



29 September 2017

Law Council of Australia
GPO Box 1989
Canberra ACT 2601
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By email: justiceproject@lawcouncil.asn.au

Dear Sirs/Madam

Justice Project

The Consumer Credit Legal Service (WA) Inc. welcomes the opportunity to comment on the current legal issues that are faced by older people in the community as one of the thirteen priority groups identified in the terms of reference of the Justice Project.

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 telephone advice line service that provides specific and tailored legal advice to Western Australian consumers;
- resources 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.

Due to this line of work, we are frequently exposed to the financial issues suffered by many different disadvantaged groups. A disadvantaged group often seeking advice and assistance are older people. Of 1086 clients assisted by CCLSWA in the 2016/2017 financial year, 263 were between the ages of 50 and 64; and 130 were over 65.

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As part of its community legal education, CCLSWA is currently in talks with Have A Go News, Seniors Recreation Council of WA and Linkwest regarding delivering financial literacy training to seniors groups.

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

2) Elder abuse

Older people are a group in the community that can easily be targeted and taken advantage of, especially in financial situations. Our experience indicates that frequently family members are the perpetrators of financial elder abuse, either deliberately or inadvertently. Situations often arise where parents are guarantors or co-borrowers to loans taken out by their children, and mortgage the family home as security for the guarantee or loan. They may feel an obligation to assist their children or family members, to either enter the housing market, or pursue other financial goals such as starting a business. Parents who are elderly often may not understand the roles and responsibilities they are undertaking when they enter into these guarantees and/or loan agreements. The extent of the risk of their legal and financial liability is often unknown to them, despite the protections in Australia's consumer credit legislation.

Where financial service providers (FSPs), such as banks, become aware of any disadvantage, they are required to act in good faith, and act in a way that does not exploit this known disadvantage. However, CCLSWA sees many instances where FSPs take advantage of their stronger bargaining position and fail to act in compliance with *Australian Securities and Investments Commission Act 2001* (Cth). CCLSWA frequently receives requests for advice from older people who have entered into guarantees or other financial arrangements with younger family members, only to later find out that what they had agreed to was significantly different to what they understood the arrangement to be. This suggests that the protections in Australia's consumer credit legislation may not have been complied with by the FSP. This is particularly a concern when it comes to older people that may solely rely on the pension (or other social security payments) or are asset rich but income poor.

3) Elder abuse case study

Last year, CCLSWA dealt in detail with a case where financial elder abuse was evident. Our clients were an older couple, both over 70 years old. Our clients' son and his wife got his elderly parents to provide an unlimited guarantee for a loan for the son's company secured by a mortgage over our client's family home. Not only did the son and daughter-in-law perpetrate financial elder abuse, but the FSP also took unfair advantage of the older couple.

The FSP in dealing with the older couple, who were obviously disadvantaged by their advanced age and limited understanding of English, failed to take steps to ensure our clients understood the details of what they were agreeing to and the severity of the situation. The FSP was aware, or should have been aware that our clients were at a special disadvantage.

This case is a clear example of the financial abuse prevalent among the vulnerable older population. While in this instance our clients were linguistically disadvantaged, often age can also bring associated mental or physical disabilities. This vulnerability can lead to them

easily being taken advantage of for financial gain, leaving them to face severe legal and financial issues and at a particularly vulnerable time of their lives. What would have happened to this client if access to free legal advice was not available?

As well as poor mental and physical health placing an older person at risk of elder abuse, these same factors can act as a barrier to access to justice. We have found that once older people have made contact with CCLSWA and are on the path to accessing justice, elderly clients who are suffering from mental and physical illnesses can be difficult to reach to obtain instructions and pursue legal options that are available to them. As a result, our services must be appropriate and as easy to access as possible. This requires providing the option of attending our premises to receive legal advice and take instructions. The ability to provide face-to-face assistance in a welcoming atmosphere is important for this group. Additionally, telephone calls and written communication can also be effective.

4) Financial service providers failing to fulfil their responsible lending duties

FSPs can often fail to take adequate measures to ensure that their customers duly understand the agreements, such as the loans and mortgages, they are entering into. If FSPs provide unclear terms and conditions to their consumers and do not take adequate steps to ensure that their customers understand these terms and conditions, they may be failing to fulfil their responsible lending duties under the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) and ASIC's Regulatory Guide 209 *Credit Licensing: Responsible Lending Conduct*.

Provisions of the NCCPA which require FSPs to encourage potential guarantors to obtain independent legal advice address the potential that vulnerable groups, such as older people, can be at a special disadvantage when entering into guarantees. Further, requirements in the NCCPA that aim to ensure that customers obtain independent legal advice before entering into loan facilities, such as reverse mortgages, provide extra protection for older people. However, CCLSWA has encountered instances where FSPs have still failed to comply with their responsible lending duties despite these protections, when providing loans or facilities to older people.

One measure that may help to alleviate the potential of older people to be taken advantage of by FSPs is the introduction of a rebuttable presumption that certain vulnerable groups are at a special disadvantage. This would require FSPs to show that the customer understood the obligations of the loan or guarantee despite their special disadvantage. This type of measure is likely to result in higher compliance by FSPs in ensuring that their customers understand the agreements they are entering into and their obligations.

Protections in legislation reduce the likelihood that vulnerable people will require legal services in the future.

5) Case study of financial service providers failing to fulfil their responsible lending duties

Recently, CCLSWA dealt with a case that saw an FSP fail to fulfil their responsible lending duties. This matter was resolved through external dispute resolution. The case saw an 85 year old woman enter into a reverse mortgage with a FSP. The FSP failed to adequately fulfil their responsibilities as lenders in three ways. Firstly, the FSP provided our client with

documents for her loan that contained many inaccuracies and inconsistencies. The extent of the mistakes were such that it was unreasonable to expect that our client could have understood the terms and conditions of the loan. Secondly, the FSP failed to ensure that our client had received independent legal or financial advice about the loan agreement. Thirdly, the FSP failed to take reasonable steps to ensure that the legal and practical effect of the agreement were accurately explained to our client, and failed to ascertain whether she actually understood the provisions and their effect. Furthermore, the FSP breached the SEQUAL Code of Conduct. Due to this failure of the FSP, our client was put in an immensely difficult financial situation.

This is just one example of how FSPs can fail to provide lending services responsibly, leaving older people, such as our client, in difficult financial situations and with tremendous legal issues.

6) Access to justice for older people

In cases where there has been elderly abuse, or unfair treatment in regards to older people, it is imperative that the people facing this abuse are given access to justice. Many of the people facing this abuse do not know where to turn to for advice, let alone have the capacity to face the problem by themselves. Other factors that may prevent victims of elder abuse from accessing justice include embarrassment or shame in being a victim to someone they trust, and the fear of repercussions from the perpetrator of the abuse.

Services, like CCLSWA are vital as they offer disadvantaged people, including older people, the opportunity to be given the legal advice that they require. Due to the costs often associated with getting sound legal advice, many disadvantaged people facing difficult legal situations do not have the opportunity to gain advice from someone with training and expertise in the law, leaving them in a much worse off situation than someone who has the luxury to afford legal assistance. In regards to the first client who suffered elder abuse, without the assistance of our services, it is likely that their home would have been repossessed. In the second case, our client was facing severe financial issues. Without our assistance, the second client would have been placed in an even more dire financial position, being made to pay back far more than was possible for her. These two cases highlight the importance of access to justice for older people facing financial difficulty.

This highlights the importance of funding community legal centres such as CCLSWA in order to enable the provision of support and advice to older people. This is particularly the case for older people where greater resources may be required to assist them because, for example, their legal issue may be complicated by other factors or face-to-face interaction is required to provide the legal service effectively. Therefore, funding is essential for both meeting unmet need and meeting needs appropriately and flexibly to match the service to each client's capabilities and legal issue.

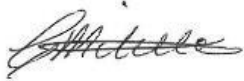
7) Acknowledgements

We hope that our submission is useful in elucidating the current issues surrounding older people and that the information aids the Justice Project.

Please contact our Managing Solicitor Gemma Mitchell on (08) 6336 7020 if you have any questions about this submission.

Yours faithfully

Consumer Credit Legal Service WA Inc.

A handwritten signature in black ink, appearing to read 'Gemma Mitchell', with a horizontal line drawn through the middle of the signature.

Gemma Mitchell
Managing Solicitor