

## **Inquiry into Elder Abuse in Queensland**

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<b>Submitted by:</b>	Clayton Utz Pro Bono Practice
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## **INQUIRY INTO ELDER ABUSE IN QUEENSLAND**

**SUBMISSION BY THE CLAYTON UTZ PRO BONO PRACTICE**

## 1. Introduction

- 1.1 The Clayton Utz Pro Bono practice<sup>1</sup> welcomes the opportunity to make a submission to the Inquiry into Elder Abuse in Queensland (the **Inquiry**).
- 1.2 Since 2005, the Clayton Utz Pro Bono practice has advised and represented 131 people experiencing legal issues involving elder abuse, 86 of whom were residents in Queensland and were assisted by lawyers in our Brisbane office. These clients are referred to us from various community legal centres across Queensland that administer the Seniors Legal and Support Service<sup>2</sup> as they cannot afford to pay for private legal assistance.
- 1.3 In recent years, we have been concerned by the growing number of clients referred to us for assistance. Of the 86 cases conducted by our Brisbane office, 61 were referred to us in the past 5 years alone.
- 1.4 This submission is informed by our Brisbane office's work for these clients on a pro bono basis.

## 2. Scope and limitations of submission

- 2.1 We recognise that elder abuse is a complex and multidimensional issue that requires a multifaceted and coordinated response, involving the government, non-government and private sectors as well as the broader community.
- 2.2 Elder abuse takes many forms.<sup>3</sup> The dynamics of elder abuse are context dependent and may be influenced by factors including gender, sexual orientation, culture and language and disability. Whether an older person experiencing elder abuse is Aboriginal and/or Torres Strait Islander and/or living in rural or remote areas may also shape experiences of elder abuse.<sup>4</sup>
- 2.3 Relatedly, an older person's ability to access legal advice and services is often restricted by physical, personal, economic, social or environmental factors.<sup>5</sup> Older persons with impaired decision-making capacity may also be unable to access legal services without appropriate legal instruments and/or supports in place.
- 2.4 In that context, we note that our experience in responding to elder abuse is very specific, being limited to assisting older people who have been able to access community legal services and are seeking redress for financial abuse through civil legal frameworks.
- 2.5 Many cases referred to us involve the failure of a 'family agreement', or an arrangement between an older person and another party (usually a family member) for the older person to transfer title to their real property, or proceeds from the sale of their real property, or other

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<sup>1</sup> See Pro Bono at Calyton Utz, Clayton Utz (2025) <<https://www.claytonutz.com/about/pro-bono-practice/pro-bono-at-clayton-utz>>.

<sup>2</sup> See *Seniors legal and support service*, Queensland Government (2018) <<https://www.qld.gov.au/seniors/legal-finance-concessions/legal-support/legal-services>>.

<sup>3</sup> See *Abuse of older people*, World Health Organisation (2024) <<https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>>.

<sup>4</sup> See *Elder Abuse - A National Legal Response*, Australian Law Reform Commission (ALRC) (2017) at 2.64 to 2.72 <[https://www.alrc.gov.au/wp-content/uploads/2019/08/elder\\_abuse\\_131\\_final\\_report\\_31\\_may\\_2017.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/elder_abuse_131_final_report_31_may_2017.pdf)>.

<sup>5</sup> See *Elder Abuse Joint Issues Paper*, Queensland Law Society (QLS) (2022) at 10 <[https://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0006/707973/elder-abuse-joint-issues-paper-20220209.pdf](https://www.justice.qld.gov.au/_data/assets/pdf_file/0006/707973/elder-abuse-joint-issues-paper-20220209.pdf)>.



assets, to the other party, in exchange for ongoing support, care and housing. Family agreements are typically not put in writing.<sup>6</sup>

- 2.6 At the point of time when a case is referred to us, the relationship between the parties to a family agreement has broken down, and the older person has lost, or is at risk of losing, their housing arrangements and/or their financial ability to seek alternative arrangements. Generally, the older person has experienced or is experiencing more than one form of elder abuse.
- 2.7 We provide the following de-identified case examples that illustrate the common factual circumstances and legal issues involved in our cases.

#### **Case Example A**

When her marriage ended, Lousie gave the proceeds of the sale of her home to her son, on the understanding that they would buy a house together and live together for the rest of her life.

Louise's son purchased a property and they moved in together. Louise was not involved in the purchasing process and trusted her son to have done everything necessary to put the understanding in place. Their agreement was not recorded in writing, but Louise always believed that she owned the property with her son.

After some time, Louise and her son's relationship broke down due to his verbal and psychological abuse, and she left the property under difficult circumstances. When Louise sought advice from a community legal centre, she discovered that her son was the sole registered owner of the property.

In response to a demand from Louise for the repayment of the money she had given to her son, he asserted that her money had been a gift and that Louise had no entitlement to it or any interest in the property. Louise had no substantial assets and her only source of income was the pension.

By the time Louise was referred to us, it was apparent that she was experiencing some issues with her memory and that she was confused about the timing and sequence of events. Court was not a good option for her.

We assisted Louise in lodging a caveat over the property, based on the equitable interest in the property as a beneficiary of a resulting or constructive trust which had arisen out of her financial contributions towards the purchase and improvement of the property.

Following a successful mediation, Louise's son agreed to repay Louise in return for the withdrawal of Louise's caveat.

#### **Case Example B**

Due to illness, Alice was unable to look after her home. Alice's daughter suggested that Alice should sell her home and build a granny flat on her daughter's property, so that her daughter could assist Alice with her day-to-day living requirements for the rest of Alice's life.

Alice sold her home and used the proceeds of the sale to pay for the construction of a granny flat. Alice also made financial contributions to fund extensive improvements to her daughter's property. While living in the granny flat, Alice contributed to household expenses and cared for her daughter's children, sometimes in a full-time capacity.

The relationship between Alice and her daughter deteriorated significantly and Alice obtained a domestic violence order against her daughter. Her daughter told Alice that she

<sup>6</sup> See ALRC, above note 3 at 1.29; see also QLS, above note 4 at 6.1 to 6.2.



would sell the property and that Alice would receive nothing. Alice could not afford alternative housing arrangements without being compensated for the granny flat. However, she had to leave the property as it was no longer safe for her to stay.

Alice was assisted by a social worker to find temporary public housing while we helped to negotiate with her daughter. Alice had an equitable interest in the property as a beneficiary of a constructive and/or implied or resulting trust, arising out of her financial and non-financial contributions to the acquisition, maintenance and improvement of her daughter's property.

Negotiations with the daughter were protracted and failed to progress, until we indicated that Alice would commence court proceedings, and produced a draft statement of claim. The case subsequently resolved at mediation.

### **Case Example C**

Joanne sold her house and agreed to provide the proceeds of the sale to her daughter, on the understanding that her daughter would then purchase a property at which the two of them would reside for the remainder of Joanne's life.

Joanne and her daughter signed an agreement which recorded that Joanne would provide money to her daughter to purchase a property in exchange for the grant of a life tenancy in a granny flat on the property. Her daughter handled the legal arrangements, and although Joanne understood the agreement, she did not obtain independent legal advice.

After Joanne's daughter purchased a property, Joanne, her daughter and her daughter's adult son all moved in together. Joanne furnished the property but otherwise did not make financial contributions to the property.

A dispute arose when the daughter and grandson expressed a desire to move interstate. Joanne's relationship with them deteriorated significantly, and Joanne's daughter told her that their previous agreement was over.

Joanne's health suffered greatly from the stress of the situation at home, and she was hospitalised on a number of occasions. She feared for her safety and worried that her daughter might commit violence against her.

When Joanne was referred to us, she had moved into a rental property. We became aware that the property had been listed for sale. However, we were unable to rely on the protection of a caveat, as we considered it was likely that Joanne did not have a not a legal or equitable interest in the property.

We therefore assisted Joanne to commence proceedings against her daughter for the money she had provided to her daughter under the agreement and/or damages for breach of contract. This prompted negotiations, which resulted in a settlement for Joanne without having to continue court proceedings.

- 2.8 This submission is informed and limited by our specific experience in providing legal services to older people seeking redress for financial detriment following the failure of a family agreement. Our submission focuses on potential legislative reforms within the Queensland civil legal framework in preventing and responding to financial abuse. Our submission does not explore potential reforms within the State's guardianship and administration framework.



3. **Summary of recommendations**

3.1 Our recommendations identify potential opportunities for further investigation and propose specific reforms within the Queensland civil legal framework that, in our view, would assist in preventing and responding to financial abuse of older people.

3.2 Specifically, we recommend that:

- further detailed consideration be given to potential reforms within the property law legislative framework that streamline the State's civil legal processes for resolving family agreement disputes (**Recommendation 1**);
- further investigation into the need and feasibility of establishing a statutory mechanism by which parties to a family agreement dispute may access alternative dispute resolution processes (**Recommendation 2**); and
- the Queensland Civil and Administrative Tribunal (**QCAT**) be given jurisdiction to resolve disputes arising from family agreements, as an additional avenue for pursuing remedies through the civil legal system (**Recommendation 3**).

4. **Recommendation 1 – Reforming the property law framework**

4.1 As illustrated by the case examples, elder abuse in the form of financial abuse often involves property law issues, almost always resulting from the older person having no registered interest in the relevant property.

4.2 Under the property law legislative framework in Queensland, an instrument does not transfer or create an interest in land until it is registered on title.<sup>7</sup> Priority of interests in land is determined by the order of registration.<sup>8</sup> This means that registration is necessary to both legally establish and protect interests in land, although people may still bring personal claims founded in law or equity against the registered owner.<sup>9</sup>

4.3 Given family agreements are rarely put in writing and are not registered on title, and the current property law framework does not expressly regulate family agreements, the older person in a family agreement dispute is generally in a weaker legal position vis-à-vis the other party, because they have to bring personal claims.

4.4 Older people seeking to recover their contributions to or establish an equitable proprietary interest in a property must bring equitable claims involving significant complexity. In cases where the older person to the family agreement does not have an equitable proprietary interest and only has a licence to occupy the property, they may only bring contractual claims. Relatedly, an older person bringing a contractual claim is not entitled to lodge a caveat over the property to prevent subsequent dealings of the property pending resolution of their claim.<sup>10</sup>

4.5 Regardless of whether the older person is bringing an equitable and/or contractual claim, the courts apply certain presumptions that place the older person in a position of disadvantage. First, the presumption of advancement operates to presume that any transfer of property made from a parent to a child is a gift. Another relevant presumption is that family members do not intend to create legal relations. While these presumptions are rebuttable, the onus is upon the older person to prove that the presumed facts do not apply.

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<sup>7</sup> See *Land Title Act 1994* (Qld) section 181.

<sup>8</sup> See *Land Title Act 1994* (Qld) section 178.

<sup>9</sup> See *Land Title Act 1994* (Qld) sections 184–185.

<sup>10</sup> See *Land Title Act 1994* (Qld) Part 7 Division 2; see also *King v King* [2012] 2 Qd R 448 at [36].



- 4.6 We consider that the civil legal processes for resolving a family agreement dispute could be made more efficient by amendments to the property law legislative framework that expressly deal with older people's interests in family agreements.
- 4.7 First, we consider that a family agreement with the following characteristics should be expressly recognised in legislation as a specific licence to occupy that is capable of registration and protection by lodgement of a caveat:
- (a) the person resides in the property as their principal place of residence; and
  - (b) the person has provided a substantial financial contribution to the acquisition, maintenance or improvement of the property as consideration for the licence to occupy the property for life.
- 4.8 In our view, creating a new statutory licence to occupy that is capable of registration and protection by lodgement of a caveat would avoid the need to pursue complex equitable claims and the application of presumptions that place the older person in a position of disadvantage.
- 4.9 Second, we consider that family agreements with the characteristics set out in paragraph 4.7 above should be also expressly recognised as a residential tenancy agreement (or a specific type of residential tenancy agreement) within the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RTRA Act**).
- 4.10 Under the RTRA Act, a residential tenancy agreement is defined as an agreement under which a person gives another person a right to occupy residential premises as a residence.<sup>11</sup> Residential tenancy agreements, whether or not in writing, are subject to the provisions under the RTRA Act.<sup>12</sup>
- 4.11 In our view, expressly recognising family agreements as residential tenancy agreement within the RTRA Act would provide the older person to such a family agreement access to certain protections under the RTRA Act, and enable the older person to access conciliation services under the RTRA Act.<sup>13</sup>
- 4.12 We recommend that further detailed consideration be given to potential reforms within the property law legislative framework that streamline the State's civil legal processes for resolving family agreement disputes.
5. **Recommendation 2 – Establishing an independent statutory authority**
- 5.1 As noted above, most, if not all, cases that are referred to us involve a failure of a family agreement. Typically, family agreements are not put in writing and do not provide for what happens if the promise of ongoing care, support and housing cannot be fulfilled, or the parties' relationship breaks down.
- 5.2 In our experience, negotiations with the other party to the family agreement generally fail to progress until our client commences (or is about to commence) proceedings. None of the proceedings we have conducted have progressed to hearing, having resolved by mediation shortly after their commencement, either via voluntary participation in a private mediation or via referral from the court.<sup>14</sup>

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<sup>11</sup> See *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) section 12 (**RTRA Act**).

<sup>12</sup> *Ibid.*

<sup>13</sup> See *RTRA Act* Chapter 6; see also *RTRA Act* section 468(g).

<sup>14</sup> See *Uniform Civil Procedure Rules 1999* (Qld) Chapter 4 Part 4.



- 5.3 This means our clients are often subjected to the significant stress of commencing proceedings, despite not ultimately accessing remedies through the courts. Outside of court ordered referrals, we are unaware of any other statutory mechanism by which parties to a family agreement dispute may be compelled to participate in or otherwise gain access to alternative dispute resolution processes.
- 5.4 This is not the case in other disputes, where, for example:
- (a) the Queensland Human Rights Commission, an independent statutory authority, when dealing with complaints made under the *Anti-Discrimination Act 1991* (Qld) or the *Human Rights Act 2019* (Qld), may direct parties to attend conciliation conferences;
  - (b) the Office of the Public Guardian, an independent statutory authority, may, in relation to an adult with impaired capacity for a matter, conduct mediations and conciliations between parties including attorneys, guardians and administrators, if the public guardian considers it appropriate;<sup>15</sup> and
  - (c) the Residential Tenancy Authority, an independent statutory authority, must, on request of a party to a residential tenancy agreement or rooming accommodation agreement, start a conciliation process if the dispute is suitable for conciliation.<sup>16</sup>
- 5.5 In our view, establishing an independent statutory authority – or expanding the functions and powers of an existing independent statutory authority – to deal with family dispute agreements could assist older people to access alternative dispute resolution processes without first having to commence proceedings in court.
- 5.6 We therefore recommend further investigation into the need and feasibility of establishing a statutory mechanism by which parties to a family agreement dispute may access alternative dispute resolution processes.
6. **Recommendation 3 – Expanding QCAT's jurisdiction**
- 6.1 While conducting litigation to resolve family agreement disputes should be a measure of last resort for cases that do not resolve by alternative dispute resolution processes, we consider that various reforms to the civil legal framework could be implemented to improve older people's experience in the litigation process.
- 6.2 Due to the complex legal and evidentiary issues involved in our clients' cases, the causes of action and remedies available to our clients are often based in both law and equity. As a result, our clients must pursue their claims through the District Court and the Supreme Court.<sup>17</sup>
- 6.3 In our experience, pursuing litigation through the courts presents significant practical challenges for many of our clients.
- (a) First, our clients may experience difficulty in producing and/or giving reliable evidence due to challenges with impaired and/or declining cognitive processes such as attention and memory. Such challenges are not helped by the absence of written agreements or other relevant documents.
  - (b) Second, conducting proceedings in the courts is an unsatisfactorily lengthy process, particularly where the older person has lost their housing arrangements and cannot

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<sup>15</sup> See *Public Guardian Act 2014* (Qld) section 12(d).

<sup>16</sup> See *RTRA Act* sections 402–403.

<sup>17</sup> See *Magistrates Court Act 1921* (Qld) section 7; see also *Queensland Civil and Administrative Tribunal Act 2009* (Qld) sections 9, 11 and Schedule 3 (definition of 'minor civil dispute').



afford alternative arrangements and/or where the older person has declining capacity. Unfortunately, two of our clients passed away before their cases were resolved.

- 6.4 Accordingly, we recommend that QCAT be given jurisdiction to resolve disputes arising from family agreements, as an additional avenue for pursuing remedies through the civil legal system.
- 6.5 Specifically, we consider that QCAT should be empowered to hear family agreement disputes concerning any legal and/or equitable interests an older person may have in their current or former place of residence and to award appropriate remedies, including non-monetary, monetary and real property. Broadening QCAT's jurisdiction to encompass family agreements may also facilitate parties' access to conciliation, compulsory conferences and mediation.<sup>18</sup>
- 6.6 Given the complexity involved in family agreement disputes, any broadening of QCAT's jurisdiction must be supported by sufficient funding for the appointment of Senior Members with relevant extensive knowledge, expertise or experience<sup>19</sup> and/or the appointment of District Court and Supreme Court judges as supplementary members.<sup>20</sup> Establishing a division for family agreement disputes would also enable specific practice directions to be made, including about the allocation of members to that division.<sup>21</sup>
- 6.7 We note that this recommendation is generally consistent with one of the recommendations of the Australian Law Reform Commission in its final report, *Elder Abuse—A National Legal Response*, that state and territory tribunals be given jurisdiction to resolve family disputes involving residential property under a family agreement.<sup>22</sup>
- 6.8 This approach has been taken in Victoria when the Victorian Civil and Administrative Tribunal's jurisdiction was expanded in 2006 by amendments to the *Property Law Act 1958* (Vic). Although the expansion was slightly different to that which is proposed in our recommendation, the reforms give the tribunal jurisdiction to hear property disputes between equitable and legal co-owners and make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.

If you wish to discuss any of the matters raised in this submission, please do not hesitate to contact us. We would be delighted to share our experiences further as part of the consultation process.

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<sup>18</sup> See *Queensland Civil and Administrative Tribunal Act 2009* Part 6 Divisions 1A, 2, 3, and 4.

<sup>19</sup> See *Queensland Civil and Administrative Tribunal Act 2009* section 183.

<sup>20</sup> See *Queensland Civil and Administrative Tribunal Act 2009* section 192.

<sup>21</sup> See *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) rule 5.

<sup>22</sup> See ALRC, above note 3 at 6.48 to 6.80.