

Central Bank of Ireland Consultation Paper on the Consumer Protection Code

A Submission by Sage Advocacy
June 2024

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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. 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, including decisions about accessing and managing their finances. 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 the Central Bank Consultation Paper on the Consumer Protection Code. This submission should be considered in the context of our 2023 Submission to the Central Bank on Phase One of comprehensive review of the Consumer Protection Code 2012. (That submission is available at [sage-advocacy-central-bank-submission-march-2023.pdf](https://www.sageadvocacy.ie/wp-content/uploads/2023/03/sage-advocacy-central-bank-submission-march-2023.pdf) ([sageadvocacy.ie](https://www.sageadvocacy.ie))

At the outset, Sage Advocacy wishes to state that the Consultation Paper addresses some of the issues relating to financial abuse raised in our previous submission and that this is critically important in the context of Sage Advocacy casework relating to people's access to and management of their finances.

This Submission deals mainly with matters that are of concern to Sage Advocacy clients, many of whom face challenges in managing their finances and are at high risk of financial abuse and exploitation.

General observations

The reference in the Consultation Paper to financial abuse as well as to fraud and scams is hugely important. Financial exploitation and abuse of adults in vulnerable situations can be subtle and highly manipulative and arise in situations of coercive control or people being advised that specific arrangements are in their 'best interests' without adequate attention to supporting them with information and supports to understand what is involved and to enable them to make their own decisions. The reality is that a person perpetrating financial abuse is frequently someone the person knows well, e.g., a family member, a friend, a relative or a carer.

The strong focus in the Consultation Paper on protecting consumers in vulnerable circumstances is welcome. However, the term 'vulnerable' almost certainly masks the wide diversity of the population being referred to. The Paper very importantly notes that vulnerability is not always a static, innate or permanent characteristic of any person, that it exists across a spectrum and that any circumstance (whether an innate characteristic or temporary condition or life event) that

makes a person more prone to suffer poor outcomes requires firms to act with the appropriate degree of care.

While the Consultation Paper notes that the obligation to secure customers' interests does not confer a responsibility, or a right, on firms to make decisions on behalf of customers as this would clearly encroach on the decision-making autonomy of individuals, the term 'customers' interests' may inadvertently suggest or imply that there is an identifiable homogeneous group which clearly there is not.

In order to better understand the range and complexity of needs of people in vulnerable circumstances, there is a need to 'unpack' the term in order to comprehend its diversity. If the term is to be meaningful, there needs to be more specific reference in the Code to the group of people being referred to. e.g., 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 who are highly dependent on others to carry out daily living tasks (including carrying out financial transactions); those living full-time in residential care services; people experiencing mental health or addiction difficulties; and, very importantly, people who are digitally excluded. There is a need to state explicitly that people may be in vulnerable circumstances due to a combination of personal characteristics, socio-economic factors and living situation. There is a need for the Code to specifically refer to people with mental health challenges as well as to people with disabilities.

In the Consultation Paper, 'financial abuse' is understood as any of the following: (a) the wrongful or unauthorised taking, withholding, appropriation, or use of a customer's money, assets or property; (b) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a customer, to – (i) obtain control, through deception, intimidation or undue influence, over the customer's money, assets or property, or (ii) wrongfully interfere with or deny the customer's ownership, use, benefit or possession of the customer's money, assets or property.

The Law Reform Commission in its Report on a Regulatory Framework for Adult Safeguarding¹ (Glossary) includes reference to fraud, exploitation or pressure relating to wills, property, inheritance or financial transactions.

Particular caution is required to ensure that the focus is clearly on people who are at risk of financial abuse because of reduced decision-making capacity (as a result of dementia or an intellectual disability or mental health difficulties) or because they are dependent on others for their care and for assistance in managing their finances. It is important, therefore, that the Code is very specific in making it a requirement on financial services to have in place measures to ensure that people who are potentially at risk of being financially exploited or abused are protected.

The introduction in law (through the Assisted Decision Making (Capacity) Acts (2015 and 2022)) 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

¹ <https://www.lawreform.ie/news/the-law-reform-commission-publishes-report-on-a-regulatory-framework-for-adult-safeguarding.1141.html>

regarded, including in decisions about their finances. The legislation requires that: (i) each person is treated as an individual and provided with whatever support is deemed necessary to enable them to maximise their participation in decisions about their finances; (ii) engagement with customers must be on the presumption of decision-making capacity unless an individual has been properly and appropriately assessed as not having capacity, and (iii) advising customers that they can avail of the provisions of the Act to get whatever support they require to manage their finances. A person is only to be regarded as having reduced capacity to understand and manage their finances after all reasonable efforts have been made to support their decision making by facilitating them to understand the decision to be made.

The Consultation Paper takes into account the fact that, given the important role that financial services firms play in the lives of all customers, including those in “vulnerable circumstances”, it is vital that firms are mindful of their statutory obligations under the 2015 Act. While the Consultation Paper references and clearly acknowledges the importance of the assisted decision-making legislation, it does not refer to the Code of Practice for Financial Professionals and Financial Service Providers developed by the Decision Support Service which stipulates a duty of care and sets out the steps that financial professionals must take in order to comply with that duty. The Consumer Protection Code should include a requirement for all financial institutions to adhere to the Code of Practice for Financial Professionals and Financial Service Providers.

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. It is important that the 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 is required by law under the Assisted Decision-Making (Capacity) Act 2015. 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.

It is noted that Annex 5 of the Consultation Paper contains draft guidance on protecting consumers in vulnerable circumstances and advises that consumers in vulnerable circumstances require additional support when engaging with financial services and that firms need to understand vulnerability, and ensure that their culture, policies and processes take account of the needs of consumers in vulnerable circumstances. This is a critically important consideration

It may be that the repeated references in the Consultation Paper to the need for financial institutions to act in customers’ best interests could have the unintended result of removing the focus away from an individual’s will and preference, in other words, enabling the individual voice to be heard on the financial matter in hand.

Independent advocacy plays an important role in supporting people to manage their finances and to deal with financial services. Sage Advocacy casework frequently involves supporting people with issues of financial management and access to bank accounts and related financial services. The Consultation Paper makes no reference to independent advocacy which is a potentially centrally important support for many people engaging with financial services. The role of independent

advocacy should be explicitly built into the Code and banks should be required to engage with an independent advocate where a person has nominated an advocate to support them and to advise the consumer to seek the services of an independent advocate; and provide a person with list of recognised independent advocacy services where a person is identified as requiring support.

Sage Advocacy casework indicates that in some instances, banks are unwilling to engage with an independent advocate because of the requirements of the ADMC legislation but, at the same time, not fully implementing the legislation in relation to supported decision-making.

Difficulties with access to accounts arises regularly in Sage Advocacy casework. Some people experience difficulty in accessing their account with a requirement to get a 'Doctor's Cert'. While this practice will have to change under the requirements of assisted decision-making legislation, it is important that the Code stipulates that any such practices in the future will be in breach of the legislation. There will be a need for ongoing monitoring of cases where an adult is refused a bank account or other financial products or access to an existing account based on an assessment of capacity that is not in compliance with the legislation. Additionally, in cases where accounts or financial products are declined, there should be some obligation on financial services to recommend alternative services to enable people to manage their finances. It is critically important that people who are unable, for whatever reason/s, to open a bank account or access an existing one do not become financially excluded.

There should be a requirement on banks to direct people 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).

[Relevant recommendations in the Law Reform Commission Report](#)

The Law Reform Commission has made a number of relevant recommendations which need to be reflected in the Central Bank Code, viz.

- Regulations should provide for obligations on regulated financial service providers (to prevent and address actual or suspected financial abuse of at-risk adults who are customers of financial services);
- Regulated financial service providers (RFSPs), including credit unions and post offices, should be under a statutory obligation to ensure that relevant personnel receive regular adult safeguarding awareness training;
- Regulations should be consistent with the Assisted Decision-Making (Capacity) Act 2015 and existing codes, such as the statutory codes of practice made under the Assisted Decision-Making (Capacity) Act 2015, for example, the Code of Practice for Financial Service Providers should be implemented;
- The term 'Consumers in Vulnerable Circumstances' should clarify what is meant by 'harm'.
- RFSPs should be provided with a power in primary legislation (i.e. an Act of the Oireachtas) or in secondary legislation (i.e. regulations) to temporarily suspend the completion of a

financial transaction where there is knowledge or a reasonable belief that an at-risk customer is being, has been, or is likely to be subject to financial abuse.

Additional overarching principles relevant to the Code

There are three additional overarching principles which Sage Advocacy believes should underpin the Code – risk assessment, safeguarding and individual empowerment. The principle of empowerment means the presumption of decision-making capacity, the facilitation of supported decision-making, where requested or required and, very importantly, ensuring informed consent. Adult safeguarding refers to measures that are, or may be, put in place to promote the health, safety and welfare of at-risk adults, minimise the risk of harm to and support them to protect themselves from harm.

The Law Reform Commission has recommended a number of legislative provisions relating to risk assessment which are relevant to the Code:

- a) A duty to ensure, as far as reasonably practicable, that services are organised, managed and provided in such a way as to prevent harm to any adult who is, may be or may become, an at-risk adult while availing of the service;
- b) A duty to undertake, and document, a risk assessment of any potential for harm to an adult while availing of the service; and
- c) A duty to prepare an adult safeguarding statement – this should specify the policies, procedures and measures that a provider of a relevant service has in place to safeguard adults, including adults who are, may be, or may become at-risk adults.

Answers to selected specific consultation questions

Do you have any comments on the Securing Customers' Interests Standard for Business, Supporting Standards for Business or the draft Guidance on Securing Customers' Interests set out in Annex 5?

The Consultation Paper statement that securing Customers' Interests reflects the fact that customers have a right and responsibility to make their own decisions as to what products and services they wish to purchase, and how they plan to meet their financial needs and objectives is important. However, how this is to be done adequately in situations where there is a question about a person's decision-making capacity needs to be spelled out in specific terms.

The Consultation Paper also states that consumers should have confidence that firms will act in a way that helps, rather than hinders, their ability to make decisions in their own interests and that they should be able to trust that firms will not seek to unfairly exploit or take advantage of them.

While this is a very important consideration, a key question remains as to how financial institutions are to instil confidence in consumers that this is the case, particularly in respect of people who are fearful of digital banking and reluctant to choose that option which is often perceived as being forced on them by banks.

Do you have any comments on the proposed Code enhancements with regard to digitalisation?

The Consultation Paper refers to the need for firms to ensure that the use of technology is not applied in a way that would seek to exploit the behaviours, habits, preferences or biases of customers where it has the potential to cause customer detriment. Additionally, firms transitioning to a digital-based business model must carefully consider customer impacts and identify appropriate mitigants to address identified issues for customers. This should include careful consideration of the impact on consumers in vulnerable circumstances and what reasonable assistance might be provided to mitigate potential adverse impacts.

In addition to the above, Sage Advocacy believes that 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.

The Code needs to be more specific in how financial institutions should deal with the fact that many older people have not used smart phones and do not wish to use them. 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. 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.

What are your views on the proposed requirements on banks where they are changing or ceasing branch services

The Consultation Paper states that assessments relating to bank closures or change of services should examine the impact on customers, the suitability of alternative service provision arrangements, and the plans for migrating customers to those alternatives, especially at-risk customers.

While this is a highly plausible aspiration, the reality is that financial services operate primarily on the principle of economic efficiency rather than public need and that, therefore, the trend in recent years of disappearing bank branches, a move to transact business online and limited transaction services available in remaining branches is likely to continue to be the norm. 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. This matter is not at all addressed in the Code.

Do you have any comments on the 'informing effectively' proposals?

The Code needs to put greater emphasis on the imbalance in information and understanding between financial firms and consumers which effectively means that consumers may not always be able to fully

understand a product or service without clear, objective and unbiased information. 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. The Sage Advocacy experience is that the fact that people communicate very differently may not always be 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 and should be referenced in the Code.

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.

Are there any other circumstances that we should consider within the proposed definition of financial abuse?

As stated above, the Law Reform's inclusion of 'exploitation or pressure relating to wills, property, inheritance or financial transactions' in its definition could be usefully included in the Code.

What are your views on the proposed amendments to the Consumer Protection Code in relation to consumers in vulnerable circumstances? Do you have any comments on the draft Guidance on Protecting Consumers in Vulnerable Circumstances?

The proposal in the Consultation Paper that all firms ensure that, with the consent of the customer, the information that they have been given by the customer, detailing circumstances of vulnerability, is recorded and is available to staff of the firm when the firm is dealing with that customer on a later occasion is very important.

Is the role of the trusted contact person clear? What more could a Trusted Contact Person do?

In looking at the concept of a trusted contact person, the Code 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. The role of an independent advocate should be referenced in the context of a Trusted Contact Person. Also, of critical importance is the fact financial abuse is frequently perpetrated by someone a person knows well and trusts, such as a relative, a friend, a neighbour or a carer.

What are your views on the proposal for a 12-month implementation period? Should some proposals be implemented sooner?

The 12-month implementation period seems appropriate. Importantly, this period should be used to examine and Integrate relevant Law Reform Commission proposals.

Some concluding observations

There is significant scope within the process of developing a new Code at process for the adoption of a more robust protective regime to safeguard at-risk adults from actual or suspected financial abuse. This opportunity should not be missed.

Ensuring that the regulatory framework, while adapting to the changing nature of financial services, remains fit for purpose for all citizens is a vital consideration in terms of technologies and in service delivery models and is a necessary condition for both equality of access and maintaining trust in financial services.

The new Code needs to complement and be complemented by the Financial Literacy Strategy and the National Payments Strategy, particularly in relation to eliminating financial abuse.

Financial institutions should be mandated to ensure that all staff are adequately trained in how to be vigilant in respect of actual or potential financial exploitation and how to deal with it appropriately where the matter arises.

Financial abuse should be regarded as a central concern in the Code. Financial institutions have an important role in monitoring activity on accounts and have the capacity to identify possible abuse. All financial institutions should, therefore, be required to collect data relating to financial abuse (in addition to data on frauds and scams) in order to establish the full extent of the issue which is likely to be much wider than generally reported.

There should be a clear and unambiguous obligation set out in the Code for all financial service providers to ensure that the detailed arrangements of the ADMC Act are an integral part of the support arrangements in the provision of financial services.