Central Bank of Ireland

Review of the Consumer Protection Code

A Submission by Sage Advocacy

March 2023

Introduction

Sage Advocacy is the National Advocacy Service for Older People. It also supports vulnerable adults and healthcare patients in certain situations where no other service is able to assist. Sage provides information, support and advocacy and our work on behalf of clients is independent of family, service provider or systems interests. Our team of experienced advocates is available right across the Republic of Ireland and our service is free of charge and confidential. Sage Advocacy ensures that a person's voice is heard, that their wishes are taken into account and that they are assisted, in whatever way necessary, to be involved in decisions that affect them. Our work is guided by Quality Standards for Support & Advocacy Work with Older People, a Case Management Group and a Policy & Practice Committee.

Sage Advocacy welcomes the opportunity to make a response to Phase One of the Central Bank of Ireland comprehensive review of the Consumer Protection Code 2012 and looks forward to ongoing engagement with the Central Bank on the matter.

The submission is divided into four sections. Section One provides some contextual analysis relevant to the provision of financial services to people experiencing vulnerability. Section Two provides an overview of key issues arising from Sage Advocacy casework that should, it is suggested, inform the review of the Code. Section Three sets out relevant overarching considerations and Section Four addresses some of the specific questions identified in the Consultation Document which are relevant to Sage Advocacy and its target group.

Section One

Understanding vulnerability

While there is repeated references to vulnerable groups in Central Bank documentation as well as in the broader domains of political and policy discourse, this term may imply that vulnerable people are a homogeneous group which clearly they are not. The term 'vulnerable' almost certainly masks the wide diversity of the population being referred to. In order to better understand the range and complexity of needs, we need to 'unpack' the term 'vulnerable group' in order to comprehend its diversity. The following are some of the groups who may experience vulnerability.

- ✓ Frail and dependent people who to a greater or lesser extent are less actively engaged in society
- ✓ People with reduced decision-making capacity, including some with an intellectual disability and those with dementia
- ✓ People with poor mental and physical health sometimes associated with the ageing process or with alcohol or drug dependency
- ✓ People who are dependent on others to carry out daily living tasks, including carrying out financial transactions
- ✓ Those living in residential care services, including nursing homes
- ✓ Those who have little or no social networks and those who are socially isolated, including many older people living alone
- ✓ People who are dependent solely on social welfare for their income
- ✓ People who are digitally excluded
- ✓ People with poor literacy, numeracy and language skills

Sage Advocacy strongly believes that in using the term 'vulnerable' the Consumer Protection Code must take full cognisance of the multi-faced nature of vulnerability and the fact that clearly different responses are required by financial institutions to different types of vulnerability. For example, the support needs of a socially isolated older person may be quite different from those of a person with an intellectual disability or a person experiencing mental health difficulties, irrespective of their living circumstances.

Vulnerability can arise because of a multitude of factors, ranging from language barriers, age-related reduction in autonomous functioning; family or domestic violence; mental health difficulties; serious illness; or any other personal or financial circumstance which can result in vulnerability. Circumstances may include bereavement, the breakdown of a relationship or job loss. Poor financial literacy or learning difficulties are also characteristics that can make consumers potentially vulnerable. All of these issues and characteristics can impact on a person's capacity to negotiate banking processes and make good financial decisions.

The reality is that people may move in and out of states of vulnerability and they may be vulnerable in respect of some categories of transactions but not others. It seems more appropriate therefore to describe vulnerability as a spectrum of risk rather than a binary state, as suggested in the Consultation Document. Sage Advocacy strongly agrees with the point suggested in the Consultation Document, about the need to take into account that consumer vulnerability can take different forms and be applicable in different circumstances, and may be due to a combination of personal characteristics, economic situations and market conditions. This point should be strongly reflected in the Code.

Responding to vulnerability

It is noted that the Central Bank has issued a letter to CEOs of financial entities.[1] This states that specific consideration should be given to the impact of decisions on vulnerable customers and that the assistance necessary to reasonably mitigate those impacts and enable people to retain access to basic financial services should be provided. The entities should also have *"specific and effective processes and communication plans to support vulnerable customers during this time of increased uncertainty"* (Paragraph 3 of Letter). There are important issues associated with the quick onset of vulnerability arising from, for example, dementia or an acquired brain injury which need to be identified, analysed and addressed.

It is noted that the Department of Finance has carried out a broad-ranging review of the retail banking sector in Ireland.[2] One of its Terms of Reference was to consider the potential consequences for consumer protection (including for existing and future customers and for vulnerable customers).

- As a general principle, the Central Bank should require banks to examine the impact on customers, the suitability of alternative service provision arrangements, and the plans for migrating customers to them, especially at-risk customers.

- Require, in the revised Consumer Protection Code, all providers of retail banking products and services to set out and publish customer charters, incorporating service standards.

[1] Consumer Protection expectations in a changing retail banking landscape 2021
https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/consumer-protection-expectations-in-a-changing-retail-banking-landscape-2021.pdf?sfvrsn=4
[2] https://assets.gov.ie/240770/d 8b98fef-fe6a-4df8-b7d6-2f63e9f224b8.pdf

- In advance of changes that may ultimately be made to the Consumer Protection Code, the Review Team recommends that all providers of retail banking products and services implement this recommendation on a voluntary basis.

Sage Advocacy believes that these recommendations warrant serious consideration by the Central Bank. It is also noted that, in its submission to the public consultation on the above review, the National Adult Literacy Agency recommended a number of actions for the retail banking sector, including new measures to help customers work online and to transition from offline to online financial services.

Challenges arising from a changing banking environment

Challenges for some people have emerged in recent years as a result of disappearing bank branches, a move to transact business online and limited transaction services available in remaining branches. For older people who are affected by mobility issues, travelling to bank branches can pose a challenge. The lack of a physical financial services infrastructure at local level, especially in rural areas, is a particular barrier to financial inclusion for this group.

Some population groups, including welfare dependent people, older people, those suffering from mental health problems and people living with disabilities are particularly ill-served by the growing number of Bank and Post Office closures and the growing emphasis on digital banking. While rapid transformation of financial and other services driven by technology may be inevitable, this should not mean that the needs and preferences of people who do not wish to, or are unable to adapt, should be ignored. As citizens, everybody is entitled to equality of access to services necessary for daily living, including financial services. Clearly, there is a range of consumer preferences in banking, all of which need to be respected in the context of our shared citizenship.

Complex sets of rules and procedures associated with financial products can leave the individual consumer somewhat weak and vulnerable vis-*a-vis* a financial services provider. Use of financial services can also become more difficult as a result of physical/sensory disabilities, including gradual hearing loss, changes in vision, and slower reaction times. Such changes can affect access to financial services, particularly if older people are not seen by banks as ‘desirable’ customers, and products are not specifically targeted through the most appropriate channels. For example, misunderstanding the communication needs of people with hearing or vision impairments can perpetuate stereotypes around older age. Hearing-impaired older people may be labelled as ‘confused’ because they cannot hear fully what is being said.

Financial literacy

Financial literacy can be described as peoples’ ability to process finance-related material and make informed decisions about financial planning, wealth accumulation, pensions and debt.

Consumers who are well-informed, experienced, and who understand the financial products and services required to serve their needs, are better placed to make good financial decisions and to look after their own interests. They are less likely to be susceptible to fraud and scams.

Financial literacy impacts on financial wellbeing, i.e., the ability of individuals and households to finance their current and future needs, and their resilience to financial shocks. The OECD sees individual financial well-being as being in control, feeling secure and having freedom about one’s own current and future finances. These are matters that are relevant to the Consumer Protection Code.

Section Two: Issues identified through Sage Advocacy Casework

During 2022, almost 600 referrals to Sage Advocacy involved a financial matter. These included people needing support with the Nursing Home Support Scheme, financial abuse, and debt issues. Some cases involved Sage Advocacy supporting people to change their bank to one where there appeared to be a greater awareness in practice of the needs of people who required additional supports to manage their finances. In the main, the issues identified by Sage advocates relate to the fact that a person is finding it difficult to access their own money and that the support structures available to help them to do so are inadequate. There are a number of factors that contribute to difficulties in accessing banking services:

- ✓ Change of address (for example, now living in a nursing home);
- ✓ Not having ID (e.g., passport, drivers licence) that a financial service will accept;
- ✓ Mobility issues which make it very difficult for a person to attend a financial institution in person;
- ✓ Cost implications (e.g. taxi fares), particularly for people on low income;
- ✓ Change in signature/handwriting which no longer matches that on file – a difficulty with changed handwriting sometimes occurs despite the fact that a medical certificate has been provided to explain the reason for the change;
- ✓ Change in communication style (e.g. due to stroke) which results in people not being able to speak clearly on the phone);
- ✓ Banks not communicating with people in a way that suits them (e.g. writing to them when they have a visual impairment or calling to confirm an address when they have a hearing difficulty);
- ✓ Financial services requesting a capacity assessment before taking instructions merely because the person is now in a nursing home or because they need a support person to accompany them;
- ✓ People being advised to use online banking when they do not have the skills, the equipment (e.g. Internet access) or confidence to do so;
- ✓ Other people controlling a person's money and using it for their own benefit without the knowledge or consent of the person;
- ✓ People experiencing difficulties in accessing their money following the freezing of an account in order to stop fraud which had come to light or had been suspected or because a bank card had been lost;
- ✓ Difficulties getting in contact with banks, most of which have centralised information hubs and a related difficulty in getting through to individual branches;

- ✓ Financial institutions not accepting letters from Nursing Homes as proof of change of address resulting in people not getting up to date bank statements;
- ✓ Freezing bank accounts because the person's new address is not registered on the account which can result in arrears in payments to nursing homes;
- ✓ Bank cards being sent to old addresses even though people had indicated to a Bank that they now lived in a nursing home at a new address;
- ✓ People being asked to sign documents that they did not understand, e.g., simply because they were not able to read them due to sight difficulties;
- ✓ Banks sometimes not appearing to take visual impairment into consideration in their correspondence with customers;
- ✓ Some bank branches appearing not to fully appreciate the fact that older people may sometimes need access to their money as a matter of urgency;
- ✓ Some banks do not have functioning vulnerable adults' sections.

Issue with ID

A particular issue affecting many Sage Advocacy clients is their inability to provide an ID that is acceptable to banks. Some banks will only accept a passport or drivers licence. The ML 10 form is no longer accepted as proof of ID. The PPS card is also not accepted as ID. Many Sage Advocacy clients do not have a passport or a drivers licence. In supporting clients to set up a new bank account, the Sage Advocacy experience is that only some banks will support alternative methods of proof of identity (e.g., signed letters stamped by a nursing home as proof of address, or a doctor's letter if a person is unable to sign). Other financial institutions will accept a letter from DSP confirming a person as a social welfare recipient or a Birth Certificate. It is reasonable to suggest that there should be a uniform approach by all financial institutions on this matter and that the Central Bank Consumer Protection Code should require this.

Difficulties with in-branch consultations

A typical Sage Advocacy case relating to financial matters is where a Sage advocate accompanies a person to a financial institution to support them in resolving a banking issue. This is often a big undertaking for the individual – emotionally, physically and financially. If a person is in a nursing home, there is a requirement to have a carer with them, which they have to pay for, along with a taxi which they also pay for. There have been instances where the appropriate person in the branch was not available at the allocated time or where the transaction could not be completed because the person did not have an ID that was acceptable to the bank. There were also instances where people were left waiting for an inappropriately long period before being seen, and instances requesting a medical report before a transaction could be processed. There is also an issue with wheelchair users not being able to carry out their business in private because there are no wheelchair accessible private spaces.

There appears currently be no mechanism in place for people in branches to visit vulnerable customers in the community or in a nursing home to help them to access their own finances. This option was provided by some branches of specific banks prior to the outbreak of Covid-19.

While individual financial institutions will clearly have their own policy and practices in dealing with people who require individual support, there is a strong case to be made for a standardised and uniform approach based on best practice principles. This should be reflected in a new Consumer Protection Code.

Implications of change to handwriting as people age and/or experience health problems

The Sage Advocacy experience is that there does not appear to be sufficient understanding by individual banks of the fact that a person's handwriting can change over time as they age and their dexterity may change, for example, as a result of Parkinson's disease. There have been instances where Sage Advocacy clients could not set up a transaction as the signature did not match, even when said clients were supported by Sage Advocacy to attend the bank. In some instances, the bank dealt with the customer at the time and then at a later time processed the transaction. However, in some of those instances, when the transaction was subsequently processed, a letter was sent to the customer to inform them that as the signature did not match and that the transaction had not, therefore, been processed.

Communication style

It is obvious that some people communicate very differently. The Sage Advocacy experience is that this is frequently not acknowledged by financial services. This is a matter of serious concern in the context of the right of each person to have equality of access to financial services. There have been instances where a bank has requested a capacity assessment as the person needed additional support to communicate, instances where people were not dealt with in a branch because they were not understood, and instances where a meeting was not set up because it was alleged that a person "lacked capacity" regarding the transaction they required when clearly this was not the case.

The need for face to face communication and for sufficient time to engage with a person who communicates differently is evident and needs to be built into the practice of financial institutions. Having a different communication style is clearly not the same as lacking capacity to make a decision regarding finances.

In some instances, where a Sage advocate is involved and where a person requires additional support with communication, a bank has stated they will not proceed without a having a Power of Attorney, which is costly to the client, and which they do not require. What they do require is appropriate support from the financial institution to autonomously make the transaction that they require and an acknowledgement of the role of an independent advocate where a person has requested such involvement and has given their consent accordingly.

Financial services requesting a capacity assessment because the person is now in a nursing home

Sage Advocacy has supported many people to access bank statements in order to check that their finances are secure and that no one else has been accessing their accounts. There have been a number of instances where a person's capacity is questioned by the financial institution without any direct communication with the person involved. Banks have requested that Sage Advocacy source a capacity assessment from a consultant before they proceed with the request. Besides the fact that the client would usually have to pay privately for this assessment and generally would not have the means to do so, it is entirely inappropriate.

The presumption of capacity should always prevail unless it is clearly in question. It is reasonable to suggest, therefore, that banks should have better mechanisms in place to support the person to access their own financial information without having to rely on a letter from a doctor stating that a person can indeed manage their own affairs.

There are also instances where financial institutions will not entertain any form of communication from an advocate and question a person's capacity due to the fact that the person required an advocate in the first instance to support them regarding their finances. This has occurred despite the fact that a signed consent form for involvement by Sage Advocacy was provided to the bank.

Advising vulnerable customers to use online banking

The practice of requiring people to use on-line banking is now the norm. Many older people have not used smart phones and do not want to use smart phones. Some Sage Advocacy clients have a visual impairment or dexterity issues that would inhibit them from being able to use technology for day to day banking. Other people have phones where updated apps are not supported on their device. There is also the added fear of potential financial abuse by others who could access the person's online account information. While some Sage Advocacy clients can and do get help with online banking, Sage Advocacy has evidence that financial abuse has occurred in such instances. When Sage Advocacy intervenes in such situations to support people to have online banking revoked because of abuse, there is the added issue of future access to banking by the client. There would appear to be inadequate support from financial institutions in such instances.

Other people controlling a person's money and using it for their own benefit, and

Sage Advocacy has supported a number of clients to have their accounts secured, such as cancelling bank cards, having their addresses changed, switching accounts, removing joint names etc. This can be a very distressing time for clients. There have been instances where banks would not engage with an advocate to support the client with a plan going forward, leaving clients in arrears in payments. This has further implications as to their residency in a nursing home with the possibility of them being served a notice to quit as their fees are not being paid. In order to avoid such scenarios, banks should be obliged to have liaison people who visit customers in their place of residence in order to support them regarding their current and future banking needs.

People being advised to do a Power of Attorney

Sage Advocacy has come across a number of instances where banks are advising customers to do a Power of Attorney in order to protect their money. This can have a negative consequence in the sense that it could allow the attorney to deal with all of the donor's assets which may not be at all what is required and could remove all agency from an individual in respect of their assets.

Difficulties getting in contact with bank branches

Communication with individual branches has become very difficult generally which particularly affects people who have traditionally relied on and trusted their local 'friendly' bank. There have been occasions when Sage Advocacy has supported clients by physically bringing them to a branch. This has not always worked effectively because the bank required people to have an appointment or people have been left waiting an unreasonable amount of time in the context of their physical frailty.

Centralised offices will not give out phone numbers for individual branches, and if the centralised office cannot get through to a local branch, a person either has to call back another time to try again, or await a call back. By the time the call back comes, it is frequently the case that the advocate is no longer there to support the individual or the person is not there to give consent for the advocate to be involved. Another date and time has to be arranged, and the cycle may occur again.

There are some banks that have vulnerable customer units, and it is Sage's experience that these work exceptionally well for the most part for customers who require enhanced support. All banks should have this type of service and it should be a specific requirement under the Consumer Protection Code.

Unregulated bank accounts in Nursing Homes

There is a practice in some instances of people's pensions being paid into a nursing home client account to cover a resident's Nursing Home Support Scheme ('Fair Deal') contribution with the nursing home holding the balance of the resident's money for the benefit of the resident. Some Sage Advocacy clients hold considerable sums in a Nursing Home client account but there is no supervision of the system. Nor are regular statements provided to the resident.

An Post

There are Sage Advocacy cases where a person's social welfare pension was "kept" by the postmaster, used to pay for groceries in the same shop owned by the postmaster and in which the Post Office is located. Neither the balance or statement of account was given to the individual. This suggests, at a minimum, poor practice but, also, perhaps unregulated activity by An Post.

Section Three: Some overarching considerations

This section outlines a number of overarching considerations relevant to the review of the Code.

Financial abuse

The Law Reform Commission (LRC), in its Issues Paper, ***A Regulatory Framework for Adult Safeguarding***, has comprehensively highlighted (4.3) the issues that contribute to financial abuse – a lack of understanding of financial decisions among vulnerable or at risk adults; inadequate provision of training and professional development for banking staff; inadequate supports for banking staff; the absence of mandatory reporting of financial abuse; and an absence of inter-sectoral collaboration. Inadequate legislation and policy is also identified by the LRC as a key issue. The LRC Paper also refers to many additional issues, including: a lack of public awareness of the abuse of adults at risk; financial abuse related to joint accounts; financial abuse related to social welfare payments; and increasing rates of financial abuse linked to advances in technology.

Among the key findings of a 2019 Red C poll[3] conducted for the BPFI and Safeguarding Ireland was that one-in-five (20%) adults aged 18+ in Ireland either were currently experiencing or have in the past experienced financial abuse. Sage Advocacy has reported[4] a connection – in cases where adults at risk had experienced financial abuse - between having to depend on family or carers for help with spending or managing their money and financial abuse.

International research[5] has indicated that older people are more at risk of financial abuse if they have diminished capacity (either arising from reduced decision-making capacity or a physical/sensory disability). It has been noted[6] that older people's assets can be a site of competing

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[3] https://www.safeguardingireland.org/wp-content/uploads/2019/11/BPFI-Safeguarding-Ireland-Financial-Abuse-Nov-2019.pdf

[4] *Breaking the Wall of Silence*, https://www.sageadvocacy.ie/media/2202/6376-sage-voc-report-fa-for-web.pdf

[5] https://web.archive.org/web/20190309064534id_/https://seniorsrights.org.au/wp-content/uploads/2014/03/Financial_abuse-of-older-people-by-family-members.pdf
https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/money-matters/financial_abuse_evidence_review-nov_2015.pdf

[6] Wilson et al. cited in Age UK, *Financial Abuse Evidence Review*,

interests, in that families have an interest in protecting potential inheritances; the market has interests in promoting lifestyle, care, and accommodation options, as well as financial products, such as reverse mortgages.

Research[7] which examined bank staff's experiences of financial abuse of vulnerable adults found that almost 70 per cent of survey respondents had had a suspicion of financial abuse of a vulnerable adult. Bank managers and National Safeguarding staff highlighted particular issues in relation to capacity, family assumption of entitlements to a vulnerable adult's finances and difficulty in the context of a PIN number being shared. There is also some evidence of financial abuse being perpetrated on at risk adults who had power of attorney orders in place and where powers of attorney had been abused.

Sharing of information in the context of actual or potential financial abuse and fraud

Article 6(1)(f) of GDPR[8] provides a legal basis for the sharing of data where this is necessary for the purposes of the legitimate interests pursued by a data controller or a third party.[9] The legitimate interest basis can be invoked in the context of safeguarding people from financial abuse. The Data Protection Commission's *Guidance Note*[10] indicates that legitimate interests may include commercial interests, individual interests, or broader societal benefits and that this legal basis could be appropriate in a wide range of situations. The Guidance states that legitimate interest is particularly relevant in safeguarding situations where an adult at risk is exposed to a risk of financial abuse. The Guidance states unequivocally that the sharing of personal data for the purpose of preventing fraud constitutes a legitimate interest of the data controller concerned.

This means in effect that there is a legal basis under Data Protection Law for a financial institution to share information regarding a risk of financial abuse with another organisation, for example, the Department of Social Protection, the National Shared Services Office (which has responsibility for payment of pensions to public servants) or the HSE.

Sage Advocacy believes that it is hugely important that this matter is addressed in a revised Consumer Protection Code and guidance provided accordingly.

Decision-making capacity and financial capacity

The matter of the management by at risk adults of their personal finances is intrinsically linked to decision-making capacity. There is a common law assumption, now given statutory effect in the Assisted Decision Making (Capacity) (ADMC) Act 2015, that all persons are presumed to have the capacity (or ability or competency) to make a specific decision or decisions until the contrary is indicated. A person is, therefore, only to be regarded as having reduced capacity to understand and manage their finances after all efforts have been made to support their decision making by facilitating them to understand the decision to be made.

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https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/reports-and-briefings/money-matters/financial_abuse_evidence_review-nov_2015.pdf

[7] Amanda Phelan, Deirdre O'Donnell and Sandra McCarthy (2021), *Financial abuse of older people by third parties in banking institutions: a qualitative exploration*, https://www.cambridge.org/core/journals/ageing-and-society/article/financial-abuse-of-older-people-by-third-parties-in-banking-institutions-a-qualitative-exploration/8CB9EF01B3A1DC261D0DE177A89E671B

[8] https://gdpr-info.eu/art-6-gdpr/

[9] For a detailed discussion of this, see Ní Leathlobhair, N. in Browne, M. et al (2022), Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf ps. 149 and following.

[10] https://www.dataprotection.ie/sites/default/files/uploads/2020-04/Guidance%20on%20Legal%20Bases.pdf

Changes to the Power of Attorney arrangements to be introduced under Part 7 of the ADMC Act, as well as the decision-making support options, will be centrally relevant to financial institutions and will need to be reflected in their policies and codes of practice.

Supported decision-making

The introduction in law (through the Assisted Decision Making (Capacity) Acts (2015 and 2022), (scheduled to commence on 26th April this year), of the statutory presumption of capacity and the legal requirement for people whose decision-making capacity may be in question to be provided with whatever support that they require to maximise their decision-making capacity introduces a fundamental change in how such people are to be regarded. This applies to all domains of daily living where people are required to make a decision, including decisions about their finances.

The ADMC Act 2015 (Section 103) provides for the development of a statutory Code of Practice for the guidance of, *inter alia*, financial professionals and financial service providers. Therefore, the Consumer Protection Code should include a requirement for all financial institutions to follow the legislation and to adhere to the Decision Support Service (DSS) Code of Practice for Financial Professionals and Financial Service Providers. This Code stipulates a duty of care and sets out the steps that financial professionals must take in order to comply with that duty.

Will and preferences

The assisted decision-making legislation fundamentally changes the discourse by requiring a focus on ascertaining people's will and preferences as distinct from looking after their 'best interests' as typically decided by a third party rather than the person themselves. This is crucially important in the context of financial transactions notwithstanding the continuing use by the OECD of the term 'best interests'. It is important that the Central Bank Consumer Protection Code develops a discourse around the need to have full regard to the concept of respecting people's will and preferences if for no other reason than that this will be required by law once the Assisted Decision-Making Capacity Act 2015 is commenced.

While it is clear that financial institutions have a duty of care not to proactively sell financial products that are blatantly unsuitable (e.g., financial investments with a timespan inappropriate to the age of a person), this should not in any way take from the requirement to at all times respect people's will and preference where the latter is mediated through an appropriate decision support mechanism as provided for in the legislation.

Requirement to provide appropriate supports to people who may be experiencing vulnerability

Clearly people should be supported to manage their own finances to the greatest extent possible and to be able to access their own money when they need to. This requires that all banking staff acknowledge the basic principle that all people retain legal capacity irrespective of their decision-making capacity. This means, in effect that frontline banking staff fully understand the concept of supported decision-making and are appropriately trained to provide the necessary supports themselves and, where this is not possible, to know where to seek such support and to make referrals accordingly. This is an area where the Consumer Protection Code should set out requirements for financial institutions and provide guidance accordingly.

The Code should include a requirement for banking information to be provided in accessible formats (audio, larger font, Plain English). There should also be a requirement to provide Sign Language Interpretation for those who require it. It is reasonable to suggest that this should be provided on an appointment basis to those who need it.

Life-long loans: Implications for financial assessment for 'Fair Deal'

The Code should require banks, as part of their duty of care to people who are vulnerable, to have a mechanism for informing people who seek loans (for example against their property) that such loans will be assessed and taken into account if a person requires nursing home care and applies for the Nursing Home Support Scheme (Fair Deal) within 5 years of drawing down the loan. Only if the loan was used to extend/improve their house will it be allowed as a deduction. If used for "pleasure" or gifts to others, they will not be entitled to deduct it from the value of their assessed assets but instead it will be regarded as an existing asset even if they have in the meantime divested themselves of it or spent it.

Also, the Code should stipulate that financial institutions should advise that with accumulating unpaid interest the loan outstanding can amount to so much that it becomes greater than the value of the house or close enough to it that ancillary state support (HSE taking a charge of the house instead of the resident paying 17.5% of the value of it for the first 3 years as a part of their contribution to Fair Deal) will be refused by the HSE on the basis that there is not enough equity now left in the house to ensure that any further charge in favour of the HSE will be repaid. This leaves the resident having to meet the full amount of their contribution based on their assessed assets for 3 years and their pension may not be enough to cover this this.

Section Four: Answers to Selected Consultation Questions

What changes do you think need to be made to the Consumer Protection Code to ensure that it is fit for purpose in today's financial system?

There should be a stronger emphasis in the Code on the requirement to 'know your customer'.

There should also be a requirement for people to be directed to other potential areas for solving their immediate financial need, e.g., access to exceptional needs payments (ENPs) under the Supplementary Welfare Allowance (SWA) system and support from agencies such as Money Advice & Budgeting Service (MABS), Sage Advocacy and Citizens Information Centres (CICs).

How do you think the personalisation and individual-targeting of ads can be made compatible with the requirement for firms to act in the best interests of customers?

The concept of 'buyer beware' places a responsibility on consumers to examine and assess a product before purchase. However, the imbalance in information and understanding between firms and consumers means that consumers may not always be able to fully understand and assess a product or service. This applies in particular to consumers who may be vulnerable because of frailty associated with ageing, because of having an intellectual disability or because of mental health challenges.

There is a clear onus on financial services to take full cognisance of this power imbalance. Good quality and clear information can empower consumers to choose the most appropriate and competitively priced product for them.

Sage Advocacy believes that the Central Bank Consumer Protection Code could make stronger enforcement provision in relation to how information is provided relating to the sale of financial products with appropriate sanctions for non-compliance.

How can regulation improve effectiveness of information disclosure to consumers?

Some people because they have reduced decision-making capacity or because they have mental health difficulties are more likely to be at risk of detriment or harm in the context of managing their personal finances. They can make poor or uninformed decisions, especially when firms are not acting with the appropriate duty of care. They are more likely to be subject to scams and exposed to mis-selling. They are also more likely to purchase inappropriate products, or are unlikely to be able to manage a product or service, including seeking to resolve issues or complain when problems arise.

Equitable and fair treatment of consumers, including those who may be vulnerable

The Code should continue to emphasise that special attention should be paid to the treatment of consumers who may be experiencing vulnerability or financial hardship. Approaches may take into account that consumer vulnerability can take different forms and be applicable in different circumstances, and may be due to a combination of personal characteristics and socio-economic factors.

Can we identify proportionate ways to ensure that financial services providers support customers who are deemed to be in vulnerable circumstances, and to ensure that staff are trained and empowered to act?

Dealing with individual cases

The Code should oblige financial institutions to provide those identified as vulnerable with such reasonable arrangements and/or assistance that may be necessary to facilitate them in their dealings with the institution bearing in mind that as our society and economy ages the requirements for such supports will grow and, in time, become the norm.

Staff of financial services need to be able to recognise and respond to vulnerability. They need to know when it is appropriate to seek additional support within the institution for customers or, depending on their circumstances, to seek that support externally.

Bank staff should be required to appropriately record information, while respecting the privacy and autonomy of the individual, to ensure future engagement with the customer takes account of their particular circumstances. All financial institutions should consider the organisational arrangements that need to be put in place to support customers in vulnerable circumstances, including, in particular, the establishment of vulnerable customer units.

Are external supports valuable, such as the trusted contact person? Are there others?

There should be provision for a facility allowing consumers to provide the name and contact information for a trusted contact person – someone who a financial institution may contact where they may have difficulty in dealing with a customer, or where financial exploitation or fraud is suspected. While older people are likely to be the group who would be most likely to benefit from having a trusted contact person, consideration could be given to extending the concept to all customers who might need or want the assistance of another person they trust, in their dealings with financial institutions. However, a note of caution is required in relation to identifying a trusted contact person in that the perpetrators of financial abuse are often 'trusted' and are frequently family members.[11] There is also a need to take into account the fact that family members are often likely to be ultimate beneficiaries of an older person's assets and may, therefore, have a vested interest in 'protecting their inheritance'. Also, clearly the fact that next-of-kin have no legal status whatsoever must always be a factor.

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[11] See Browne, M. *et al.,*(2022), *Identifying RISKS – Sharing RESPONSIBILITIES: The Case for a Comprehensive Approach to Safeguarding Vulnerable Adults*, Safeguarding Ireland, https://www.safeguardingireland.org/wp-content/uploads/2022/05/6439-Safeguarding-Risks-Resp-Report-FA4_lowres.pdf

In looking at the concept of a trusted contact person, the Central Bank should take cognisance of the Assisted Decision-Making (Capacity) Act 2015 which provides for a range of support people for those whose decision-making capacity is in question. These are:

A decision-making assistant
A decision-making assistance agreement is a written agreement a person prepares in which they identify one or more people they trust to act as a decision-making assistant to help them make decisions. In the agreement, a person can choose what decisions they need help with, including, for example, financial matters.

A co-decision maker
A co-decision making agreement is a written agreement a person prepares in which they choose a person to make decisions jointly with them as a co-decision-maker. This can be used where a person feels unable to make decisions on their own.

A decision-making representative
A decision-making representative is someone who is appointed by the court to make certain decisions on a person's behalf, taking into account their wishes. This can happen if a person is unable to make decisions, even with help. The person appointed by the Court can be someone known to the individual and trusted by them or a person from a special panel who is trained for the role.

There is no doubt that, as the legislation becomes embedded in practice, these support mechanisms will play an important role in the way people are enabled to manage their finances. The Review of the Consumer Protection Code will need to make provision for this evolving scenario.

Independent advocacy

The role of independent advocacy should be explicitly built into the Code and banks should be required to:

(a) Engage positively with an independent advocate where a person has nominated an advocate to support them;

(b) Inform people of their right to have an independent advocate; and

(c) Provide a person with list of recognised independent advocacy services where a person is identified as requiring support.

What other specific measures might be adopted to protect consumers in vulnerable circumstances while respecting their privacy and autonomy?

Technology and digitalisation

Clearly technology is fundamentally changing the way financial services are provided and is for many a useful and valuable tool both for financial institutions and consumers. However, great care must be taken to ensure that there is equitable and fair treatment for people who have underdeveloped digital literacy skills. The Code should clearly stipulate that the growing use of digital and on-line services should not result in some consumers being discriminated against on the basis of age or disability, both of which are included as 'grounds' in equal status legislation in Ireland.

Concluding Points

There should be a requirement for all bank staff to clearly understand the legal difference between 'joint' accounts and an 'agency' account. In the latter case, two people can operate an account but money legally and clearly belongs to only one of them. This is essentially different to a 'joint' account where either can withdraw funds Banks should be required to advise people of this important distinction when they indicate a wish to have someone else help them with managing their finances.

In order to eliminate financial abuse in the context of Bank transactions, financial service providers should assist adults who may be at risk in setting up and managing appropriate accounts. They should have a mechanism in place for periodic checking to ensure that this taking place. It is crucially important that financial institutions have experienced staff trained in the legal and tax consequences of transferring financial accounts into joint names and be able to explain the issues to the customer. There is a clear role for independent advocacy in these processes.

Other relevant points are:

- ✓ Technology can be used to gather real-time information to support effective engagement with financial institutions by people in vulnerable situations and to identify possible safeguarding related issues such as an increase in the number of joint accounts among people aged over 65 years;

- ✓ There is clear potential to use personal finance databases to identify general patterns of activity that may be a cause of concern in the context of safeguarding people at risk from financial exploitation, e.g., number of joint accounts being opened by people in their later years and number and amounts of cash transfers by older people to relatives;

- ✓ The right to use cash and to engage personally with a "person" regarding their money should be regarded as a basic consumer right;

- ✓ There is a need for provision by banks of outreach community banking services, e.g., to community centres, day care centres and nursing homes;

- ✓ It is important that there would be a practice in place in all banks where people who appear to be experiencing vulnerability in one form or another are advised to seek the assistance of an independent advocate;

Finally, and very important, is the need for financial institutions to give full effect to the provisions of assisted decision-making legislation shortly to be commenced. This means:

(i) Treating each person as an individual and providing them with whatever support is deemed necessary to enable them to maximise their participation in decisions about their finances;

(ii) Advising customers that they can avail of the provisions of the Act to get whatever support they require to manage their finances.