

3 March 2017

Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sirs/Madam

Discussion Paper 83: Elder Abuse

The Consumer Credit Legal Service (WA) Inc. welcomes the opportunity to comment on the proposals and questions on Elder Abuse as outlined in Discussion Paper 83 on Elder Abuse (**discussion paper**).

Given the specialist nature of our legal service, our submission addresses proposals 5-1, 5-2, 6-1, 6-2, 7-1, and 7-2; and question 5-1.

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;
- 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.

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) Proposal 5–1

A national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators, should be established.

An enduring power of attorney (**EPA**) enables anyone who is 18 years of age or older and who has legal capacity to give another person or agency, legal authority to make financial and/or property decisions on his or her behalf. The person giving the power is called the donor. The person or agency accepting the power is called the attorney or donee. An EPA comes into operation from the time specified on the form.¹

Substitute decision-makers, including persons appointed under an EPA, frequently contact CCLSWA through its telephone advice line. CCLSWA will request that these substitute decision-makers email a copy of their EPA for review, before we can advise them on behalf of the donor. Currently, the only method of verifying the validity of an EPA is to check the instrument itself including the witnessing requirements. If the formal requirements for creating the EPA have been satisfied, then CCLSWA accepts the EPA as being valid and in force.

However, difficulties can arise in performing these basic checks where the instrument was issued in another State or Territory. This is because EPA legislation differs throughout Australia. As such, each State and Territory has its own laws with respect to how an EPA must be prepared, signed and witnessed, and how the EPA may be used.²

Due to the inherent private nature of EPAs, it is difficult to assess the extent of the alleged abuses of these EPAs.³ CCLSWA would welcome a nationally consistent approach to the registration and management of enduring documents and orders for the appointment of financial administrators.

Current Western Australian laws allow a donee to withdraw all of the donor's savings and sell their property (excluding real property), without being required to formally register the EPA. If the attorney wishes to deal with any real property owned by the donor, then the EPA must be registered with Landgate. However, the registration with Landgate only serves to ensure that Landgate is aware that the attorney is authorised to conduct real property transactions. Landgate registration does not provide protection measures to safeguard vulnerable elders from financial abuse.

Currently there is no way of confirming whether an EPA instrument is valid and has not been revoked. The establishment of the national online register would provide for a uniform and centralised database where all EPAs could be verified as current and in force. This will alleviate uncertainty when it comes to ensuring that the EPAs are valid and in force. It could also reduce the risk of elder abuse arising out of the misuse of EPAs.

¹ *Enduring power of attorney* 2016. Available from:

http://www.publicadvocate.wa.gov.au/_files/IS-8.Enduring_Powers_of_Attorney.pdf.

² State Trustees, *Power of Attorney Kit (Victoria)* (2015) <https://www.statetrustees.com.au/wp-content/uploads/2015/08/1508_POA_planning_guide_V.pdf>.

³ Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 361.

In response to findings made in a report looking at how financial institutions deal with powers of attorney,⁴ the Australian Bankers Association agreed that the lack of a national register exposed people to the risk of financial abuse.⁵ A national online register will enable banks, financial institutions and other organisations such as CCLSWA to verify the validity of EPAs, and accordingly act in the best interests of the client. This will also provide accountability for donees and their actions, further preventing financial elder abuse.⁶

In order to ensure the effective operation of a national register for EPAs, it is necessary to consider the cost of any registration fee, ease of access and usage. The duration of the registration and revocation process, particularly in terms of elder financial abuse that can take place while the latter is being processed, must also be considered. It is also necessary to appoint an administrative body responsible for this function, taking into account the considerable administrative burden.⁷ In assessing this administrative burden, it may be useful to consider how other jurisdictions that implemented an EPA registration system, such as the UK, dealt with such difficulties.⁸

3) Question 5–1

Who should be permitted to search the national online register without restriction?

Registration ensures that all valid EPAs are accessible by third parties who need to know if the EPA exists and is still in force.⁹ Examples include financial institutions, banks, hospitals, government agencies, aged care facilities, lawyers and others who would otherwise be in breach of privacy legislation and potentially other laws if they shared information about a client with a third party, or permitted that third party to act on the client's behalf in the absence of lawful authorisation.¹⁰

However, the ability to conduct an unrestricted search of a register for EPAs raises serious privacy implications because such instruments may contain sensitive personal information. These concerns may be alleviated by ensuring that the register lists basic information about the power of attorney, rather than the whole instrument. The attorney could then provide the third party with the EPA to assess whether the instrument has been validly registered. For instance, the register might simply set out the date on which the EPA was signed, the parties to the EPA, the number of the EPA (which it would receive upon registration and would then need to be added to the document) and whether the EPA is still valid or if it has been

⁴ University of Western Sydney, Cognitive Decline Partnership Centre and Council on the Ageing NSW, 'The Policies And Practices Of Financial Institutions Around Substitute Decision Making' <<http://sydney.edu.au/medicine/cdpc/documents/about/final-report-policies-practices-of-financial-institutions.pdf>>.

⁵ Jackie Keast, 'Lack of National Register Leaving Banks Unclear on the Power of Attorney', *Australian Ageing Agenda*, 24 July 2015 < <http://www.australianageingagenda.com.au/2015/07/24/lack-of-national-register-leaving-banks-unclear-on-power-of-attorney/>>.

⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law: Government Response* (2007) <<http://www.aphref.aph.gov.au/house-committee-laca-olderpeople-report-front>>

⁷ Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) 178.

⁸ Ministry of Justice, *Reviewing the Mental Capacity Act 2005: forms, supervision and fees*, Consultation Paper, CP 26/08 (2008); The Public Guardian Board, Annual Report 2009, *Making Legislative Reform a Reality* (2009) 14.

⁹ Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 225–7.

¹⁰ Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, 'Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers: A Comparative Analysis' (2015) 36 *Adelaide Law Review* 355, 358.

revoked. Such information would be sufficient to assess whether the EPA has been validly registered and that registration has not been revoked.

4) Proposal 5–2

The making or revocation of an enduring document should not be valid until registered. The making and registering of a subsequent enduring document should automatically revoke the previous document of the same type.

As it stands, it is difficult to verify the validity of an EPA once a copy is sent to CCLSWA by the substitute decision-maker and even more difficult to verify that the instrument is current and has not been revoked. With an effective system of registration rendering all previous instruments invalid once a current EPA is registered, there will be a decreased risk of such instruments being misused. It will also ensure that the substitute decision-maker always has the donor's authority to act on their behalf and will give more control to donors to protect themselves against any abuse of trust.

For the uniform operation of the national online register, it is important that older EPAs that came into force prior to the establishment of the register are also registered. This will ensure consistency across the board and that no one falls outside the ambit of protection provided by the register.

This registration system will also ensure that lawyers and all those acting for the donor are acting in the best interests of the client and with the full consent and authority of that person. The registration and subsequent revocation of previous EPAs ensures regular monitoring of the registration system to prevent elder abuse being perpetrated by those seeking to misuse EPAs. It is essential that the additional protection provided by the registration is balanced against the need to avoid making the task of the substitute decision-maker more onerous than required particularly in the case of family members.¹¹

The registration system has limitations in circumstances where elderly people with impaired capacity are concerned, particularly where the EPA came into operation based on the elderly person's limited capacity.¹² Therefore, it is necessary for the registration system to take into account circumstances where the elderly person has revoked an EPA but has not yet had time to register that revocation or where the elderly person is unable to do so due to their impaired capacity.¹³

Further, the registration system does not prevent elder abuse in circumstances where the EPA came into operation through deception, coercion or undue influence particularly where elderly people with impaired capacity are concerned or those from CALD backgrounds. The

¹¹ A-L McCawley et al, 'Access to assets: Older people with impaired capacity and financial abuse' 8(1) (2006) *The Journal of Adult Protection*, 30.

¹² Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) 174.

¹³ Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) vol 1, 157.

development of a registration system for EPAs should take into account such circumstances in which elder abuse using current and registered EPAs could still be perpetrated.

5) Proposal 6–1

Newly-appointed non-professional guardians and financial administrators should be informed of the scope of their roles, responsibilities and obligations

Family members are more frequently perpetrating financial elder abuse, either deliberately or inadvertently.¹⁴ CCLSWA commends any proactive measures undertaken to inform guardians and financial administrators about their roles, responsibilities and obligations. This should include the implementation of monitoring and reporting protocols to safeguard against elder abuse. The measures should also ensure accountability of guardians and financial administrators in the event that a person fails to comply with their obligations under the relevant Act.¹⁵

Pursuant to Proposal 5-5, civil penalties should also be enforceable for serious cases of a person's failure to comply with their obligations. CCLSWA recommends the implementation of civil penalties which provide procedural flexibility, as opposed to criminal sanctions that do not. To act as a deterrent against elder abuse, non-professional guardians and financial administrators should be informed of these civil penalties.¹⁶

As a result of the complexity and unfamiliarity of a guardian or financial administrator's role, most in those positions do not understand their roles and responsibilities. Community education and support plays an important role in ensuring that substitute decision-makers have a good understanding of their roles and responsibilities. Any community education programme should also include a discussion about the risks of mixing finances in respect of EPA arrangements. Increasing awareness amongst the general community about the guardianship and administration legislation should also be included within the community education.¹⁷

6) Proposal 6–2

Newly-appointed guardians and financial administrators should be required to sign an undertaking to comply with their responsibilities and obligations.

The proposal that substitute decision-makers be required to sign an undertaking to comply with their roles and responsibilities may prove effective in preventing or protecting against financial elder abuse. However, it is also necessary to consider if such undertakings are likely to deter or dissuade individuals from accepting a substitute decision-making role due to the added burden of such undertakings.¹⁸ If guardians and financial administrators are required to sign an undertaking at the time of being appointed, it has been suggested that

¹⁴ A-L McCawley et al, above n 11.

¹⁵ Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012) 413.

¹⁶ *Ibid* 62.

¹⁷ A-L McCawley et al, above n 11.

¹⁸ Victorian Law Reform Commission, *Guardianship*, Report No 24 (2012) 410-413.

the undertaking could be used in any subsequent proceedings concerning failure of a substitute decision-maker to comply with a particular duty.¹⁹

7) Proposal 7-1

The Code of Banking Practice should provide that banks will take reasonable steps to prevent the financial abuse of older customers. The Code should give examples of such reasonable steps, including training for staff, using software to identify suspicious transactions and, in appropriate cases, reporting suspected abuse to the relevant authorities

CCLSWA has experienced an increase in those seeking advice on matters concerning elder financial abuse, although the client may not explicitly describe the behaviour as “elder abuse”. Quite frequently, CCLSWA provides services in relation to financial matters involving potential or actual abuse of trust by a family member and/or someone held in the position of trust and confidence by the elderly client.

CCLSWA often encounters situations where elders signed on as co-borrowers or as guarantors for loans for which they do not receive any benefit. Subsequently the lenders have sought to enforce the loan or the guarantee against them.

The Code of Banking Practice

The Code of Banking Practice (**Code**) is the banking industry’s code of conduct which sets standards of good banking practice for banks to follow when dealing with individual and small business customers and guarantors.²⁰

Guarantors under the Code

Clause 28 of the Code provides that financial service providers will try to assist customers to overcome their financial difficulties with any credit facility that they have with the financial service provider. However, this requirement does not cover guarantors. This means that, under the Code, financial service providers are not required to consider requests of financial difficulty assistance from guarantors in relation to their liabilities under the guarantees.²¹ Guarantors are also not entitled to lodge a request for a change to the credit agreement on grounds of financial hardship.²²

Elderly people generally act as guarantors for borrowers who are typically family members or individuals on whom the elderly person places trust and confidence. Elderly persons who have unknowingly provided guarantees or provided guarantees without considering their potential liability, are not afforded protection under Clause 28 of the Code. This leaves them

¹⁹ Ibid 414.

²⁰ Australian Banker’s Association, *Code of Banking Practice* (at 1 February 2014).

²¹ Financial Ombudsman Service Australia, ‘Code of Banking Practice – Independent Review’, September 2016, Submission, 9.

²² Section 72 of Schedule 1 of the National Credit Code under the *National Consumer Credit Protection Act 2009* only applies to the debtor under the credit contract.

in a vulnerable position because they cannot seek assistance from the financial service provider in cases of financial difficulty.

Clause 29.1 of the Code is designed to prevent a person from being added as a co-borrower to a debt, where in fact they should be classified as a guarantor. It states:

We will not accept you as a co-debtor under a credit facility where it is clear, on the facts known to us, that you will not receive a benefit under the facility.

The following case study is a typical case of elder financial abuse that CCLSWA encounters.

Case Study 1 – 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.

As the case study above demonstrates, entering into the loan to assist the perpetrator will often have a familial relationship with the perpetrator. In this case study, Mr and Mrs Langdon did not recognise the transactions as "abuse" and only sought help from CCLSWA when it appeared that they were likely to lose their family home.

The lender in Langdon's case was not signatory to the Code, as such it did not regulate their actions. The matter also did not fall under the *National Credit Code* as it was classified as a business loan. Accordingly, it may be necessary to consider possible transactions that fall outside the scope of the Code in order to ensure that elderly persons are safeguarded against elder abuse in all circumstances.

a. Training for staff

The industry guidelines that currently exist to provide protection from elder abuse remain voluntary and are therefore unenforceable. Banks are at the forefront of most financial transactions, and as such are in the best position to detect elder financial abuse. For example, bank tellers or bank staff can draw attention to alarming behaviour when they notice certain demeanour or behavioural signs indicating potential financial abuse between vulnerable customers and their associates.²³

The following case study is a typical case of elder financial abuse that CCLSWA encounters:

Case Study 2 – The Smiths

Mr and Mrs Smith took out a loan for \$100,000 to purchase their residence and continued to make regular payments on their mortgage. Both Mr and Mrs Smith are in their eighties and currently receive the aged pension. The residential property is the only asset owned by the Smiths. At the time the property was purchased, the Smiths included their son, John, on the certificate of title for the property before John passed away.

After John's death, his partner, Sally remained in touch with the Smiths.

Subsequently, Sally offered to make all the repayments on the loan and although the Smiths had the funds to make the payments, they agreed to her request. There was not a significant amount left to repay on the loan.

Sometime later, Sally took out a loan for \$200,000 and offered to discharge the Smiths' remaining loan, which had \$25,000 outstanding. The Smiths declined this offer. Sally also used the proceeds to buy motor vehicles for herself and her mother.

Sometime later the Smiths were shocked to receive a default notice in relation to the \$200,000 loan. The Smiths never went to the lender and did not sign any loan documents for Sally. Later, it was discovered that the Smiths' signatures were forged and unbeknown to them they were co-borrowers on the loan with Sally. They also found out that Sally was able to obtain the \$200,000 loan by using the Smiths' residence as security for the loan.

Sally effectively obtained the benefit of the loan by using the only property the Smiths owned as security.

As the case study above demonstrates, there appears to be a relationship of trust and confidence between the elderly person and the perpetrator, which the perpetrator exploits to cause harm or distress to the elderly person. The perpetrator in these relationships is

²³ Consumer Financial Protection Bureau (US), *Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation* (2016) <http://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf>.

typically a close friend or relative of the elderly person. The elderly person usually has placed trust on these persons and is emotionally dependent upon them.²⁴ The perpetrator may not necessarily set out to harm the elderly person in all cases but may inadvertently choose his or her own interests over that of the elderly person.

Banks and financial institutions may be able to prevent or reduce the instances of elder abuse, by providing appropriate training to their staff, which may enable them to identify situations which may give rise to elder abuse. This is particularly so in situations where the elderly person enters into a transaction without independent legal advice by trusting those close to them or where their signature is forced or forged in order for the perpetrator to receive a benefit.

In the above case study, the distress and loss caused to the Smiths could have been prevented if the bank had measures in place to identify situations where there may be a high risk of elder abuse. The fact that the Smiths did not contact the bank at all or did not appear to gain any benefit from this loan, should have resulted in the bank investigating the loan in more detail.

The Commonwealth Parliament's House of Representatives Standing Committee on Legal and Constitutional Affairs made two key recommendations involving the banking sector in order to detect financial elder abuse in its early stages, which includes:²⁵

- Co-operative development of national, industry-wide protocols for reporting alleged financial abuse; and
- Development of a training program to assist bank staff to identify suspicious transactions.

Training staff members can include the development of educational programs designed to reduce the risk and incidence of financial elder abuse.²⁶ The Victorian Government launched an online training module for Elder Abuse prevention that has been widely accessed since its launch in March 2015. Although the training module is not specifically designed for bank staff, it can be accessed by anyone working with elderly people to identify and respond to elder abuse.²⁷

In North America, much of the training programs designed for the staff of financial institutions include the following components:²⁸

- The need to respond to a case of financial elder abuse;
- Definitions and examples of elder abuse;

²⁴ 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

²⁵ The House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older People and the Law* (2007) http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/laca/olderpeople/report.htm.

²⁶ Financial Ombudsman Service, *Banking and Finance – Bulletin 56* (2007) https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf.

²⁷ Central Victorian Primary Care Partnership, *Elder Abuse* (2014) <http://centralvicpcp.com.au/social-safety-family-violence-prevention/elder-abuse/>

²⁸ Financial Ombudsman Service, above n 25.

- How to spot cases or potential cases of financial abuse – the ‘red flags’;
- Response protocols in such situations including taking preventative actions for transactions that raise red flags;
- Legal issues associated with financial elder abuse;
- Reporting, including protocols for contact with relevant authorities;
- Information that can be given to customers about good financial practices to reduce the risk of financial abuse; and
- Sample ‘fraud alert forms’ – these are single page forms which ask the customer to consider a series of questions, inform the customer that answering yes to any question makes it likely that they are the victim of fraud, and ask if they would like to talk to an official from the bank in private.²⁹

Staff must also be trained to closely monitor and record any suspicious interactions or transactions in relation to elderly customers. This may include identifying evidence of coercion, and suspicious interactions with caregivers and third parties. CCLSWA also recommends that suspicious account activity and sudden changes in transaction pattern of vulnerable elderly customers are recorded so early preventative measures can be taken to stop elder abuse.

Studies show that cyclical and repetitive training sessions are more effective in enhancing memory retention and individual knowledge.³⁰ As such, CCLSWA further recommends that financial elder abuse training for bank and financial institution staff members be conducted in this manner.

Surveys indicate that Western Australian’s have a low level of understanding and community awareness in relation to the support services accessible and available to the vulnerable older population.³¹ CCLSWA believes that raising community awareness of elder abuse is equally as important as training staff members at banks or financial institutions. This can be achieved by developing bank-sponsored educational activities as a service to elderly account holders. Community education can include financial seminars for local seniors, including providing case studies of elder abuse and outlining the steps that can be taken to prevent or protect against financial exploitation of an elder person. Further means of educating the community, including the elder population, would be by distributing information and material in relation to elder abuse at teller windows or information kiosks.

Due to the ease and convenience for many, online banking usage has exponentially increased. However, online banking can be risky. In order to ensure that financial elder abuse is tackled effectively in these reforms it is necessary that these proposals take into account the ease and accessibility of online banking platforms and their susceptibility to exploitation. Some older Australians rely on close family members or friends for help with activities such as online banking. In this process, they may end up sharing their online banking details with these family members or friends, which would constitute a breach of the terms and conditions of their bank account. Banks or financial institutions can then exploit

²⁹ Financial Ombudsman Service, above n 25.

³⁰ BITS Financial Services Roundtable, At-Risk Adult Training Curriculum (2013), available at: <http://fsroundtable.org/wp-content/uploads/2015/09/BITS-Roundtable-At-Risk-Adult-Training-Curriculum-Jan-2013.pdf>

³¹ T, D’Aurizio, ‘Research into community attitudes to elder abuse in Western Australia’, Department of Communities, Government of Western Australia (2008).

this breach and use it as a reason for not assisting the elderly person, even in situations where elder abuse may be occurring. Community legal education on the risks of online banking may assist elderly Australians in making informed choices about who they share their personal details with and the potential consequences of doing so.

b. Identifying suspicious transactions

The Code should include a requirement for banks to use software to identify suspicious transactions. This may assist in the prevention of financial elder abuse particularly where it is evident that the elderly customer receives no benefit from certain transactions, for instance where they are acting as guarantors on loans.

Examples of possible suspicious transactions in relation to financial abuse of vulnerable elderly customers include:³²

- Atypical use of ATM cards;
- Uncharacteristic non-sufficient funds activity or overdraft fees;
- Activity in previously inactive accounts;
- Opening new joint checking account or adding joint owner to existing account;
- Increase in total monthly cash withdrawals compared to historical patterns.

With the increased use of software to detect unusual and suspicious transactions, the possibility of early detection of such fraud is more likely. However, elder abuse can come in many different forms, some of which are different to conventional patterns of suspicious activity. Technology which includes additional filtering criteria may be used to monitor and explore additional risk factors with respect to financial elder abuse.³³

It is equally important that banks develop protocols about alerts when unusual and suspicious transactions take place and the appropriate response in each case. This intersects with providing training to the staff of the banks and financial institutions with respect to reporting protocols and appropriate measures to be taken once elder financial abuse is identified.³⁴

c. Reporting suspected abuse to relevant authorities

Some reporting processes exist for situations where elder abuse is suspected. Where these processes exist, they are not consistent or are not understood consistently. CCLSWA recommends that banks and financial institutions play a more proactive role in identifying

³² BITS Financial Services Roundtable, *Protecting the Elderly and Vulnerable from Financial Exploitation* (2010) 11-13, available at: <<http://fsroundtable.org/wpcontent/uploads/2015/05/BITSProtectingVulnerableAdults0410.pdf>>.

³³ Consumer Financial Protection Bureau (US), above n 22.

³⁴ Mike Clare, Barbara Black Blundell and Joseph Clare, *Examination of the Extent of Elder Abuse in Western Australia* (Crime Research Centre, The University of Western Australia and Advocare Inc, April 2011) http://www.law.uwa.edu.au/data/assets/pdf_file/0008/2129606/2011-Examination-of-the-Extent-of-Elder-Abuse-in-Western-Australia.pdf.

and reporting financial elder abuse, as they are most uniquely positioned to detect early signs of abuse taking place and reporting it to relevant authorities where appropriate.

However, reporting suspected abuse presents some difficulties including whether reporting should be mandatory.³⁵ There are also privacy concerns around reporting suspected abuse and the consequences it may have on the perpetrator as well as the elderly victim who may not wish to report the perpetrator in cases where the perpetrator is a family member of the elderly victim.

It is important to identify what reporting entails, to whom the reporting should be made, and under what circumstances. Notwithstanding the requirement for reporting to be mandatory or voluntary, it is essential for financial institutions and banks to report suspected elder financial abuse to an independent body that undertakes investigations. One suggestion is that banks and financial institutions nominate a party to evaluate and report on instances of suspected financial abuse. Reporting should not just be for mere regulatory compliance and it is important to have frontline staff in appropriate agencies responding to these reports and where appropriate, providing support and referrals.

Elderly clients who have signed on as guarantors for loans without ever receiving contact from the bank or without any understanding of their financial obligations or consequences, often contact CCLSWA. These clients are usually only contacted by the bank once there has been a default on the loan. These situations often involve an element of elder abuse. An independent government body that receives such reports and undertakes investigations will ensure that elderly clients receive the benefit of an independent investigation and can respond appropriately as recommended.³⁶

In order to have a holistic approach to reporting suspected abuse, CCLSWA recommends sharing of information across different sectors with increased stakeholder cooperation to protect against or prevent actual or potential abuse including but not limited to financial elder abuse. There is a strong need for statutorily mandated intervention permitting stakeholders to work collaboratively to achieve this aim as well as overcoming the restrictions posed by privacy law.³⁷

Although the reforms address the importance of frontline staff in detecting possible or actual financial elder abuse, the reforms need to take into account other measures including community and customer education, law enforcement steps and responses and information sharing between different stakeholders including the health sector.³⁸

³⁵ 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

³⁶ Consumer Financial Protection Bureau (US), above n 24.

³⁷ Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' 36 (2014) *Sydney Law Review* 99, 100.

³⁸ Financial Ombudsman Service, Banking and Finance – Bulletin 56 (2007) Available at: https://www.fos.org.au/custom/files/docs/fos_banking_finance_bulletin_56.pdf.

8) Proposal 7-2

The Code of Banking Practice should increase the witnessing requirements for arrangements that allow people to authorise third parties to access their bank accounts. For example, at least two people should witness the customer sign the form giving authorisation, and customers should sign a declaration stating that they understand the scope of the authority and the additional risk of financial abuse.

The 'Authority to Operate' forms used by banks to authorise third parties to access bank accounts held by the account holder currently do not have any witnessing requirements. The forms only require the signature of the account holder authorising access and the third party authorised to access those accounts. This leaves many elderly people, particularly those with impaired capacity, susceptible to financial abuse through fraud including circumstances where third parties force or forge the person's signature.

The proposal to include witnessing requirements in order to authorise third parties to access the bank account of the account holder will provide an added protection against elder abuse than what the current system does. However, elderly persons authorising access to their bank accounts may allow it because the third parties accessing those accounts are often family members, relatives and friends trusted by the elderly person.

Customers are often required to sign a declaration stating that they understand the scope of the authority that they are providing. CCLSWA has experienced that clients often do not read or do not understand the scope of the declaration that they are signing. As such, CCLSWA believes that it is unlikely that a signed declaration will safeguard elders from financial abuse. It is also unlikely that the declaration will provide the benefit proposed in terms of safeguarding people from elder abuse.

Although the suggested witnessing requirements may provide an added layer of protection in terms of forgery, there is a big risk that the declaration may be used to prevent older Australians from redress against their perpetrators or their banks. If a matter is referred to an External Dispute Resolution Scheme (i.e. an Ombudsman), they are only required to show that the client has signed the declaration, and excluding any evidence to the contrary, the bank has complied with its obligations.

Banks may also consider their customer 'informed', thus may not take any further steps to prevent elder exploitation by third parties, and instead may use the declaration as a form of waiver. It is also likely that the proposal may not be of much assistance to older Australians from CALD backgrounds or elderly people with impaired capacity who may not understand the declaration, its risks or its implications.

In Australia, data indicates that 80% of elder abuse victims over the age of 65 suffered elder abuse at the hands of their family members, most often their own children, and that financial abuse is the most common form of abuse.³⁹ This is also a reason for why elder abuse often

³⁹ Victorian Government, Department of Health, *Elder Abuse Prevention and Response Guidelines 2012 2014* (June 2012) 3 http://www.health.vic.gov.au/agedcare/downloads/pdf/eap_guidelines.pdf; Duncan Boldy et al, 'Addressing Elder Abuse: West Australian Case Study' (2005) 24 *Australasian Journal on Ageing* 3.

goes underreported.⁴⁰ Therefore, the proposal does not go far enough in protecting against elder exploitation in that informed elderly people will continue to authorise their family members and relatives to access their bank accounts due to the degree of trust and confidence involved. It may be more suitable for proposal 7.2 to apply to authorised third parties as well requiring the third party to confirm that they will not misuse the account holder's bank account for their own or someone else's benefit.

The proposal is seeking to make it harder for third parties to obtain the 'Authority to Operate' forms to access a bank account. However, this proposal is limited as financial institutions may use it as a tool to show that the customer has "waived" their rights. There is also a risk that financial institutions will not do more to protect elderly customers against financial exploitation in terms of identifying or reporting suspicious transactions relating to their bank accounts.

Although proposal 7.2 provides added protection against elder abuse, banks need to do more in order to protect most vulnerable members of our society from elder exploitation as they are most uniquely positioned to identify and detect elder financial abuse.

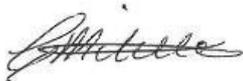
9) Acknowledgements

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.



Gemma Mitchell
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⁴⁰ Queensland Elder Abuse Protection Unit Annual Report (2006) 7; Older People and the Law, Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into Older People and the Law <http://www.aph.gov.au/house/committee/LACA/olderpeople/report.htm> p15.