Consultation on Independent Review of Credit Reporting Code

Submission by Legal Aid Queensland

Legal Aid
QUEENSLAND

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission a submission to the Independent Review of the Credit Reporting Code.

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 always 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 and tribunals. We believe 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 Civil Justice Services Unit lawyers provide advice and representation in banking and finance, credit and debt, farm debt mediation, credit reporting and default listings, insurance and consumer law. We regularly assist clients who have issues with their credit reports.

Questions

Effectiveness of the Credit Reporting CR code

1. What provisions in the CR Code work well and should remain as they are or with minimal changes?

Overall, the CR Code is not user-friendly document for consumers and organisations that help them to enforce their privacy rights. For example, paragraph 21 of the CR Code deals with complaints. If the CR Code was consumer facing that paragraph should explain:

- that all CRBs and CPs are required to belong to an approved external dispute resolution (EDR) scheme (the section only refers to the requirement that CRBs belong to an EDR scheme).
- That individuals who have an issue with their credit report can approach either:

  (i) the CP who had refused them credit based on information contained in their credit report,

  (ii) the CP who had reported the inaccurate information, or

  (iii) the CRB, to deal with and resolve their complaint/s.

Instead, paragraph 21 deals primarily with how the CPs and CRB's deal with each other, and contains nothing of importance to individuals such as how:

- CRB's and CPs should respond to urgent requests for amendments to a credit report where for example the individual is seeking to purchase a property and the inaccurate report will ensure that credit is not approved;
- complaints from persons affected by domestic violence should be dealt with;

- to resolve complaints when the underlying complaint is not about the CP the person has complained to; and

- CRB's could coordinate complaints to numerous creditors in fraud/ identity theft cases where there might be multiple accounts.

Ideally the CR Code should be revised in its entirety and a consumer facing document produced. The Principles of Reciprocity and Data Exchange Code (PRDE) may be an appropriate place for matters about rules governing how CPs and CRBs interact to meet their obligations under the legislation and CR Code. However, it is important that where a conflict exists between the PRDE and the CR Code takes precedence.

In addition, when proposing or implementing variation to the requirements in the CR Code, reviewers are not required to consider the impact on the PRDE. Rather the PRDE needs to be varied in response to changes in the CR Code

We recommend that the CR Code is rewritten as a consumer facing document, that adequate funding is provided to consumer organisations to enable consumers to access assistance with credit reporting complaints, the provision of training to "coal face workers" and the funding of policy and advocacy when consumers/consumer groups are called upon to assist with the development and variations of the CR Code moving forward.

Consideration should be given to sourcing a new code developer able to represent the interests of all stakeholder, not just the credit industry

2. What provisions in the CR Code are no longer fit-for-purpose? Why?

See response to Q1, Q4.

3. Does the CR Code get the balance right between the protection of privacy on the one hand and use of credit-related personal information on the other? Why or why not

The CR Code is not widely used by individuals and advocates because it fails to balance the protection of privacy on the one hand and use of credit-related personal information on the other.

The CR Code does not contain an overarching principle of fairness like other Codes in the finance sector, such as the Banking Code and the General Insurance Code of Practice.

Incorporating a standard of fairness would go some way to ensuring that there is a balance between the protection of privacy and the use of credit related personal information.

We recommend incorporating a fairness standard in the CR Code.

Form and readability of the CR Code

4. Does the CR Code need to be amended for clarity or readability? If so, in what way?

Please see below our submissions to ARCA about the readability and clarity of the CR Code which set out our views about the complexity and readability of the Code and ways in which it could be improved. It is largely reproduced below.

A Code of this nature, which can have significant financial impact for individuals should be clear, easy to understand and accessible to Industry and individuals. The CR Code in its current form is too complex and difficult to navigate. The structure and design of the CR Code makes it difficult for individuals and consumer advocates, to use, advise on and identify where proposed legislative changes may detrimentally effect individuals.

Issue with structure, design and drafting of the CR Code

The CR Code was intended to aid the understanding of the Privacy Act 1988 and regulations as it relates to credit reporting. It was not intended to be legislation or circumvent the intention of parliament. The CR Code was also not intended to enable "scope creep".

The CR Code's current structure and drafting style result in a level of complexity that is a major risk for individuals.

The CR Code:

- is not drafted in plain English,
- has a structure that is convoluted, complex and confusing,
- has poorly drafted definitions,
- fails to include aids to understanding such as diagrams, case examples or flowcharts,

The CR Code's complexity inhibits and prevents clear and accurate interpretation of its provisions. This complexity leaves open to industry the ability to interpret the CR Code to advance its interests to the detriment of individuals.

Whilst it is acknowledged that the ARCA, in accordance with the OAIC's Guidelines for developing codes, is undertaking public consultation, ARCA needs to also comply with the Guidelines in relation to drafting style. The OAIC Guidelines for developing codes provides:

"As registered codes are legally binding, it is important that entities bound by the code, the Information Commissioner, other stakeholders and the general public are able to easily understand and interpret the code."

Examples of some of the specific issues in relation to the proposed amendments are set out below

- Plain English

The CR Code must be clear and the language used must promote understanding. The amendments proposed and the CR Code itself needs to be reviewed for comprehension.

One example of the need for a plain English and comprehension review is found in clause 2.3 of the CR Code which reads as follows:

> 2.3 For the purposes of the definition of non-participating credit provider in Subsection 6(1) of the Privacy Act:
>
> (a) a CP is deemed to be likely to disclose credit reporting information or credit eligibility information about an individual to a CRB if the CP has represented to an individual who has taken out, or who is likely to take out, consumer credit with the CP that the CP may make such disclosures (unless the CP has subsequently advised the individual in writing that the CP will not make the disclosures); and
>
> (b) a CP that acquires the rights of another CP, which was not a non-participating credit provider, in relation to the repayment of an amount of consumer credit is not a non-participating credit provider.

- Structure

The structure of the CR Code should reflect the life cycle of the credit reporting relationship between the individual and the credit provider.

An example of where the proposed amendments do not reflect that life cycle is the references to temporary and variation FHA in Clauses 8.A1 (c) and 8A.7.

In clauses 8A.1 (c) and 8A.7 reference should first be made to Temporary FHA rather than the variation FHA. Temporary FHA arrangements are commonly and usually the first suggestion made by credit provider. The proposed amendments make reference to Variation FHA first. The proposal does not reflect the natural life cycle of the credit reporting relationship and sequencing that occurs between the individual and the credit provider.

- Definitions

The CR Code should ensure that all relevant terms are defined within the CR Code and the definitions included must be clear and easy to understand. The amendments proposed to definitions within the CR Code itself need to be reviewed for clarity and comprehension.

For example, the definitions of a V and A arrangement are hard to follow. It's difficult to work out what the fundamental difference is, on a contractual basis, between the two terms. It appears with an "A" arrangement you can accumulate up to 7 months of delayed payments. This is a deferral in the traditional sense of the three options provided for in the old consumer credit code . Then there are V arrangements which encompass every other arrangement except what is considered to be an A arrangement.

The definitions are not inherently clear. The definitions are also misleading as to how the law works. For example, all arrangements under the National Credit Code are Financial Hardship Arrangements (FHA). Under the NCCP there are no "A" arrangements or " V" arrangements. The impact of the proposed definition is to carve out an "A" arrangement from the definitions for financial hardship under the NCCP, and reframe it as a deferral for 7 months and possible catchup and test periods.

The definition should be clear and upfront about the intention of the proposed changes.

- Aids to understanding

The use of diagrams, case examples and flowcharts assist and would promote understanding the Code.

For example, ASIC regulatory guides have good examples to support and promote understanding.

5. Are there any CR Code provisions that are open to interpretation or prone to misinterpretation? Which provisions and how could they be improved

No comment

Interaction with the CCR system

6. What has been the effect of mandatory CCR on compliance with the CR Code?

LAQ is unable to provide any comments on this question as there is no reporting or data released publicly.

The PRDE was to a certain extent already imposing conditions on CPs to report information consistently if the CP wished to access credit reporting information.

With the mandatory reporting of information there is less flexibility for individuals when negotiating outcomes with CPs and CRBs about the information that is reported to CRB's or remains on credit reports.

For example, as a complaint outcome, a consumer and CP might agree that:

- the consumer is released from the debt; and or
- defaults or consumer liability information are removed from the credit report or not reported to the CRB.

without an acknowledgment by the CP that they did not comply with the relevant law when providing the credit.

If a CP must report, it is unlikely that a CP can agree to such an arrangement without itself potentially breaching the law because of their obligations to report CCR.

This is the sort of matter that could be addressed by a consumer facing CR Code as to the circumstances under which default and other information can be removed from an individual's credit report.

7. Are there inconsistencies between CCR requirements and CR Code requirements that could be addressed via an amendment to the CR Code? How could the CR Code be amended in this context

See response to question 6 as one example where the CR Code could provide greater clarity around the issue of negotiated agreements.

Participation of other entities

8. How might the CR Code need to be updated to accommodate other entities?

To access credit reporting, an entity must meet the definition of credit provider in the Privacy Act (1988) s6G (1).

Entities such as telecommunication companies meet the definition of credit provider for the purposes of S6G (1).

It is incorrect to say that telecommunications companies are unable to access credit reporting as stated in the consultation paper.

The definition of credit provider under the Privacy Act is very broad.

Prior to 2014 Individuals often complained that a great variety of businesses (including plumbers and dentists, video stores etc.) were accessing credit reports and reporting defaults and other information that was inaccurate. Individuals were struggling to correct inaccurate information on their credit reports as the only avenue for redress was the Privacy Commissioner who was unable to investigate and resolve matters in a timely manner.

In 2014 an amendment to the Privacy Act required membership by a CP of an authorised external dispute resolution scheme approved by the Privacy Commissioner if they wished to access credit reporting.

This resulted in fewer credit providers accessing credit reporting but also meant that consumers were able to access timely complaint resolution.

Telecommunications companies, energy providers and regulated lenders were also, prior to 2014, required as a licence condition for the provision of utilities and regulated credit to belong to an external dispute resolution scheme

These existing schemes were approved by the Privacy Commissioner (after 2014) to also deal with credit reporting complaints.

Comprehensive credit reporting reforms were also introduced in 2014. This allowed the collection of and access to further information by CPs.

The following represented the new information that could be collected and accessed and was defined as Consumer Credit Liability information CCLI:

1. Type of account.
2. Account open and close dates.
3. Credit limit (NOT outstanding debt).

4. Terms and conditions e.g. loan term, type of security, interest only or principal and interest.

5. Repayment history information.

Collection of CCLI information was made mandatory for banks in 2017 and Australian Credit Licence ACL holders in 2021.

The PRDE also made it mandatory for other CPs (as a condition of their membership of a CRB to collect and disclose CCLI information to CRB's).

All CCLI information could be accessed and collected by all CPs except Repayment history information RHI which could only be provided and accessed by "Australian Credit Licence holders" for loans regulated by the *National Consumer Credit Protection Act 2010* (NCCP).

Historically there had always been a concern that RHI could be used not only to assess the credit worthiness of an individual but also to lend more money or provide additional services to an individual.

Only if the CP had legislated responsible lending obligations could any assurance be provided that RHI would only be used for establishing the credit worthiness of an individual who has applied tor credit.

It was for concerns around the misuse of RHI and despite industry pressure that comprehensive credit reporting including the collection of RHI was not introduced in the 2000s.

However, in 2010, the NCCP imposed responsible lending obligation on entities providing regulated loans

This resulted in a recommendation by the Australian Law Reform Commission that RHI could be collected and accessed but only for those entities who had an ACL and were subject to legislated responsible lending obligations.

In our view it was the intention of parliament that only regulated lending could have RHI reported and only ACL's when considering applications for regulated credit could access RHI.

See the excerpt from the explanatory memorandum of the 2012 Privacy Bill that articulates this intention set out below:

> *"The fifth kind of personal information, repayment history information, is only available to credit providers who are licensees under Chapter 3 of the National Consumer Credit Protection Act and subject to responsible lending obligations under that Chapter."*
>
> (From Explanatory Memorandum - PRIVACY AMENDMENT (ENHANCING PRIVACY PROTECTION) BILL 2012 - https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4813_ems_00948d06-092b-447e-9191-5706fdfa0728%22).

In our view there is no scope to increase the entities that have access to RHI or the reporting or access to of RHI for unregulated lending or other products who do not have responsible lending obligations when providing that credit.

We recommend that the code clearly states that only entities holding ACL licences when providing regulated loans have access to and report RHI.

We do not support changes to the definitions of what information can be collected as for example the definition of "Account open and closed" can be used to encompass when a service is connected and disconnected if that is a concern of other industries.

Code development and ongoing monitoring

9. Is the current process for developing variations to the registered CR Code appropriate?

Below is the excerpt from LAQ's submission to the OAIC responding to ARCA's recent request to vary the Credit Reporting Code. This reflects LAQ's current position on the issue.

The Role of ARCA in CR Code development

LAQ did not oppose the Australian Retail Credit Association ("ARCA") taking a leading role in the development of the CR Code when it was proposed in 2011. However, at the time, LAQ was concerned that the body responsible for CR Code development should be independent. This independence could only be achieved if the governing body was comprised of equal representation by industry and consumers advocates with an independent chair.

Unless the body tasked with developing the Credit Reporting Code (the "CR Code") was independent of industry, it was likely that the CR Code would not seek to protect and balance the legitimate interests of all participants and in particular individuals whose information is being collected and disclosed. That submission was rejected on the grounds that the Office of the Australian Information Commissioner OAIC would retain ultimate authority to approve the CR Code and the role of ARCA was limited to the role of co-developer with the OAIC.

Our experience has been that what ARCA proposes is rarely questioned by the OAIC to any significant degree.

The entire CR Code is being reviewed later this year. Individuals and consumer groups have not had input into the tender, the terms of reference or the appointment of the reviewer. It's unclear whether ARCA have been consulted about the review process. We understand that ARCA has been provided with a copy of the tender. It would appear likely that ARCA have had at least some input into the process.

In 2017, when the CR Code was last reviewed by Price Waterhouse Cooper PWC, many issues were raised by consumers. For example, the complexity of the CR Code was deemed out of scope by the reviewer. Once the independent report written by PWC was received by the OAIC, ARCA was tasked with implementing the recommendations in the report.

In LAQ's view the recommendations implemented in the PWC report were largely actioned through the lens of industry interests and there was not a balanced approach to recognise and protect the privacy of individuals.

This process of the CR Code development and review could be taken to lack a balanced approach with the view that individual's interests are not being given the same weight as those interests of industry by ARCA.

Additionally, we have seen very little evidence of the OAIC taking ARCA to task about the issues raised by consumer advocates in any review process. For example, LAQ is not aware of any occasion where the OAIC has made any significant changes to the CR Code once ARCA has sent the CR Code to the OAIC for approval.

We are concerned that

- *ARCA to has not provided independent advice to parliament and the government about the impact of proposed changes to credit reporting legislation.*

In LAQ's view, ARCA in its role as CR Code developer has not provided accurate advice to the government or parliament in relation to the impact of the proposed changes to the legislation affecting credit reporting.

When enacting the hardship reforms to credit reporting, it was clear that parliament intended that the Financial Hardship Information (FHI) should not be provided to other credit providers for the purposes of collecting debt .

The amendments also enhance the credit reporting framework in Schedule 2 to the Bill and the Privacy Act 1988 to provide greater protections for consumers and access to their information. These amendments involve: • limiting disclosure of financial hardship information by credit reporting bodies to situations where the consumer is seeking to access new credit.

Specific changes to the Privacy Act were made to ensure that this was not a permitted disclosure and FHI should not be disclosed except when a creditor was assessing a new application for credit.

ARCA did not point out to the parliament that the proposed amendments to the legislation would not prevent creditors from being informed of Financial Hardship Information (FHI) if the creditor received "alerts" as set out in Item 5 of Section 21H of the Privacy Act, for "the purpose of assisting the individual to avoid defaulting on his or her obligations in relation to consumer credit" thus circumventing the restriction that intention of parliament to impose that FHI should not be disclosed except when a creditor was assessing a new application for credit.

- *Failure of ARCA to consider implementing the legislation in ways that has the least intrusive impact on the privacy of individuals*

ARCA is of the view that the hardship reforms require lenders to report Repayment History Information (RHI) if they hold an Australian Credit Licence (ACL) even where the products are not regulated by the National Consumer Credit Protection Act 2009 (Cth) (NCCP). For example, some ACL lenders are or are considering releasing or have released "Buy Now Pay Later" products that are not be regulated by the NCCP.

Despite Parliament clearly expressing an intention that RHI should only be available or collected in respect of regulated credit where there was a legislative obligation to lend responsibly, ARCA is seeking to extend the reporting of RHI to these products rather than ensuring that the reporting of RHI is limited to only those products where the provider has responsible lending obligations.

On 10 October 2021 in a follow up email to the OAIC on proposed variations to the Credit Reporting Code, we stressed our concerns about the CR Code and its development:

In summary, we are concerned about:

- *The role of ARCA in driving the Code Development process when ARCA is not independent of industry;*
- *The complexity of the CR Code; and the*
- *Structure, design and drafting of the Code.*

In our view, the OAIC has an obligation to review the CR Code and amendments proposed by ARCA:

- *to ensure an independent and rigorous scrutiny of the proposed amendments is undertaken, and,*
- *to protect and balance the legitimate interests of all participants and in particular individuals whose information is being collected and disclosed,*
- *to ensure the proposed amendments are complaint with the OAIC's Guidelines for developing codes which provides:*

> *"As registered codes are legally binding, it is important that entities bound by the code, the Information Commissioner, other stakeholders and the general public are able to easily understand and interpret the code."*

> *Consideration should be given to whether ARCA is the most appropriate body to be developing the CR Code, given that the code should balance the rights of individuals to privacy and access of credit providers to information to allow them to make good decisions in relation to the enforcement and extension of credit. Consideration should be given to ensuring the CR Code development body is independent and comprised of equal representation by industry and consumers advocates with an independent chair.*

We recommend that consideration be given to sourcing another code developer is changed and/or that the governance, compliance and monitoring arrangements are altered, including the establishment of an independent code monitoring and compliance body.

10. Should additional compliance monitoring and governance arrangements be stipulated in the CR Code?

Yes, see response to question 9.

Education and Awareness

11. Do industry and individuals have access to the information they need to understand and/or apply the CR Code in practice? If not, what amendments could be made to the CR Code to improve this?

Access to information can assist sophisticated consumers, financial counsellors and others providing assistance to consumers. It is unlikely to assist other individual consumers who need access to timely legal advice, financial counselling and effective dispute resolution to assist them.

LAQ recommends that delivery of information is:

- Contemporaneous and timely and provided in the format that matches other information provision. For example if an individual has asked for a repayment hardship arrangement by phone, then information about the consequences to the credit report ought to be also provided over the phone

- Delivered to consumer advocates, financial counsellors and other organisations assisting consumers to navigate the CR system through comprehensive training.

- Provided in one place – Currently good credit reporting information is provided through the OAIC website, ASIC and the industry website www.credtismart.org.au

Credit reporting agreements, audits, training and policies

12. Are the provisions on credit reporting agreements, audits, training and policies appropriate? Should they be amended in any way? If yes, how?

Currently non-compliance by credit providers of Part IIIA of the Privacy Act 1974 is monitored by CRBs. There is no public reporting of the monitoring carried out by CRBs, any non-compliance detected, or corrections made as a result of the monitoring.

Whilst there is some incentive for CRBs to monitor some activities (such as accuracy of relevant data on the Credit report) there is little incentive to monitor other activities such as compliance with complaint handling requirements which have little or no impact on the information contained in the credit report.

Monitoring activities that are likely to be of most assistance to consumers are unlikely to be prioritised.

In addition, given the dependence that CRBs have on the information provided by CPs (particularly large CPs) there is a perception that the CRBs are unlikely to act on non-compliance by any of these large CPs on whose information their business viability rests.

At a minimum, section 23 of the CR code should contain a requirement that results of audits and monitoring activities of CPs are made public. Ideally if an independent Code monitoring and compliance body was established, that body should receive the reports and they could then publicly report on the findings and use the audits as a means of identifying systemic issues, undertaking further monitoring and compliance activities and recommending improvements for the industry and individual CPs.

Currently there is no mechanism for regular audits of CRBs. Such a mechanism should be included in the Code with results of the audit made public.

LAQ recommends that CP audits by CRBs are made public and regular audits of CRBs are undertaken and public reported.

Internal practices and recordkeeping

13. Are the provisions related to internal practices and recordkeeping appropriate? Should they be amended in any way? If yes, how

See response to question 12

Consumer credit liability information

14. Are the CCLI provisions appropriate? Should the CCLI provisions contained in paragraph 6 be amended in any way? If yes, how?

See response to question 15

15. Are the definitions / interpretations contained in paragraph 6 appropriate? Should they be amended in any way? If yes, how?

See response to Question 4.

In addition, LAQ has become aware that debt collectors have listed CCLI where a judgement was obtained, and the judgment has subsequently fallen off the credit report as it is more than 5 years since the day of the judgment.

At law the consumer credit is terminated, at the latest on the day that a judgment is entered. Once a judgement is entered, there is no credit contract in existence, the credit contract is not enforceable only the judgment is.

See Wolfe v Permanent Custodians Limited [2012] VSC 275 (11 October 2012) and particularly from paragraph 87:

> 87 Referred to as the doctrine of merger, a final judgment extinguishes the cause of action and the rights and liabilities that are its basis. The extent of the parties' rights and liabilities are contained within the judgment and their character is defined by it.

Additionally, once 6 years have passed, enforcement of a judgment in Queensland cannot proceed without the leave of the court and only in circumstances where the creditor can show why reasonably they have been unable to enforce in the previous 6 years. There are different requirements in each state as to the enforceability of judgments.

We recommend redrafting of paragraph 6, including to clarify that once a judgment is obtained the contract which formed the basis of the litigation is terminated.

Repayment history information

16. Are the RHI provisions appropriate? Should RHI provisions contained in paragraph 8 be amended in any way? If yes, how?

There are crucial issues that do not appear to have been addressed in paragraph 8 in relation to disclosure and correction of a credit report/RHI?.

Correction of RHI does not appear to be available in the CR Code and there is no reference to the disclosure of RHI and particular negative RHI and Financial Hardship arrangements.

LAQ recommends the inclusion of the capacity to correct RHI and contemporaneous requirements for disclosure.

Default information and payment information

17. Are the default information and payment information provisions appropriate? Should the provisions contained in paragraphs 9 and 10 be updated in any way? If yes, how?

Paragraphs 9 and 10 do not impose any obligation on the CP to list information in a timely manner. Sometimes defaults are only listed many years after the credit contract was accelerated and the whole amount under the credit contract became due and payable. It is then difficult to determine whether the default was previously listed.

This is perhaps best illustrated with an example. The Consumer has a loan with B Bank, the consumer defaults, a default is reported, the loan is subsequently accelerated, and default information updated. The debt is on-sold to C, the consumer makes some payments in reduction of the accelerated debt. The original default drops off after 5 years. C sells the debt to D. D accesses the report and lists a new default.

The consumer unless they have a copy of a previous report are unable to show that the debt has been listed twice.

This problem and the problem of lenders listing just before a debt becomes statute barred could be resolved if a creditor, if they wish to list a default, must do so within a reasonable time of the default otherwise they lose the capacity to list. Please note the obligation to list would not be mandatory, simply the right to list would be lost if not made within a reasonable period.

LAQ recommends that default information cannot be listed if not listed within a reasonable time after the date of the default on which it is based.

Publicly available information

18. Are the provisions regulating use of publicly available information appropriate? Should they be amended in any way? If yes, how? Is the meaning of publicly available information adequately clear?

This section makes it clear that publicly available information can only be collected if it relates to the credit worthiness of the individual

Serious credit infringements

19. Are the provisions on serious credit infringements appropriate? Should they be amended in any way? If yes, how?

LAQ does not have any current concerns about this section.

Notice to individuals

20. Are the provisions regulating how individuals are notified that their information will be provided to a CRB appropriate? Should they be amended in any way? If yes, how?

Most individuals do not understand that that the reporting of information to CRBs is based on notice and not consent.

Individuals are concerned with credit enquiries appearing on credit reports. Individuals believe that the existence of that information impacts their ability to obtain credit.

Given that it is now mandatory to report CCLI information for regulated credit and the PRDE makes reporting CCLI for non-regulated credit mandatory (excluding RHI) for subscribers, in our view credit enquiries should no longer be made available to CPs. This will ensure that individuals can still check who has accessed their report but will ensure that credit enquiry information cannot be used for the purposes of assessing applications for credit.

LAQ recommends that credit enquiry information no longer be made available to CPs but only available to individuals accessing their credit report.

Protections for victims of fraud

21. Are the protections for victims of fraud appropriate? Should the provisions contained in paragraph 17 be updated in any way? If yes, how?

The protections for victims of fraud are inadequate.

The initial ban period of 21 days is inadequate and the requirement that the individual nominate an extension of the ban period within the 21-day period is onerous.

LAQ is unable to assess how this provision has operated in practice as there is no public reporting as to any monitoring or audit activities undertaken by the CRBs.

When Individuals make complaints to CRBs about inaccurate information on CR reports based on fraud/identity theft, CRBs should seek relevant information from CP's to establish whether there are grounds for removing the listening.

This needs to go beyond just checking the information that was provided to CPs to establish identity. LAQ is aware that identification documents can be stolen and then used to obtain credit. Many credit contracts (regulated or unregulated, for utilities etc.) are obtained entirely online with the fraudster producing the information online without any one even speaking to the intended recipient of the credit. Simply relying on what information was gathered by the CP without looking at the substance of the transaction/transactions will result in a finding that the information disclosed by the CP was properly collected and reported and should not be removed.

If that is the outcome individuals are left with limited options for the removal of information from their credit reports based on the fraudulent activity.

Current options for removal

Under section 375.1 of the *Criminal Code Act 1995* (Cth), victims of identity fraud can apply to state magistrates' courts for a Commonwealth Victims' Certificate.

A Certificate will record the name of the victim and describes the circumstances in which the person has been a victim of Commonwealth identity crime. The certificate however will not list the offender or alleged offender.

The Certificate cannot determine whether a particular transaction was fraudulent, nor can it be used in legal proceedings.

The Certificate can be used in situations where a client is disputing liability of relevant fraudulent dealings, or to remove any fraudulent transactions from credit reports for instance.

However whilst there are hundreds of thousands of people each year who are victims of scams ,fraud or identity theft, it is LAQ's understanding that there have been over 20,000 applications since the law's inception but only a handful of these certificates have ever been issued.

The only other option for victims of fraud/identity theft is that a complaint in relation to each individual fraudulent listing is made to the Australian Financial Complaints Authority. This is extremely onerous to the individual complaint and very time consuming.

We recommend that CRBS co-ordinate the removal of all inaccurate information on credit reports where the view is formed on a reasonable basis that the individual has been the victim of identity theft

22. Should there be further obligations on CRBs to alert individuals of enquiries received on a credit report during a ban period?

LAQ supports free alerts to individuals of any information collected on a credit report during a ban period.

Use of credit reporting information for direct marketing

23. Are the existing direct marketing provisions appropriate? Should they be amended in any way? If yes, how?

It is important that the CR Code specifically prohibits the use of financial hardship information in pre-screening tools.

Access rights

24. Are the access provisions appropriate? Should the provisions in paragraph 19 be updated in any way? If yes, how?

LAQ welcomes the industry's greater commitment to the provision of free reports.

It is important that if an individual makes an application to one CRB they are provided with their CR from all CRBs.

Individuals continue to have difficulty in accessing reports if they are not computer literate, have a cognitive impairment or do not have an email address. It can take significant coaching particularly over the phone to guide these individuals through the process.

LAQ recommends that an application to one CRB for a credit report will generate a report from all CRBs and that CRBS provide alternative forms of access to credit reports.

Correction of information

25. Are the correction provisions appropriate? Should the provisions in paragraph 20 be updated in any way? If yes, how?

See response to Question 1 and 4.

Complaint handling

26. Are the provisions on complaint handling appropriate? Should the provisions in paragraph 21 be amended in any way? If yes, how?

See response to Question 1 and 4.

Dispute resolution

27. Are arrangements for dispute resolution appropriate? Should the arrangements be changed in any way? If yes, how?

See response to Question 1 and 4.

Other options to enhance protections for individuals

28. How could the CR Code be amended to enhance protections for individuals?

See response to Q29 below.

29. *How could the CR Code be amended to better support people affected by domestic abuse?*

The CR Code should be amended to make it clear that reporting should be based on the individual and not an account-based approach.

Joint loans mean the borrowers are jointly and severally liable.

The lender can when enforcing agreement choose to pursue:

- each borrower for the whole amount owing or for different proportions of the debt;
- one borrower; or
- seek to initially enforce against mortgaged property owned individually or jointly by the borrowers or a third-party guarantor before proceeding against any individual.

Borrowers can also seek to negotiate payment arrangements/reduced payout or challenge liability for the debt individually against the lender.

Different arrangements between borrowers are far more likely to result in situations where there has been domestic violence, however it is also very common in situations where joint borrowers have separated.

To ensure the accuracy of an individual's credit report, the report must accurately reflect the individual's liability in relation to a joint account.

If an individual approach is adopted, it obviates the need for special treatment for individuals who identify as the victims of domestic violence. It also obviates the need to make a disclosure about domestic violence to obtain special treatment. This approach is likely to assist many individuals not just individuals who are the victims of domestic violence. This approach will more importantly protect an individual's privacy.

It also aligns with universal design principles where systems are designed for use by all and systems do not need retrograde changes to accommodate the different requirements of vulnerable individuals.

Furthermore in our submission to the ARCA Consultation – Privacy (Credit Reporting) Code (CR Code) Hardship Reforms LAQ made specific reference to the recording of FHA where accounts were jointly held.

"Any FHA reporting should only apply to individuals who have agreed to the proposal.

LAQ agrees that a FHA can be made with the agreement of one joint account holder, however if both account holders do not agree to a negotiated FHA, only the individual who has made the particular FHA will have FHI in accordance with the FHA reported on their credit file. The other individual will continue to have RHI reported against them in accordance with the terms and conditions of the contract.

A FHA may be different between joint account holders for a variety of reasons, several examples are set out below:

- A credit provider could enter into different FHAs with individual account holders, requiring repayments of different amounts depending on who is working and or living in the property; and
- A credit provider may release one individual from all obligations under the contract but continue to hold the other joint account holder liable for the contractual repayments.

For example, Joint Account holder "A" seeks a reduction in the amount owed based on irresponsible lending. Joint Account holder "B" seeks a release once the mortgaged goods are returned by them on the basis that they received no benefit from the loan. The credit provider agrees to the resolution. In LAQ's view Joint Account holder" A" ought to have a "V" arrangement from the beginning given the permanent nature of the variation. Joint Account holder "B" should have their account closed and no RHI recorded. It is difficult to see how an account-based approach to credit reporting would accurately reflect each party's obligations."

We recommend that an individual, as opposed to account-based, approach to credit reporting to assist domestic violence victims.

Funding for consumer advocates and direct services to consumers

To ensure a balance of consumer voices and access to dispute resolution, adequate resourcing must be provided to

- Any independent Code developer – particularly for the consumer representatives on a board of such a body
- The Code Monitoring and compliance body tasked with ensuring compliance with the CR Code including adequate resourcing of consumer representatives
- Consumer agencies providing assistance to consumers to enforce their rights.