



18 August 2016

Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sirs/Madam

Issues Paper 47: Elder Abuse

The Consumer Credit Legal Service (WA) Inc. welcomes the opportunity to comment on the consultation questions on Elder Abuse as outlined in the issues paper.

Given the specialist nature of our legal service, our submission only addresses questions 25 and 26 of the issues paper.

1) About Consumer Credit Legal Service (WA)

Consumer Credit Legal Service (WA) Inc. (**CCLSWA**) is a not-for-profit community legal centre based in metropolitan Perth that provides:

- legal advice and assistance to and advocacy on behalf of consumers, with issues arising out of their credit and debt related problems; or out of their Australian Consumer Law disputes. CCLSWA operates a daily telephone advice line service which consumers use to request legal advice and information;
- a resource for financial counsellors and other consumer advocates working with low-income people for the resolution of their credit-related problems, or out of their Australian Consumer Law disputes; and
- community education programmes in matters relating to credit and debt law and the legal system.

CCLSWA also engages in relevant social policy and law reform initiatives, including contributing to such initiatives spearheaded by other organisations.

2) Question 25: What evidence is there of elder abuse in banking or financial systems?

CCLSWA has encountered several instances where elders signed on as borrowers or as guarantors for loans for which they did not receive any benefit. Subsequently the banks sought to enforce the loan or the guarantee against them.

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A typical case would usually involve an elderly person being approached by a relative (usually an adult child) to either be a co-borrower or guarantor to a loan for the latter's benefit; and involving the elderly person's primary home or other asset as security for the loan. Once the elderly person has signed the documents, the loan proceeds would usually be disbursed by the financial service provider to the relative with the relative being solely responsible for making repayments. At this point, the elderly person is usually unaware of the potential consequences and may even forget the existence of the loan. Subsequently, the relative would fail to make repayments, either willfully or due to financial hardship, and default on repayments. The financial service provider would then attempt to enforce the security on the basis that there has been a default and the elderly person would usually be shocked by court documents and the impending consequences.

Although the term "abuse" suggests malicious intent, the perpetrator might in some circumstances not set out to harm the elderly person but may as a consequence of bad luck or incompetence be placed in a position where they inevitably choose their own interests over the elderly person's interests. The following case study is a typical case of elder financial abuse that CCLSWA encounters.

Case study 1 – The Banners

Mr and Mrs Banner wanted to help their son further his ambitions and decided to use their own home (Asset A) as security for their son, Sam to purchase his home (Asset B). Originally, Mr and Mrs Banner believed that they were 20% guarantors on the loan used to purchase Asset B. However, Mr and Mrs Banner were in fact co-borrowers with Sam. It was intended that Sam would make all repayments.

Subsequently, Sam obtained an additional line of credit of \$250,000 which Sam used to purchase Asset C. The line of credit was secured by Assets A, B and C. Mr and Mrs Banner consented to this.

Sam subsequently sold Asset B. Sam used the proceeds to reduce the debt on the line of credit (which was used to purchase Asset C). Due to a bank error, the bank believed that Sam had sole ownership of Asset B and was the sole borrower and allowed Sam to use the proceeds of sale to reduce the debt on Asset C without discharging the debt on Asset B. The loan for Asset B was thus only secured by Asset A which was Mr and Mrs Banner's family home.

Sam then sold Asset C and discharged the remaining loan on Asset C and received a surplus. Sam then moved overseas, leaving Mr and Mrs Banner responsible for the remaining loan on Asset B with only Asset A, their family home, as security.

Sam had effectively obtained the benefit of the loan on Asset B at the expense of Mr and Mrs Banner.

Case study 2 – The Langdons

Mr and Mrs Langdon owned their own home, Asset A. Their son, Adam, asked them to be the guarantors for a loan. The loan was taken out by Adam's company as trustee for Adam's family trust and was used for the purposes of renovating Asset B. Asset B was intended to be sold after the renovations were completed and make a profit for Adam's family trust. The initial loan was for \$600,000 for 6 months. Mr and Mrs Langdon agreed to be unlimited guarantors and placed their family home, Asset A as security for the loan.

After 6 months, Adam was unable to repay the loan and agreed with the lender to extend the loan period and increase the loan amount by \$500,000. The lender did not communicate this to Mr and Mrs Langdon. At the end of the extended loan period, Adam was unable to repay the loan and the lender commenced proceedings to enforce the loan including the guarantee provided by Mr and Mrs Langdon.

Mr and Mrs Langdon are currently challenging the guarantee in the courts.

When asked about their motivations for providing the guarantee, Mr and Mrs Langdon said that their concern for Adam and their wish to assist him because he was their son motivated them to become guarantors. They also indicated that they placed a significant amount of trust in Adam due to the fact that he was their son. Due to the level of trust they had in their son, Mr and Mrs Langdon did not focus on the financial aspects of the transaction and the potential implications for their family home if the loan was not repaid.

It would appear that the relative difference in wealth and assets between Adam and Mr and Mrs Langdon spurred Adam to request Mr and Mrs Langdon to be guarantors and Mr and Mrs Langdon's trust in Adam spurred them to be guarantors.

Several causes are evident from the above cases.

Firstly, there appears to have been a degree of trust between the elderly person and the perpetrator. As the help extended by the elderly person is likely to benefit the perpetrator only – and not the elderly person - the elderly person is usually in a relationship of trust with the perpetrator. In our experience the perpetrator tends to be either a relative or friend of the elderly person.¹

Secondly, the difference in assets and wealth between the elderly person and the perpetrator creates a strong incentive for the elderly person to enter into these situations. The elderly person is likely to have assets and be likely to be able to access credit either as a co-borrower or guarantor. The perpetrator is likely to have few assets and be unable to access credit easily. They would also be seeking to obtain credit to further their personal ambitions such as purchasing a house or investing in a business. Hence, the perpetrator would often rely on the

¹ Australian Institute of Family Studies, *Family Matters Issue 37: Abuse and Neglect of Older People* (1994) <<https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>>. See also Financial Ombudsman Service, *Bulletin 56: Financial Abuse of the Vulnerable Older Person* (2007) <https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf>

trust between the elderly person and the perpetrator; and solicit the help of the elderly person to act as the co-borrower or guarantor in order to access credit.

From these two cases, we have also identified several issues with the current regime surrounding elder financial abuse.

a) Inadequacy of the current law

The current law does not adequately protect elders. As the law currently stands, elderly persons may seek to deny liability on the basis that they were unduly influenced into entering into the loan contracts either as co-borrowers or guarantors in two ways.

- 1) the lender has directly exerted undue influence; or
- 2) the lender has legal notice of undue influence being exerted on the elderly person by a third person.

Given that the lender is unlikely to be the person exerting undue influence, the lender must usually be shown to have known or ought to have known about the undue influence exerted on the elderly person by the perpetrator in entering into the loan or guarantee.²

To demonstrate that there was undue influence exerted, it must be shown that either:

- 1) there was a presumed relationship of influence at law; or
- 2) the relationship was of a nature where actual undue influence was exerted.

Currently, there is no presumption of a relationship of influence between an elderly person and their adult children regardless of the degree of dependency. Thus, if an elderly person wishes to prevent the lender from enforcing the loan or guarantee, the elderly person must demonstrate that there was actual undue influence by the perpetrator and that the bank had notice of the undue influence.

While external dispute resolution providers may be utilised instead of commencing court action in relation to disputes relating to financial products, both processes are essentially similar in that both processes are uncertain, reactionary and do not prevent the issues from arising in the first instance.

b) Uncertainty

The characteristics used to determine if there was undue influence are qualitative in nature and difficult to ascertain, particularly if the characteristics were to be determined based on events which may have taken place several years earlier.

The vast majority of such abuse often affects cash poor elderly persons who might lose their homes as a result of the loan or guarantee. Hence, any uncertainty surrounding the outcome of

² *Australian Guarantee Corporation Ltd v McClelland* [1993] ASC 56-230, *Royal Bank of Scotland plc v Etridge* [No 2] [2001] UKHL 44, see generally, Fiona Burns, "Undue Influence Inter Vivos and the Elderly" (2002) 26(3) *Melbourne University Law Review* 499

litigation to enforce the guarantee or loan would undermine the elderly person's feeling of security in their home and causes significant anxiety.

c) Reactionary

The current situation has a high dependence on the law which is inevitably reactionary and poses evidentiary difficulties. Problems often only arise several years after the loan or guarantee is entered into and the evidential difficulties are significant given the particular age group.

Therefore, the current situation where reactionary processes are the only recourse for elderly persons is not satisfactory. Processes that anticipate and prevent the abuse needs to be considered.

d) Trust

However, the difficulty in formulating a preventative scheme is also a significant hurdle.

There is an implied requirement as a result of the legal doctrine of undue influence that borrowers or guarantors must first obtain independent legal advice. This requirement assumes that independent legal advice would empower borrowers and guarantors and would reduce the degree of external influence. It would strengthen a lender's case that there was no undue influence and/or the lender had no actual or constructive notice of undue influence.

However, in practice, this does not appear to be the case. As mentioned above, elderly persons are often related to the perpetrators and have a degree of trust in the perpetrators. This trust may render any legal advice ineffective and would not prevent the elderly person from being unduly influenced.

Case study 3 – The Langdons continued (See Case study 2)

Mr and Mrs Langdon had received independent legal advice and the implications of entering into the guarantee were clearly communicated by the lawyer to Mr and Mrs Langdon. However, the trust and concern Mr and Mrs Langdon had for Adam rendered the legal advice ineffective.

Mr and Mrs Langdon repeatedly cited their trust in Adam to the exclusion of legal advice. Mr and Mrs Langdon seemed eager to provide the guarantee notwithstanding the implications of default and their knowledge of Adam's lack of employment. Mr and Mrs Langdon also did not consider it likely that their guarantee would be called upon because in their opinion the sale of Asset B would pay off the loan. They even admitted to not reading the guarantee before signing it.

It was clear that Mr and Mrs Langdon disregarded the lawyer's advice and the consequences of their actions. They preferred to believe that the most optimistic scenario whereby Adam would repay the loan and the guarantee would not be called upon would be the outcome.

Trust is further exploited when the relationship is one of dependence. Often, the elderly person's ordinary source of dependence, such as a spouse, may have passed away and the elderly person shifts their dependence onto the perpetrators.

Case Study 4 - Georgina's story

Georgina was an elderly widow who had migrated to Australia as a child. She had difficulty communicating in English. She was heavily dependent on her late husband and after her husband passed away, she was dependent on her children. In particular she had a close relationship with her eldest son, Greg.

In 2004, when Greg asked Georgina for a loan, she readily agreed and signed the documents even though she did not understand the documents. The documents were for a loan solely in Georgina's name and her home would be mortgaged in the process. Greg received the proceeds of the loan and led Georgina to believe that the loan was in his name rather than hers.

It was only in or around 2012 that Georgina's other children realised that the loan was in Georgina's name, that the loan was in default and that the lender was intending to enforce the mortgage.

e) Under-reporting

Another issue in cases of elder financial abuse is the significant under-reporting of elder financial abuse.

Elderly persons are often reluctant to raise problems of abuse to third parties due to the trust and familial relationships with the perpetrator.³ This may be a result of a fear to cause the perpetrators "trouble"⁴ and a perception that the perpetrator was not doing anything wrong.⁵ In Georgina's, the Langdons' and the Banners' stories, the elderly persons had a familial relationship with the perpetrators and entered into the loans to assist the perpetrators. They did not recognise the transactions as "abuse" and only sought help when it appeared that they were likely to lose their homes as security.

Familial relationships also spur elderly persons to seek to protect the perpetrators' interests.

Case study 5 – The Banners continued (See case study 1)

Mr and Mrs Banner lodged a complaint with the Financial Ombudsman Service. Although a settlement was reached in Mr and Mrs Banner's favour at the expense of Sam, Mr and Mrs Banner were concerned for the wellbeing of Sam and asked if CCLSWA could assist Sam

³ Office of the Public Advocate (Queensland) and Queensland Law Society, *Elder Abuse: How Well Does the Law of Queensland Work?* (2010), Australian Institute of Family Studies, *Family Matters Issue 37: Abuse and Neglect of Older People* (1994) <<https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>>

⁴ Australian Institute of Family Studies, *Family Matters Issue 37: Abuse and Neglect of Older People* (1994) <<https://aifs.gov.au/publications/family-matters/issue-37/abuse-and-neglect-older-people>>

⁵ Sheri Gibson, *Understanding Underreporting of Financial Abuse: Can Data Support the Assumptions?* (PhD Dissertation, University of Colorado at Colorado Springs, 2013) page 13

aswell. As Mr and Mrs Banner's legal representative, CCLSWA was not able to assist Sam.

Mr and Mrs Banner's willingness to waive legal privilege and to have their legal representative possibly act against their interest demonstrates the desire of elders to protect the perpetrators.

The likely consequence of this desire to protect the perpetrator's interest is the reduced likelihood of seeking assistance until their interests are too heavily impaired.

Further, where there is a high degree of dependence on the perpetrator, the elderly person may have little to no ability to raise cases of elder abuse. In the case of Georgina (see case study 3), it was only the vigilance of her children other than the perpetrator which allowed the abuse to surface.

In addition, even where the elderly person recognises that they have been abused, they may be ashamed of their inability to prevent that abuse and their perceived inadequacies.

It is likely that the cases that CCLSWA have encountered are far less than the actual figure given these reasons. Similar sentiments have been expressed in other countries and jurisdictions.⁶

A second aspect of underreporting is the relatively low efforts by lenders to identify instances of elder abuse. Among the previous case studies, lenders have often relied on the customer affirming that they have received independent legal advice before approving the loans. There was no indication that there was an inquiry by the bank into whether the elderly person had sufficient capacity, understanding and free will to enter into the loan or guarantee.

3) Question 26 What changes should be made to the laws and legal frameworks relating to financial institutions to identify, improve safeguards against and respond to elder abuse? For example, should reporting requirements be imposed?

The current recourse to the doctrine of undue influence may need to be examined. We would recommend that the elderly parent-adult child relationship be a relationship that attracts the presumption of influence. This would reduce the difficulty in demonstrating that the lender had actual or constructive notice and would provide an incentive for lenders to scrutinise such relationships particularly where the adult child obtains the sole benefit of the loan.

However, altering the doctrine of undue influence should only be a part of the solution and should only be used as a last resort. A doctrine of undue influence that is too strong and in favour of elderly persons would reduce autonomy and may indirectly create barriers to elders

⁶ House of Commons (UK) Health Committee, *Elder Abuse*, 20 April 2004, Sheri Gibson, Understanding Underreporting of Financial Abuse: Can Data Support the Assumptions? (PhD Dissertation, University of Colorado at Colorado Springs, 2013), Office of the Public Advocate (Queensland) and Queensland Law Society, *Elder Abuse: How Well Does the Law of Queensland Work?* (2010)

accessing credit in addition to creating further onerous requirements on lenders. It would also not assist in preventing the problems in the first instance.

Instead, we would recommend introducing a larger number of preventative measures to overcome the issues raised above.

a) Training of stakeholders in spotting elder financial abuse

We recommend that greater training be dispensed to employees of lenders in order to increase the likelihood of elder financial abuse being identified. Studies done in the United Kingdom in the field of health sciences have demonstrated that this is effective in increasing awareness and identification of instances of elder financial abuse.⁷

Such training may also include enhanced record keeping of exchanges between the elderly person and the perpetrator and a proactive role by the lender to confirm that the elderly person understands the worse possible outcome. This would assist any future inquiry into undue influence and increase the elder's awareness of the possibility of detriment.

Such requirements should also be extended to lawyers who periodically provide advice to elders. Given that lawyers are currently the bulwark against undue influence, the failure to keep adequate records and overcome the undue influence in the cases mentioned above is unsatisfactory. These requirements may be enshrined in a code of conduct so as to ensure high standards of legal advice in such difficult circumstances.

We note that the Australian Bankers' Association (**ABA**) has provided industry guidance on protecting vulnerable customers from potential financial abuse.⁸ However, the guidance is limited to providing information to the elder and attempting to speak to the elder without the perpetrator.⁹

However, while the ABA's approach is useful in identifying potential cases of financial abuse, the remedies proposed do not go far enough to prevent the abuse and address the issues. It also creates a piecemeal approach to addressing elder financial abuse. For example, the ABA's approach would not be effective where the elder may not have thought the transaction through and was eager to assist the perpetrator in obtaining the loan in the first instance.¹⁰ The failure to share this information with other stakeholders also reduces the probability of financial abuse being detected.

⁷ Priscilla Harries, Miranda Favies, Ken Gilhooly, Mary Gilhooly and Christopher Tomlinson, "Educating novice practitioners to detect elder financial abuse: a randomized controlled trial" (2014) *BMC Medical Education* 14

⁸ Australian Bankers' Association, *Protecting Vulnerable Customers from Potential Financial Abuse*, December 2014

⁹ Australian Bankers' Association, *Protecting Vulnerable Customers from Potential Financial Abuse*, December 2014, Page 4

¹⁰ Consider the Langdons, see Figure 2. Having a lawyer provide independent legal advice without their son being present was insufficient to change their desire to help their son and it is unlikely that a bank employee would change the result

b) Separate government body relating to elder abuse and Reporting requirements

In order to have a more holistic approach to addressing elder financial abuse, we recommend that a standalone national or state department be set up and that reporting of suspected financial abuse to this department be encouraged. This department would also have responsibility to investigate claims of suspected elder abuse including but not limited to elder financial abuse.

This would allow information to be shared between different stakeholders, for instance, health workers and bank employees; and a more holistic approach to identifying and addressing elder financial abuse. Similar approaches have been taken elsewhere.¹¹ As the case studies mentioned above demonstrate, there is little contact with the elderly person between the period in which the elderly person becomes the guarantor/borrower and the period in which the abuse is reported. A government body that receives reports and undertakes investigations would bridge this gap and ensure that intervention does not end with the lender's involvement.

There is significant debate surrounding whether reporting should be mandatory. Most of the debate revolves around increasing red tape and reducing autonomy and privacy concerns being balanced against the need to increase reporting by stakeholders.¹² However, there is little conclusive evidence that demonstrates mandatory reporting would or would not lead to an actual increase in reporting of elder abuse.¹³

It is against this background that we advocate for a voluntary scheme that is contained within the Code of Banking Practice or other relevant codes of conduct. While this would have little or no hard legal effect, it would indicate model behavior and affect the lender's consideration of whether a transaction is an unconscionable transaction. It would also avoid the initial political and practical difficulties in enacting and enforcing any mandated reporting scheme.

However, it should be noted that reducing barriers to reporting such as granting exemptions from liability for elder abuse and from lenders' other legal duties as a *quid pro quo* for reporting suspected cases of financial abuse – for instance – may lead to a higher instance of reporting. This increased collaboration between lenders and the government, may be just as successful in obtaining higher reporting rates.¹⁴

¹¹ Anthony Gilbert, David Stanley, Bridget Penhale and Mary Gilhooly, "Elder Financial Abuse in England: a policy analysis perspective related to social care and banking" (2013) 15(3) *Journal of Adult Protection* 153, Charles Pratt, "Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California", (2003) 40(1) *California Western Law Review* 195

¹² See discussions in Office of the Public Advocate (Queensland) and Queensland Law Society, *Elder Abuse: How Well Does the Law of Queensland Work?* (2010), Charles Pratt, "Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California", (2003) 40(1) *California Western Law Review* 195

¹³ Charles Pratt, "Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California", (2003) 40(1) *California Western Law Review* 195

¹⁴ Charles Pratt, "Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California", (2003) 40(1) *California Western Law Review* 195

c) Future policy development

Given the under-reporting of the phenomenon, it is currently difficult to formulate processes to address the financial abuse of elderly persons that is currently occurring. Reporting of suspected abuse may in the short run provide greater clarity of the level of financial abuse that is occurring and its causal factors. It would also give a good understanding of the lenders' perspectives and the effectiveness of identifying financial abuse. In the longer term, it would allow for better targeted policies that would address under-reporting and empower elders. We would recommend that elder abuse policies be reviewed in five or ten years' time in order to review the evidence of the elder abuse that is available then.

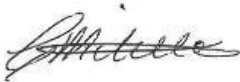
4) Acknowledgements

We hope that our submission would be useful in elucidating the current issues surrounding elder financial abuse; and that the proposed recommendations aid in making the policy response to elder abuse more robust and relevant in the future.

Please contact our solicitor Prachi Aggarwal on (08) 6336 7020 if you have any questions about this submission.

Yours faithfully

Consumer Credit Legal Service WA Inc.



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