essential that banks ensure that data regarding vulnerable customers is securely stored. Banks should consider who should be able to access to this data. It may be appropriate that only staff members who are dealing with that particular customer have access.

There should be specific staff training on data collection about vulnerable customers. Such training should include the reasons why this information is being collected and the particular privacy issues that it raises.

There should be a procedure and mechanisms to review the data that a bank has collected and, where necessary, make changes to that information. There should also be a procedure for customers to access information about themselves held by the bank, and

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update and change it. This is essential as it acknowledges that some customers have periods of vulnerability or the nature of their vulnerability may vary over time.

Banks should consider the ethical and privacy issues with respect to data sharing within their organisation and ensure that customers are not adversely affected. This is of particular concern in situations where a bank also has an insurance arm and a vulnerable customer is a customer of both entities.

#### Question 7.1.2(2) – balancing customer support with privacy

We agree that there is a need to balance privacy against the interests of customers in not having to repeat their story. In our view, banks can achieve this balance by clearly explaining to vulnerable customers, at the outset, the purpose of obtaining and recording information about vulnerabilities, and seeking consent to do so. Banks should assure customers that the information is handled sensitively, is secured safely and is only available to staff who are dealing directly with the client. If vulnerable customers can see the value in the banks following this process they will be more likely to support it.

#### Question 7.1.2(3) – asking customers about Aboriginality

We suggest that banks could ask customers if they identify as Aboriginal or Torres Strait Islander where this information is relevant to the particular vulnerabilities of the customer and is used to provide appropriate services. Banks should make it clear to customers that it is optional to provide this information, and inform customers of how this information will be used.

Banks should also be mindful of the potential for discrimination or perceived discrimination, particularly if this information is available for future credit applications.

#### Question 7.1.2(4) – questions to identify vulnerability

In our view, banks could consider asking questions that focus on circumstances that can lead to vulnerability. Banks should make it clear that it is optional for customers to provide this information.

Questions could include whether a customer has a chronic health condition, is in the process of separating from a partner, is experiencing domestic or family violence, suffers from a mental health condition, has a cognitive impairment, is on a refugee visa and has been in Australia for less than five years, has difficulty reading or understanding English or needs the assistance of an interpreter.

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## Question 7.1.2(5) – data collection

Legal Aid NSW suggests that there should be measures in place to ensure that banks have clear and transparent policies regarding the safe and secure storage of data, how staff have access to such data and how it will be used. These policies should be regularly reviewed and be available to customers. Banks should not lose sight of the purpose for which such data is collected and stored, namely, to assist vulnerable customers.

## Part 8 Staff training

### Questions 8.2.2(1) and (2) – inclusion of staff training provisions

Legal Aid NSW agrees with the inclusion of the proposed staff training provisions in the Guideline.

There should be provision for staff training to be ongoing and regularly updated. There need to be measures in place to ensure that staff training is consistent across bank branches and throughout the industry as a whole. Violet's case study below demonstrates the importance of ensuring that staff training is consistently implemented.

#### ***Case Study***

Violet has an intellectual disability and a number of physical disabilities. Her Disability Support Pension is deposited to her bank account with a major bank. Violet was taken by her cousin Edith to a branch of her bank. Edith is not Violet's carer. She has no financial management role (under an order from the Guardianship Division of NCAT), or Power of Attorney. She is not an authorised third party or a signatory on Violet's account. Despite this, Edith actively assisted Violet to withdraw a large sum from the bank teller, which she kept. Later Edith contacted the bank and successfully set up telephone banking on Violet's account, which enabled her to withdraw further funds. It was only when Edith took Violet to a different bank branch to withdraw more cash that an appropriately trained bank employee accurately assessed the situation and took steps to protect Violet's interests.

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## Part 9 Other

### Questions 9.2.2(1) – power of attorney reforms

Legal Aid NSW supports nationally consistent laws regarding powers of attorney. However, we are not persuaded that the benefits of a national register exceed the costs. Mandatory registration of all powers of attorney documents would add to the cost and complexity of the management of small estates that do not include real property.

We do not support a requirement to register court and tribunal orders. Currently it is possible to find out if a person is subject to an order by contacting the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT). Orders are regularly amended so it is likely that a register of orders would quickly become out of date.

Generally, Legal Aid NSW has concerns about creating further regulatory requirements for the creation or revocation of enduring powers of attorney and enduring guardianship. Adding to the cost and difficulty of making these arrangements is likely to deter people from using them, which will be to their disadvantage if they lose capacity. If people were deterred from making enduring instruments, there would be an increase in applications for guardianship and financial management orders in NCAT, placing burdens on both NCAT and the family of the person who is the subject of the application.

We support the existence of bodies with sufficient investigatory powers to consider allegations of financial abuse that are reported in good faith. We note that the NSW Government will establish an Ageing and Disability Commissioner from 1 July 2019. One of the Commissioner's main roles will be to investigate allegations of abuse, neglect and exploitation of adults with disability and older people in home and community settings. We note that the Commission's remit will not include all customers with potential vulnerability. The NSW Law Reform Commission made recommendations in relation to the establishment of a Public Advocate. It would be worthwhile considering the roles of existing and proposed public advocates around Australia when considering the appropriate body to conduct investigations in this context.

### Questions 9.2.2(1) and (2) – third party authorisation forms

Legal Aid NSW agrees with the proposed inclusions relating to third party authorisation forms in the Guideline.

We support the third party authorisation form being simplified and then user-tested to ensure that its purpose and effect are understood by customers. The form should be made available in a number of community languages.

Information should also be clearly available on how a customer can cancel a third party authorisation.

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### Question 9.3.1(1)-(3) – collection arrangements

Legal Aid NSW supports the inclusion of collections arrangements in the Guideline.

The appropriate parameters should be the same as set out in the ABA Industry Guideline: “Financial abuse and family and domestic violence policies”.

In particular the debt should not be sold onto third party debt collection agencies. Where a debt has been sold to a third party collection agency and the bank becomes aware that this debt involved a customer experiencing vulnerability, banks should work with the collections agency to provide the best outcome for the customer. This may include repurchasing the debt.

Arrangements should apply to all categories of vulnerable customers.

### Question 9.4.1(1)

Legal Aid NSW supports including industry level guidance on preventing scams in the Guideline.