

27 August 2021

Mr Mike Callaghan AM PSM
Independent Reviewer
2021 Code Review

By email: submissions@bankingcodereview.com.au

Dear Mr Callaghan AM PSM

2021 Independent Review of the Banking Code of Practice

Legal Aid NSW welcomes the opportunity to provide feedback to the Independent Review of the Banking Code of Practice (**Review**).

Legal Aid NSW provides legal services across NSW through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. The work of our civil law solicitors, including our specialist consumer law team, solicitors in regional offices and solicitors in the Civil Law Service for Aboriginal Communities, is focused on assisting the most vulnerable consumers in our community, including those with cognitive impairment, language or literacy issues, low levels of education, young people, Aboriginal and Torres Strait Islander people, and consumers experiencing domestic and family violence or elder abuse.

We also acknowledge research, which is consistent with the experience of our solicitors, that indicates everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.¹ These issues can further compound any barriers faced in dealing with consumer law problems.

¹ O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre* (1 November 2019).

We have had the benefit of reading the submission provided by Legal Aid Queensland (LAQ) to the Review. We support the LAQ submission and its recommendations, and we provide some further examples of our client casework to support recommendation 1 of their submission. We also make four additional recommendations to the Review, supported by our casework experience.

Access by prisoners to basic banking services

LAQ recommends that all financial institutions create a contact point for customers who are imprisoned, with a suitable policy to ensure identity can be easily verified. The LAQ submission notes that this would address existing barriers faced by people in custody to access banking services, as currently, banks do not have specific processes that allow communication with prisoners. This means that people in custody rely on ad hoc processes, such as writing directly to the bank, obtaining assistance from a relevant organisation, or by providing a Power of Attorney to an associate. These processes can be problematic and difficult to navigate, and often mean that people in custody do not access banking services.

Legal Aid NSW's casework experience supports the need for this recommendation. People in custody frequently leave prison in a worse financial position than when they entered, due to a range of issues including accumulated debts, problems with accruing bank fees, repossession of household goods or cars, and rental arrears, as examples.² Our solicitors also report that many inmates become the victims of fraud by way of people misusing the Power of Attorney—remedies are expensive and beyond the reach of most inmates. Family members often access inmates' ATM and credit cards while they are in gaol, leaving them with large debts or the loss of their money.

Legal Aid NSW's Prisoner Legal Service facilitates referrals and enquiries from prison inmates through to our civil and criminal lawyers. In our experience, people in custody are unable to directly contact banks or other non-bank lenders and as a result, cannot manage their own financial affairs. Often, people in custody access Legal Aid NSW advice services seeking assistance with their financial hardship issues.

Our client's issues are exacerbated by the difficulty of accessing financial counsellors while in custody. These issues are also well documented in the 2018 report prepared by Financial Counselling Australia *Double Punishment: How people in prison pay twice*.³

The barriers experienced by our clients in custody in accessing basic banking services are illustrated by the below case studies.

² Financial Counselling Australia, *Double Punishment: How people in prison pay twice* (May 2018), 3.

³ Financial Counselling Australia, *Double Punishment: How people in prison pay twice* (May 2018).

Matthew's story

Matthew spent most of his adult life in and out of custody. Matthew also suffers from Post-Traumatic Stress Disorder as a result of his traumatic childhood. He does not have his own bank account. Matthew received a large sum of compensation for an institutional childhood sexual assault claim. His solicitors are unable to release the money to him as he did not have his own bank account.

Matthew does not trust any family or friends to take care of the money or to act as power of attorney to set up the bank account on his behalf. Matthew has found that the bank processes have made it almost impossible for him to set up a bank account while in custody because he does not have access to his identification and other relevant paperwork that he would otherwise have access to in the community. The uncertainty has exacerbated his anxiety, and he remains unable to access his compensation payment.

John's story

John wanted to perform a single transaction and move money from his personal bank account to his 'buy up' account within the correctional centre. John has no internet access, and his welfare officer is not allowed to access his online banking portal on his behalf. John is also not able to access telephone banking because prisoners are limited to 6-minute telephone calls to outbound local and interstate numbers and are in some cases restricted as to when they are able to make calls,⁴ for example, if they are locked in their cells for very long periods of time. The only workaround involves the Governor of the correctional centre sending a letter with the centre's bank account details to the bank directly, to authorise the bank to transfer the money.

The correctional centre collected the money in a consolidated account and transferred it into John's custodial Trust Account. This caused significant delay and inconvenience to John. During this time, John did not have money and was unable to purchase basic necessities, such as food and soap.

In the experience of our solicitors, there does not appear to be a consistent or agreed approach between banks and correctional centres about how to manage these routine transactions.

Legal Aid NSW strongly supports an initiative that would allow prisoners to contact a bank directly to access banking services. We also support the recommendation of LAQ

⁴ Corrective Services NSW Standard Operating Procedures state that the Commissioner can stipulate the number of calls an inmate can make, and there are also different requirements regarding which calls are paid for by the inmate, and which calls are paid for by Corrective Services NSW.

that banks should consider policies such as repayment moratoria for incarcerated customers or waiver of debt where appropriate.⁵

Additional Legal Aid NSW recommendations

Legal Aid NSW makes the following additional recommendations to the Review of the Code, in response to the relevant consultation questions.

(1) Customers experiencing financial difficulties

Question 6 - Do the banks actively promote how they can help customers in financial difficulty? Is the publicly available information easily identifiable, accessible, and comprehensive?

Legal Aid NSW recommends that the Code should mandate bank signatories to provide information to its clients about financial counsellors, including the National Debt Helpline number. In our experience, the involvement of a financial counsellor can significantly shorten the amount of time it takes to resolve a dispute where a customer is vulnerable and in financial hardship.

Legal Aid NSW also strongly supports the BCCC prioritising engagement with the Financial Counselling sector to actively promote the importance of banks taking steps to ensure their customers who are in financial hardship are aware of the role of financial counsellors and the services they provide.

(2) The Banking Code Compliance Committee (BCCC) and the BCCC Charter

Question 1 - Is the BCCC's monitoring of compliance with the Code, investigation of potential breaches, and guidance provided to banks contributing to improved compliance with the Code?

Legal Aid NSW recommends that the BCCC should be empowered and properly resourced to resolve individual complaints. While the Australian Financial Complaints Authority (AFCA) provides an avenue of dispute resolution, the scope of its work extends to all lenders, whereas the BCCC applies to only banks. The BCCC is therefore well placed to provide an industry-specific focus on the resolution of these complaints.

In the experience of our solicitors, there is little awareness of the BCCC and its role in monitoring compliance with the Code among the community, including the clients that we see, and among legal practitioners that are outside the consumer advocate sector. Empowering the BCCC to resolve individual complaints will help to increase consumer awareness of its role and also allows the BCCC to have greater oversight of the issues affecting consumers, to inform its systemic issues investigations.

⁵ Legal Aid Queensland, *Submission to the Independent Review Code of Banking Practice 2021* (August 2021), Recommendation 2, 17.

Question 3 - Are the range of sanctions available to BCCC appropriate, particularly in responding to serious and systemic breaches of the Code?

Legal Aid NSW supports the current range of sanctions that are available to the BCCC. However, we also strongly support the BCCC publishing all identified breach decisions which identify the subscribers that breach the code, rather than just on an ad hoc basis. The details of the consumer should be anonymous.

Consistently publishing breach decisions aligns with the purpose of the BCCC to monitor and enforce the Code and drive improvements in its compliance. In our view, regular publishing of breach decisions may help to deter bank signatories from behaviour that might result in a published decision against them, which would improve the conduct of signatories more broadly. It could also help consumers to decide which bank they wish to engage with. Publishing identified decisions would also assist stakeholders to analyse trends and systemic issues in the banking industry. This is consistent with AFCA's practice to publish decisions on an identified basis.

(3) Other issues – data collection

The Consultation Paper acknowledges existing data collection by the BCCC, and identifies opportunities for better data collection, particularly regarding the need to better track data on the number of customers requesting financial assistance and those receiving hardship assistance.

We strongly support better data collection, particularly in relation to issues of customer hardship, and regular publication of that data. We note that the Australian Securities and Investment Commission (**ASIC**) has also recently started to collect data about complaints made to banks under its Regulatory Guide 271 (Internal dispute resolution), and under the breach reporting obligations. Given the overlap of this data, we suggest that the BCCC work with ASIC to ensure that the methods, definitions and terms of data collection are consistent across the sector, where possible, and where data is comparable. This will help to identify sector trends and systemic issues and improve the overall utility of the data collection over time.

Thank you for considering our submission. If you have any questions or require further information

Yours sincerely

Brendan Thomas
Chief Executive Officer