

Treasury Consultation – Scams Prevention Framework

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to Treasury's Consultation on the Scams Prevention Framework. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts, tribunals, and Ombudsman schemes. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection lawyers have extensive experience providing specialist advice and representation to vulnerable clients and regularly give advice to Queensland consumers who are the victims of scams. Victims of scams will often also need legal advice and assistance concerning credit reporting, financial hardship, debt, contracts, and loans.

The lawyers provide advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, insurance, housing repossession, debt, contracts, loans, credit reporting, telecommunications, and unsolicited consumer agreements.

LAQ has assisted and represented clients who have legal problems caused by scams. This submission is informed by that knowledge and experience.

Typical Characteristics of a scam victim

While LAQ acknowledges that any person can be the victim of a scam, consumers experiencing vulnerability are at most risk of being the victim of a scam.

This over representation by vulnerable people as scam victims occurs for a number of reasons:

- (a) The information asymmetry between consumers and commercial organisations about scams.
- (b) People experiencing vulnerability are often experiencing a range of issues including:
 - i) Struggles with mental or physical health, including a disability.
 - ii) Insecure housing.
 - iii) They are the victim of family and domestic violence or elder abuse.
 - iv) Inexperience with new technology.
 - v) Experiencing barriers accessing technology.

This means that in many circumstances they will not have the band width needed to effectively deal with scammers given everything else that is going on in their lives. Even when the scam is pointed out to them, they often find it difficult to acknowledge that they have been scammed.

Through LAQ's consumer advice service, LAQ lawyers regularly assist scam victims. As a result of this work, LAQ lawyers have seen significant gaps in the regulatory framework that leave consumers vulnerable, out of pocket financially and not adequately protected. Greater onus of acting to address these issues should be placed on industries such as the banking and finance, telecommunications and digital platforms industries who are better equipped to identify scams and develop systems to prevent scams.

There is a real need to recognise that any framework should not have the effect of transferring responsibility to prevent and respond to scams to consumers.

It is LAQ's experience that the measures marketed by financiers as protecting consumers from scams operate practically to protect banks and other industries from liability if scammers are able to access the consumer's account.

Take for example, the prevalence of sending codes to consumers phones or email addresses to authorise a payment. In a practical sense, it is not the consumer that is protected, it is the bank as the bank will not be liable for a transfer to a scammer if the code was disclosed by the consumer to a third party.

As a first step, LAQ supports the proposed legislation which seeks to impose greater responsibility on industry to prevent, detect, report, disrupt and respond to scams.

Proposed legislation

1) Does the draft legislation effectively achieve the policy objectives set out in this document?

Safe harbour provisions

One of the biggest issues that consumers currently face is that industry do not respond quickly enough when a consumer advises them of the scam. The effect of this is that:

- a) Money which could have been saved for the consumer is lost.
- b) Unnecessarily, other consumers fall victim to the same scam and lose money.

LAQ supports the safe harbour provisions in the framework as:

- a) They will encourage industry to be more proactive in taking early action to prevent a scam.
- b) They will reduce losses suffered by consumers as a result of scams.
- c) It assists that group of scam victims who, despite all evidence to the contrary, do not believe they are being scammed.

Dispute resolution process

As LAQ understands the dispute resolution process under the framework requires consumers to:

- a) Identify they have been scammed.
- b) Lodge a complaint with the company or companies involved in the transaction.
- c) If unresolved, escalate the matter to one or more Internal Dispute Resolution (IDR) areas (e.g., the IDR of a bank and the IDR of a Telco).
- d) If unresolved, escalate the matter to the Australian Financial Complaints Authority (AFCA) for resolution.

While LAQ recognises that this process is already applicable to a range of industries including banking, finance, insurance and telecommunications, in the context of a scams framework it creates a number of issues:

- a) Scams are time sensitive in nature and this process is likely to take a significant period of time for a consumer to get a result.
- b) It places the onus on the consumer to identify they have been scammed.
- c) It places the onus on the consumer to show that the industry is at least partially responsible for enabling the scam, when there is an information asymmetry which sees the industry or industries with all the information about the scam and how it occurred.
- d) Across industries, consumers are getting poorer results than in the past as it appears that many companies are not investing substantially in their IDR areas.
- e) Complaint fatigue is likely to see people drop out of the process.

LAQ recommends that the onus of proof should be placed on industry to show that they have met their obligations.

Where industry is found liable for the loss, consumers should receive compensation immediately and industry should have its own process to apportion responsibility between each industry/company responsible for the loss. LAQ considers that from the perspective of vulnerable consumers, it is important that whatever criteria is adopted for the apportionment of responsibility across businesses in different sectors, the resolution of that issue does not delay or impede a scam victim from receiving a satisfactory and prompt resolution to their complaint. A consumer should not be denied a satisfactory remedy under the EDR scheme of one sector because the responding business considers that a business in another sector is also responsible.

2) Does the draft legislation include an appropriate level of detail, noting subordinate legislation can provide more prescriptive obligations?

In LAQ's submission, when a new framework, such as the scams prevention framework, is being introduced, the best legislation combines a principles-based approach (which the legislation does well), with prescriptive obligations that set out some guidance on how those principles-based obligations can be met.

While LAQ acknowledges that subordinate legislation can set out more prescriptive obligations, it would be more effective having a mix of principles-based obligations and more prescriptive obligations in the principal legislation.

3) Are there provisions in the draft legislation that are better suited to subordinate legislation?

In LAQ's submission, none of the provisions in the draft legislation would more appropriately be in subordinate legislation.

4) Will you face any practical challenges in implementing the obligations in the draft legislation?

LAQ has no submission to make in response to this question.

5) What would be an appropriate transition period to enable you to implement these changes?

LAQ submits that given the large amount of money that is lost to scams each year, any transition period should be as short as possible so that consumers can benefit from the protections offered by the proposed legislation as soon as possible. As a result, the transition period should be no longer than 6 months.

Too often LAQ hears from industry that their systems cannot meet the obligations proposed by draft legislation or draft codes. This is not a reason to delay the implementation of the framework because any delay will mean more consumers, who might not have suffered financial loss due to scams under the framework, may continue to suffer substantial financial loss.

The obligation should be on industry to have appropriate systems, not on consumers to suffer further scam losses because industry does not have appropriate systems in place.

Usage of personal information

6) What kinds of information do relevant entities currently collect from customers (including from internal records), internal investigations and other sources to combat scams?

- a. How do entities use this information to combat fraud and scams both on their service and more broadly across the ecosystem?**
- b. How do entities ensure this information is handled and stored securely?**

In LAQ's submission, it is important that regulated entities:

- a) Collect only the minimum amount of personal information needed to meet their obligation under the scams prevention framework.
- b) Ensure that information is used only for the purpose of preventing, disrupting, and combatting scams and not for direct or indirect marketing or sales purposes.
- c) Adequately protect the collected information. Where data breaches occur, individuals should be able to use the complaint mechanism to obtain compensation for personal losses including non-financial loss. The maximum amount of the compensation available for a non-financial loss claim should be significantly increased so as incentivise industry to prioritise the protection of personal data.

7) What personal information will regulated entities need to comply with their obligations under the framework, particularly to take reasonable steps to prevent, detect, disrupt and respond to scams?

The focus of collecting personal information should be to protect consumers and not just to protect industry interests.

Information collected should provide a balance between the right to privacy of individuals and the interests of the community to prevent and respond to scams.

In addition, the collection of information should not simply rely on technological solutions. Many individuals do not have access or reliable access or simply choose not to engage in those processes.

Alternatives should be offered to individuals if they do not wish to disclose the personal information.

Those alternatives should be as convenient as any other collection method.

Overall, industry should focus on building solutions that use the current information that they collect from individuals rather than requiring individuals to provide additional personal information.

8) Will regulated entities be expecting to collect and store personal information to comply with their obligations under the framework which would not otherwise be collected and stored? (i.e. additional to personal information used for current or planned anti-scam activities)

In LAQ's submission any information that is collected should:

- a) Be stored securely.
- b) Not be used for any other purpose other than the detection, prevention, and disruption of scams.
- c) Retain the personal information for any longer than is necessary to achieve the purpose of detecting, preventing, or disrupting the scam.

9) Are there circumstances in which regulated entities may need to publicly publish personal information (e.g., of scammers) to prevent, detect or disrupt a scam?

In LAQ's submission, it will be important for regulated entities to publish the personal information of scammers to prevent, detect or disrupt a scam.

This includes providing the personal information of scammers directly to individuals to enable them to take legal action against them.

The benefits of this information being published include:

- a) It will raise awareness of the scam and reduce the number of consumers who fall victim to it.
- b) It may allow consumers to pursue the perpetrators of scams more easily for compensation.
- c) It may discourage other scammers from beginning a scam.

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