

Response to

Consultation Paper on Review of Consumer Protection Code 2010-2011

Subject: Chapter 13 Definitions

From

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Author of:

2010 'Women the Subprime Barometer' in *Life and Debt 2010 Women and financial exclusion in the age of NAMA*, TASC, web publication, 5.August.

2008 (with Helen O'Leary) 'A Matter of Life and Debt' in U. Barry (ed) *Where Are We Now?* New Island Press.

2008 Report on consultations with adults, and families of people with disabilities on draft standards for people with disabilities living in residential centres, Health Information and Quality Authority.

2005 (with Helen O'Leary) *Do the Poor Pay More?* OPEN, Money Advice and Budgeting Services and Society of St. Vincent de Paul, Dublin.

2005 (with Helen O'Leary) *Financial Literacy: Improving understanding, creating opportunity* – Report, National Adult Literacy Agency supported by EBS Building Society, Dublin.

Vulnerable Consumers

So-called vulnerable consumers are addressed in page 4 of the Consultation Document and in chapter 13 on definitions in the proposed amended Consumer Protection Code.

The use of the term ‘vulnerable’ in relation to categories of persons using banking or indeed other services has no basis yet in law. The concept of ‘vulnerable adult’ has been and is used in the UK and has a statutory basis. The proposed Irish capacity legislation has not yet seen the light of day. In the meantime, the Consumer Protection Code of Practice might reflect in its approach the work of the Law Reform Commission on the topic of vulnerable adults and the law.¹ This would enable the Code to distinguish between those customers who need:

- Assistance in decisions - for example literacy levels are not high, English not first language, not familiar with banking
- Reasonable accommodation in decision making for example the customer is Deaf or Blind
- Substitute decision-making - a restricted number of customers in Wardship, Guardianship, Power of Attorney

The meaning of vulnerable does not apply to the majority of categories in the Codes’s definitions, such as persons approaching retirement, non-English speakers, incomplete education. To attach the term ‘vulnerable’ to an array of categories of persons, some of whom are simply different from mainstream customers, some of whom lack capacity to make complex decisions, some of who have been deprived of opportunities in life and some of whom are emotionally distraught, is likely to cause huge confusion. Far from providing protection, this framework will create uncertainty in a field of life – finance – where certainty must be foremost.

The word ‘vulnerable’ is being used as an adjective and not as an objective concept with clear boundaries and borders. This could give rise to resentment and even discrimination cases under the Equal Status Act, 2000-2004, where no objective basis has been established for treating different customers differently.

¹ Law Reform Commission (2006) *Vulnerable Adults and the Law*, Dublin.

In terms of the relationship, if any, between a banking/credit service consumer and an institution, the deficit in equality between the parties appears to be found exclusively in the so-called vulnerable consumer and not in the institution. The largest scale of financial exploitation currently known is that between the former Health Boards and the elderly, where the Health Boards illegally charged the elderly for their care for over 30 years, charges which they were eventually obliged to reimburse.

Notwithstanding the three sources cited as a rationale for the proposals in relation to the definition of vulnerable consumers, national standards for the protection of individuals from financial abuse living in residential services have been published by the Health Information and Quality Authority.² These tested standards serve as some of the reference point for persons whose capacity in some or most fields of living is temporarily or enduringly impaired.

Standard 7 states:

Each individual exercises control over personal finances and is protected from financial abuse and exploitation.

7.1 The individual controls his/her own financial affairs unless he/she wishes otherwise or where he/she lacks the capacity to do so

7.2 The individual is given information, advice and support in the management of his/her own financial affairs if/ he/she so wishes.

Standard 11 states:

The individual is presumed to be capable of making informed decisions unless an assessment of his/her capacity finds otherwise.

HIQA has also published standards in relation to residential care settings for older people in Ireland.³

Standard 9 addresses resident's finances and provides guidelines for who ought and ought not to handle finances of persons with advanced cognitive impairment.

² See Standard 7, HIQA (2007) *National Quality Standards: Residential Services for People with Disabilities*, Dublin, page 28..

³ HIQA, 2009

In a similar vein the Mental Health Commission proposes that all services to service users should depart from a principle of respect for the individual service user and their engagement with decisions affecting their lives without an automatic presumption that their capacity is comprehensively diminished.⁴

The approach of HIQA, the Mental Health Commission and equality bodies is that where differentiated provision of services is required, it should be individualised person by person. It is surprising that regulated entities are being asked to identify ‘vulnerabilities’ among their customers. Such ‘needs testing’ faces many specialised bodies in the State on a daily basis and has proved extraordinarily difficult.

The use of terms in the definition such as ‘*infirmity*’ and ‘*credulity*’ suggest that the authors live in a bygone age of paternalism. Such terms have been out of use since World War II and if included will signal the financial Regulator as out of touch with the times.

Severe predatory financial exploitation is taking place among some of the elderly, among some people with disabilities and some of the citizens and non- citizens who lack experience of interacting with credit institutions. This does require an initiative. The current vulnerability proposal is disempowering, out of touch with contemporary thinking and requires revision.

⁴ Mental Health Commission (2008) *A recovery approach within the Irish mental health services*, Dublin.