



Queensland  
**Human Rights  
Commission**

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# 2021 Independent Review of Banking Code of Practice

**Submission  
to  
The Banking Code Review**

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6 August 2021

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## Introduction

The Banking Code of Practice 2021 (the Code) sets out national, enforceable standards and protections to complement the law when providing banking services to customers. The Code was first introduced in 1993 and is independently reviewed every 3 years.

The terms of reference for the 2021 review of the Code (the Review) includes in its objectives that:

- The code respond appropriately to the contemporary environment; and
- Banks and consumers are clear about their rights and responsibilities.

It goes on to provide that specific attention will be given to:

- the extent to which the Code contributes to banking services being inclusive and accessible for all customers; and
- the effectiveness of provisions of the Code for banks to act in a fair, reasonable and ethical manner, support customers during crises such as the COVID19 pandemic, and support customers experiencing vulnerability.

The Queensland Human Rights Commission (the Commission) has a role in receiving complaints under the *Anti-Discrimination Act 1991* (Qld) (AD Act), including in relation to banks in the provision of goods and services.

On 1 January 2020, the *Human Rights Act 2019* (Qld) (HR Act) commenced operation in Queensland, the third jurisdiction in Australia to have human rights protections enshrined in legislation. While banks are not 'public entities' upon which the HR Act imposes obligations, a human rights approach assists in an assessment of the Code and whether it meets the needs of consumers, particularly those consumers who are more vulnerable to abuse or neglect.<sup>1</sup>

This submission draws on the Commission's experience with handling discrimination and human rights complaints to address the Review's terms of reference outlined above.

## About the Commission

The Commission is a statutory authority established under the Queensland AD Act.

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<sup>1</sup> The Australian Human Rights Commission has identified that integrating human rights considerations are vital for managing business risks and creating opportunities in the financial sector and has produced guidance for Australian financial companies: Australian Human Rights Commission, *The Australian finance sector and human rights* (Web Page, November 2014) <<https://humanrights.gov.au/our-work/employers/australian-finance-sector-and-human-rights>>.

The Commission has functions under the AD Act and the HR Act to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.

The Commission also deals with complaints of discrimination, vilification, and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009* (Qld), and human rights complaints under the HR Act.

## COVID-19

As stated in the *Consultation Note* for the Review<sup>2</sup> (the *Consultation Note*), COVID-19 resulted in the temporary closure or reduced hours for branches, and a significantly greater use of digital channels for communication and financial transactions.<sup>3</sup> Another impact was the increased reliance on ‘tap and go’ technologies by vendors, who in some cases refused cash altogether.

The Commission became aware that some people with disability in Queensland do not have banking transaction cards due to not meeting the banks’ requirements, including the capacity to remember and operate a Personal Identification Number. As a result, the person was:

- unable to access their money due to the closure of bank branches;
- unable to make purchases through ‘tap and go’;
- potentially put at more risk of COVID-19 transmission by having to deal in person and in cash.

As it has done in other areas, the pandemic has highlighted the disadvantages faced by people with disability and inequalities in access to basic services. As technologies have evolved, the benefits enjoyed by most consumers, such as ease of access and greater transactional accountability, have not been passed to people who need additional support to access those technologies. Many of the current barriers to access, justified as ‘safeguards’, were put in place at a time when cash transactions were more common place and based on outdated concepts of capacity and disability. These safeguards are no longer appropriate and must be reconsidered in light of current community standards and expectations, and involve targeted consultation with people with disability, their families, and other supports.

Further, responses to emergencies, such as closure of branches, must plan for the impact that changes in service delivery will have on people most at risk from those changes. Shortfalls in the Code in this regard are acknowledged at page 16 of the *Consultation Note*.

More discussion regarding discrimination on the basis of disability is outlined below.

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<sup>2</sup> Independent Review of Banking Code of Practice, *Consultation Note* (July 2021) (*Consultation Note*).

<sup>3</sup> *Consultation Note* 16.

## Inclusive and accessible services

Relevantly, the AD Act makes it unlawful to:

- treat a person with an attribute less favourably than a person without the attribute (direct discrimination);
- impose an unreasonable term, with which a person with an attribute is unable to comply, but which a person without the attribute is able to comply (indirect discrimination);
- sexually harass someone;
- treat someone to their detriment because they refuse to do something that would contravene the AD Act, made a complaint under the AD Act, or were involved in another person's complaint under the AD Act (victimisation);
- ask for information which could be used to discriminate against a person, unless the information is genuinely required for a non-discriminatory reason (unnecessary information).

Discrimination must be on the basis of an attribute listed in the AD Act<sup>4</sup>. The list includes discrimination on the basis of age, race (which includes language as a characteristic of race), and impairment. It does not include geographical location.<sup>5</sup>

Between 1 January 2010 and 31 December 2021, the Commission recorded approximately 69 complaints made by consumers against respondent banks under the AD Act.<sup>6</sup> Table 1 shows the number of complaints received by year. Of the 38 complaints accepted for conciliation, most cases (30) were conciliated, three were referred to QCAT for determination, and five were either not resolved and not referred, or withdrawn.

The grounds on which accepted discrimination complaints were made are set out in Table 2.

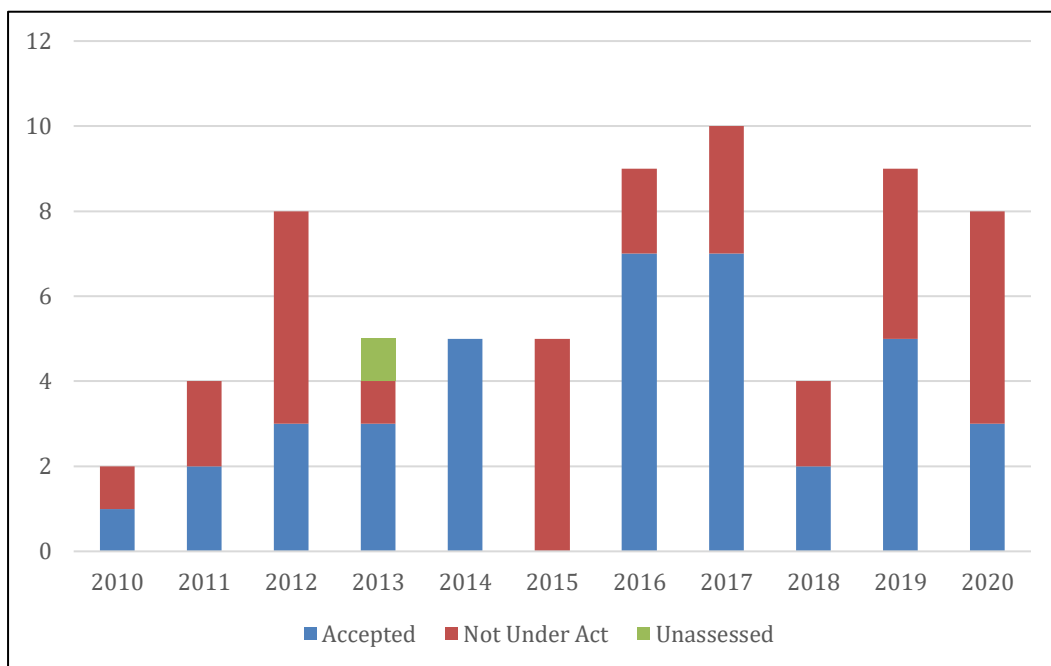
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<sup>4</sup> *Anti-Discrimination Act 1991* (Qld) s 7.

<sup>5</sup> Although, the right to recognition and equality before the law without discrimination, protected under section 15 of the *Human Rights Act 2019* (Qld), is not limited in this way.

<sup>6</sup> The statistics gathered are based on a search for the word 'bank' in the respondent names.

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**Table 1: Complaints received by year**

Attribute	Accepted complaints
Impairment	13
Age	8
Gender identity	5
Relationship status	3
Race	2
Lawful sexual activity	2
Parental status	2
Religion	1
Victimisation	1
Sexuality	1
<b>Total</b>	<b>38</b>

**Table 2: Attributes for accepted complaints**

### Intellectual and cognitive disability

The Commission has received a number of complaints from people with intellectual or cognitive disability who have found it difficult to access banking services. For example:

- A formally appointed administrator was unable to open an online bank account for their principal due to a bank policy that did not allow a third party to access or operate an online account.
- A bank refused to deal with a customer following the appointment of an administrator for the customer, despite the administrator giving authority

to the customer to make their own financial transactions (see Case study 1).

- A bank required a 'power of attorney' before parents could open a bank account for their 12-year-old child who had autism and intellectual disability.

Both the AD Act<sup>7</sup> and the HR Act<sup>8</sup> acknowledge every person's right to equal recognition and protection before the law, reflecting a number of international human rights instruments that Australia has ratified. Paragraph 6(c) of the preamble to the AD Act provides that 'the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone'.

The United Nations *Convention on the Rights of Persons with Disabilities* articulates existing international human rights obligations for application to people with disability. In particular, Article 12 provides:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

...

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.<sup>9</sup>

While recognising the current legal regimes that exist for substitute decision making<sup>10</sup> and the need to safeguard people's property, banks could do more to recognise the rights of individuals with intellectual and cognitive disability, including by:

- acknowledging the role and validity of supported decision making so that all people, as far as possible, can make their own decisions;

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<sup>7</sup> *Anti-Discrimination Act 1991* (Qld) preamble, paragraph 6(a).

<sup>8</sup> *Human Rights Act 2019* (Qld) s 15.

<sup>9</sup> For more explanation on the content of this right, see: United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (19 May 2014).

<sup>10</sup> Including the exemption in s 112 of the *Anti-Discrimination Act 1991* (Qld) which provides: 'A person may discriminate against another person because the other person is subject to a legal incapacity if the incapacity is relevant to the transaction in which they are involved'.

- considering the impact that services (including the reduction of services) and service delivery have on people who need assistance to access those services;
- having ways for the person to still participate in decisions about their financial matters should they wish, even where there is a formally appointed administrator or attorney;
- training staff about disability and legal capacity, including that capacity is matter and time specific, and does not equate with appearance, diagnosis, or making the best or wisest decision.

### ***Case study 1 – impairment discrimination***

B and C were siblings, each with intellectual disability. Their mother was appointed by the Queensland Civil and Administrative Tribunal as guardian and administrator. After the appointment, B and C received a letter from their bank to say that now that an administrator had been appointed, they had no powers to transact, open or close an account, or obtain account-related information, even though their mother had indicated that they were able to continue to make their own financial transactions.

B lost her wallet containing her debit card. The card was cancelled but the bank refused to issue B a new card, despite B using the card for many years without incident. Subsequently, C's card was also cancelled. There had been no issues with his use of the card either.

B and C made a discrimination complaint against the bank. Their mother also claimed discrimination by association. The matter was conciliated with B, C, and their mother, each receiving monetary compensation.

## **Gender identity**

There have been a handful of accepted complaints regarding gender identity, although none since 2018.

In two cases, the bank allegedly refused to call the customer by their legal name or identified title, and in one case requested a copy of the complainant's birth certificate.

One case involved a customer trying to change her gender on an insurance policy, and was allegedly asked questions about the specifics of her transition.

In another case the customer's account was locked as her voice did not match her name, despite having answered the security questions correctly. The customer was required to attend the branch to prove her identity and reinstate access to her accounts.



The Code does not currently refer to gender identity in relation to the commitment to inclusive banking services.

### Identification requirements

The *Consultation Note* refers to Clause 35 of the Code and the obligation on banks to help Aboriginal and Torres Strait Islander customers meet any identification requirements by following AUSTRAC's guidance.<sup>11</sup>

AUSTRAC recommends a flexible approach, being mindful of social and cultural sensitivities, and may include using 'reliable and independent' means of alternative identification. While specifically important for Aboriginal and Torres Strait Islander customers, the guidance also extends expressly to customers experiencing family and domestic violence, and to any persons who do not have a conventional identification.<sup>12</sup>

The need for this is demonstrated by Case study 2.

#### **Case study 2 – identification requirements**

In this 2019 case, a man sought to open an account with a bank, and was referred to the bank's online system. The online system required proof of identity with only three choices: passport, driver licence, or proof of age card. The man did not have any of these forms of ID as he was in his 70s, legally blind, and with no current need for a passport. He did however have other forms of photographic ID.

The bank told the man to attend a branch; however, the nearest branch was far away.

The complaint was ultimately withdrawn following agreement reached between the parties.

### Positive measures for inclusion and accessibility

Clause 34 of the Code obliges banks to take 'reasonable measures' to enhance access to services by people with disability, older customers, and people with limited English. The Code also requires the giving of assistance to customers in remote communities<sup>13</sup>, taking 'extra care' with customers experiencing vulnerability<sup>14</sup>, and training for staff in diversity, cultural awareness and vulnerability<sup>15</sup>. These 'positive obligations' are an important complement to anti-discrimination laws, aim to avoid problems before they arise, and reduce the burden on individuals having to enforce their rights through complaint

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<sup>11</sup> *Consultation Note* 18.

<sup>12</sup> AUSTRAC, *Identifying customers who don't have conventional forms of ID* (Web Page, 14 August 2020) < <https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/customer-identification-and-verification/identifying-customers-who-dont-have-conventional-forms-id>>.

<sup>13</sup> Banking Code of Practice (1 March 2020) cl 36.

<sup>14</sup> *Ibid* cl 38.

<sup>15</sup> *Ibid* cl 33, 37, 39.

mechanisms. They are particularly important for customers in remote areas as, at least in Queensland, geographical location is not a protected attribute under the AD Act.

As highlighted by the *Consultation Note*, these commitments are given in general terms, rather than having specific requirements or examples that can be measured, reported, and monitored. The Commission supports the *Consultation Note*'s suggestion that other codes of conduct be considered for ideas on how support for vulnerable customers can be enhanced in the Code.<sup>16</sup> The Commission also supports consultation with relevant individuals and groups who would be directly impacted by the measures.

Guidance on the meaning of 'reasonable measures', and other access and inclusion obligations on banks under the Code, could start with definitions found in anti-discrimination legislation. Indirect discrimination does not occur if the term imposed is 'reasonable'. Under section 11(2) of the AD Act, whether a term 'reasonable' depends on all the relevant circumstances of the case, including, for example –

- (a) the consequences of failure to comply with the term; and
- (b) the cost of alternative terms; and
- (c) the financial circumstances of the person who imposes, or proposes to impose, the terms.

Similarly, there are a number of exemptions to discrimination on the basis of impairment where the supply of special services or facilities would impose 'unjustifiable hardship' on the person supplying goods or services. Whether there is unjustifiable hardship depends on all the relevant circumstances of the case, including, for example:

- (a) the nature of the special services or facilities; and
- (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
- (c) the financial circumstances of the person; and
- (d) the disruption that supplying the special services or facilities might cause; and
- (e) the nature of any benefit or detriment to all people concerned.<sup>17</sup>

A rights-based approach to the content of inclusion and accessibility obligations would require that, where a person is unable to access services on an equal basis with others, the limitation of their rights must be justified. Whether a limitation is justified includes having regard to the impact of the limit on the individual, the purpose of the limitation, and whether there are less restrictive ways to achieve the same outcome.

### Complaints processes

Finally, for rights under the Code to be realised, there needs to be an effective complaints process for the people it aims to protect. This includes provision of

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<sup>16</sup> *Consultation Note* 19.

<sup>17</sup> *Anti-Discrimination Act 1991* (Qld) s 5.

an accessible process and necessary support for people in positions of vulnerability wishing to make a complaint.

In 2016, bank members of the Australian Banking Association committed to introducing a Customer Advocate position within banks, which was added to the Code in 2018.<sup>18</sup> The 2019 review of the implementation of Customer Advocates considered their impact on vulnerable customers.<sup>19</sup> It noted that:

- Not all Customer Advocate positions reviewed had accountability for vulnerable customers.
- Customer Advocates in smaller banks faced resourcing constraints and did not proactively identify vulnerable customers or tailor their approach.
- Banks used different definitions of ‘vulnerable customers’, if at all. For some smaller banks, vulnerable customer was limited to customers in financial hardship.
- There were examples of Customer Advocates engaging in activities such as consulting with Consumer Groups, identifying and responding to systemic problems with targeted programs, staff training, and referring customers for financial counselling, legal advice and other support.<sup>20</sup>

Under clause 193 of the Code, the purpose of the Customer Advocate is to ‘facilitate fair customer outcomes and minimise the likelihood of future problems’. The recently updated *Customer Advocate Guiding Principles* has clarified and strengthened the purpose, role and responsibilities of Customer Advocates, however, banks are still free to construct the role differently to respond to their needs and their community.<sup>21</sup>

The Commission recommends that the purpose and responsibilities of the Consumer Advocate be more specifically defined in the Code, and in particular their responsibilities to people requiring support to access complaint mechanisms. At a minimum, banks should refer customers needing assistance to relevant independent advocacy supports.

## Summary of recommendations

The Commission recommends that the Review of the Code:

1. Reflect on the impact COVID-19 has had on banking services for people with disability, particularly people who require in person branch services, and people who are presently ineligible to hold a banking transaction card, and whether amendment of the Code is needed to address this.

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<sup>18</sup> Banking Code of Practice (1 March 2020) cl 193.

<sup>19</sup> Deloitte, *Customer Advocate Initiative: Post Implementation Review*, Report commissioned by the Australian Banking Association (May 2019).

<sup>20</sup> *Ibid* 50-52

<sup>21</sup> Australian Banking Association, *Customer Advocate Guiding Principles* (1 July 2021).

2. Consider whether the obligations in Chapter 13 of the Code on inclusion and accessibility should be more specific and measurable, particularly for customers in remote areas, including by:
  - a. referring to other codes of conduct;
  - b. considering definitions of 'reasonable' and 'unjustifiable hardship' under anti-discrimination laws, and a rights-based approach to obligations imposed by the Code;
  - c. consulting with impacted groups, their families, and other supports.
  
3. In relation to disability, some examples of more specific obligations may be:
  - a. acknowledging the role and validity of supported decision-making so that all people, as far as possible, can make their own decisions;
  - b. considering the impact that services (including the reduction of services) and service delivery have on people who need assistance to access those services;
  - c. having ways for a person to participate in decisions about their financial matters, should they wish, even where an administrator or attorney has been formally appointed;
  - d. training staff about disability and legal capacity, including that capacity is matter and time specific, and does not equate with appearance, diagnosis or making the best or wisest decision.
  
4. Consider whether the Code should reflect sensitivities around gender diversity.
  
5. Clarify obligations under the Code regarding identification requirements for all people who may not have access to conventional means of identification.
  
6. Include a commitment to accessible complaints processes, and more specifically define the purpose, role and responsibilities of the Consumer Advocate in the Code. At a minimum, banks should commit to referring customers needing assistance to complain to relevant independent advocacy supports.