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VIA EMAIL: trcm@sen.parl.gc.ca

May 30, 2014

Senate Committee on Transport and Communications
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senators:

Re: Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act

We write to provide comments on *Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act* and to make a consequential amendment to another Act, referred to Committee on May 8, 2014.

As set out below, we are concerned that the proposed amendments to s. 7(3)(d.3) of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* are discriminatory against seniors and will increase the risk of financial abuse to this vulnerable sector of the Canadian population.

In summary, the proposed amendments to s. 7(3)(d.3) are plainly targetted at allowing banks to disclose to third parties concerns of financial abuse relating to seniors. These amendments presume that seniors will be mentally capable of deciding whether to disclose their own personal health information to their families, and will be deprived of the right to make a decision (a right that is granted to all other members of society). Furthermore, these amendments do not permit seniors to designate the person to whom disclosure could be made as "next of kin" or "authorized representative". As seniors are often abused by their close relatives or attorneys for property, this creates the very real risk that banks will disclose a concern of financial abuse to the financial abuser.

About the Advocacy Centre for the Elderly (ACE)

ACE is a specialty community legal clinic that was established to provide a range of legal services to low income seniors in Ontario. The legal services include individual and group client advice and representation, public legal education, community

development and law reform activities. ACE has been operating since 1984 and it is the first and oldest legal clinic in Canada with a specific mandate and expertise in legal issues affecting the older population.

ACE staff have had extensive experience in issues related to elder abuse and have been involved in many of the law, policy, and education initiatives related to these issues that have taken place in Ontario over the last 30 years. These have included:

- participation as a member of the Fram Committee, the work of which resulted in the passage of the Ontario *Substitute Decisions Act, 1992*;
- participation as a member of the Elder Health Coalition Elder Abuse Working Group that created a Policy lens tool to evaluate Elder abuse response programmes;
- participation as a member of the Fact Finding Working Group on Prevention and Awareness of the Abuse of Older Adults with Disabilities, 2009-2010 and the Expert Roundtable on Elder Abuse, 2008, both initiatives organized by Human Resources and Social Development Canada;
- participation as an organizer, presenter and facilitator of the Federal-Provincial-Territorial Working Group Consultation on Financial Abuse, Ottawa, June 2008;
- participation as an organizer and presenter at training programmes on Elder Abuse Response for the Ontario Police College;
- organizing and co-chairing of the First National Conference on Elder Abuse and Crime, 1990; and,
- currently participating on the Advisory Committee for the Law Commission of Ontario's Project on Legal Capacity, Decision-making and Guardianship.

Previous Expressions of Concern Regarding Bill S-4:

The proposed amendments to s. 7(3)(d.3) arise from the Canadian Bankers Associations submissions about its concerns regarding financial abuse, "particularly with seniors."¹

Concerns about these amendments to *PIPEDA* have been raised on a number of occasions at meetings with the Minister of Seniors, the Honourable Alice Wong. Both the Canadian Bar Association Elder Law Section and the Advocacy Centre for the Elderly (ACE) have been at three consultation meetings with the Minister over the last three years presenting the same position as outlined herein.

¹ *Submission by the Canadian Bankers Association to Industry Canada: Implementation of the Government of Canada's Response to the Fourth Report of the Standing Committee on Access to Information, Privacy and Ethics on the Personal Information Protection and Electronic Documents Act, January 15, 2008.*

ACE and a number of estates and trusts lawyers from across Canada, including the Chair of the CBA Estates and Trusts section, were invited to present or participate at a conference on Financial Abuse in March 2013 organized by the International Federation on Aging at the request of HRSDC. Government representatives as well as representatives from the Canadian Bankers Association and Senior Counsel from several banking institutions were at this conference. Again the same concerns about this amendment and particularly the disclosure to “next of kin” were discussed. The Canadian Bankers Association and various Government officials, including the Minister of Seniors and her staff, should be well aware of the concerns about this amendment – yet have taken no action.

Commentary on Bill S-4

Section 7(3) of PIPEDA pertains to waiver, in prescribed circumstances, of statutory consent and knowledge requirements. Bill S-4 would amend s. 7(3) of *PIPEDA* to permit banks to disclose information without the knowledge or consent of its customers, when such disclosure is:

(d.3) made on the initiative of the organization to a government institution, a part of a government institution or the individual’s next of kin or authorized representative and

- (i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,
- (ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and
- (iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse;

These proposed amendments raise two concerns:

- 1) The statutory waiver of consent in section 7(3)(d.3)(i) is focussed squarely at older adults and, as such, may be discriminatory; and
- 2) The list of people and organizations that may receive disclosure without consent is unnecessarily broad and not necessarily helpful. In particular the amendment to disclose information to the individuals ‘next of kin’ or “authorized representative” is problematic as financial abusers of older adults are most often people that could be described as a “next of kin” or “authorized representative”.

The right to privacy and the application of the fair information obligations set out in *PIPEDA* should apply equally to all banking customers, regardless of their age. Unless and until an individual is found to lack capacity to manage their property, he or she is free to make decisions regarding finances. If a banker thinks that a given transaction is “uncharacteristic,” his or her first step should not be the disclosure without the consent to the senior’s family. The first step of any concerned banker should always be to discuss the matter directly with his or her client. Astonishingly, the proposed amendments permit bankers to skip this first step even where a senior is capable to deciding for him/herself.

With respect to the list of individuals or organizations who may be notified of the bank's concerns, the list is unnecessarily broad, and potentially harmful. Sadly, the perpetrators of financial abuse, and in particular, the financial abuse of older adults, are often "next of kin" or "authorized representatives".² Disclosure of information to "next of kin" or "authorized representatives" without the knowledge or consent of the alleged victim, as contemplated in (d.3), may alert the perpetrator to the bank's awareness of the abuse, which may increase the likelihood of further harm to the alleged victim. The lack of definition for the terms "next of kin" and "authorized representative" are problematic in that bank customers would not have any prior notice of to whom reports of alleged abuse would be made.

We do not object to reporting concerns of financial abuse to the police. Financial abuse, whether in the in the form of theft, extortion, or fraud, is a crime and should be reported to the police. Indeed, this disclosure is already permitted under s. 7(3) of *PIPEDA* which provides:

- (d) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization
 - (i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or
 - (ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

Police would be captured by the phrase "government institution or part of a government institution" That phrase would also capture reports by banks to Offices of the Public Guardian and Trustee in those provinces, such as Ontario, where there is provincial legislation permitting reporting of alleged financial abuse of mentally incapable adults. In short, financial abuse is a breach of provincial and federal law, and may already be reported to appropriate investigative bodies and government institutions.

² *R. v. Kaziuk*, 2011 ONCJ 851; *R. v. Webb*, 2011 SKPC 181; *R. v. Taylor*, 2012 ONCA 809; *Nguyen-Crawford v. Nguyen*, 2010 CarswellOnt 9492; *Johnson v. Huchkewich*, 2010 CarswellOnt 8157; *McMaster v. McMaster*, 2013 ONSC 1115; see also Law Commission of Ontario, "A Framework for the Law as it affects Older Adults: Advancing Substantive Quality of Older Persons through Law, Policy and Practice" (Toronto: April 2012); Alberta Law Reform Institute, "Enduring Powers of Attorney: Safeguards Against Abuse" (Edmonton: February 2003).

Recommendations:

We recommend that Parliament remove the proposed amendment to s. 7(3)(d.3) of *PIPEDA* from Bill S-4.

In the alternative, if Parliament chooses to proceed with the amendments as drafted -- which we do not recommend -- the bill should be amended to:

- (a) define the terms “next of kin” and “authorized representative”;
- (b) obligate organizations (particularly banks and other financial institutions) to inform customers of this permissive authority to disclose confidential information when abuse is suspected; and,
- (c) require banks to permit customers to indicate to whom they would want the banks to disclose to if abuse was suspected.

Yours very truly,
ADVOCACY CENTRE for the ELDERLY

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