

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

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## Submission by Hall & Wilcox

### Inquiry into Elder Abuse in Queensland | Legislative Assembly of Queensland

#### 1 Introduction

While elder abuse has many forms, financial abuse by family members or others in positions of trust is one of the forms most encountered by members of the legal profession.

Hall & Wilcox undertakes substantial work in this area, primarily through our firm's Pro Bono & Community practice. We do so in collaboration with other legal practitioners, both at other firms and at community legal centres. In particular, the firm works closely with LawRight, which plays a crucial role in identifying, triaging and referring eligible clients for pro bono legal assistance at commercial law firms.

Based on our own experience, financial elder abuse often arises where older persons have divested themselves of their property (usually their home) or financial assets to benefit younger family members, often by transferring those assets directly. Although we have encountered instances where older people are pressured or misled into such arrangements, many willingly engage in these transactions out of a desire to assist younger family members.

Even without overt coercion, generally there will be some form of encouragement by the younger family member, reflecting the profound conflict of interest that exists where the interests of an older person are directly juxtaposed with the interests of a younger family member and where there is often the temptation of considerable financial gain.

In situations involving coercion or pressure, often the older person is made to feel guilty (for example, for 'spending the younger person's inheritance', or out of a sense of obligation to assist the younger person to enter into the property market). Commonly, the older person's vulnerability is a significant factor, such as where the older person relies on the younger person for care, or will rely on them as they get older, which can contribute to them entering into the arrangement or getting help when difficulties arise.

Anecdotal evidence suggests these cases are extremely widespread and may constitute a substantial portion of the total legal issues affecting legal help-seekers in Queensland.

#### 2 Legal issues

Some of the issues which cause or contribute to the situations described, or which increase the difficulty in resolving such situations, are the following:

##### **Lack of written documentation or formality**

Older persons rarely seek legal advice to formalise arrangements relating to asset transfers to younger family members, and written records or evidence are often absent. This creates considerable difficulty in a legal context in being able to prove the older person's version of events. It also creates considerable risk, as generally the Courts will make factual determinations in absence of clear written evidence based on the perceived credibility of the older person vis-à-vis the younger person.

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Moreover, the lack of written documentation frequently results in significant delays and increased legal costs when older persons seek to enforce their rights, as their claims often then require the making of complex legal arguments based on equitable doctrines.

### **Lack of legal advice**

In most cases, the older person has not sought legal advice prior to entering into the arrangement. Often, this is either because the older person deeply trusts the other person (and accordingly, doesn't consider legal advice necessary), or because the older person has limited awareness of the risks of failing to protect their interests or of the frequency of these arrangements failing.

Even when legal advice is given, some older individuals may choose to disregard it due to familial pressure or trust, as demonstrated in Case Study 4 below. This highlights the need for safeguards beyond mere availability of legal advice, such as a legislative requirement for independent legal advice before high-value asset transfers.

### **Reluctance or fear of taking action**

Where the arrangement or the relationship with the other party has broken down, in many cases the older person is reluctant or fearful of taking action for diverse personal reasons, such as because of concerns for future access to grandchildren, or due to an unwillingness to create legal issues for the younger person (seen as 'getting them in trouble'). We have also encountered situations where the older person has been pressured, or even threatened with physical violence, by the younger person to prevent them seeking legal assistance. These barriers can cause older persons to delay seeking legal intervention, which increases the risk of asset dissipation before any recovery is possible.

### **Insufficient clarity on the legal position**

While there is a relative abundance of court authority regarding such arrangements, and relatively developed legal doctrines (such as relating to failed joint endeavour or common interest constructive trusts), relatively small factual differences in the arrangements can have a significant impact on the older person's rights and the applicable law.

Even for experienced legal practitioners, it is rare to encounter a situation where it is possible to find court authority or an applicable legal doctrine which is a perfect match.

This legal uncertainty disproportionately disadvantages older persons, who bear the legal onus of establishing their case. Often, this results in the older person accepting a settlement that involves them recovering less than what they contributed, as reflected in Case Study 2 below.

### **Structural barriers to the legal system**

Unfortunately, the structure and dynamics of the legal system itself is a considerable barrier for older persons seeking redress.

Often, the older person cannot afford a private lawyer, or quickly exhausts all of their funds on legal expenses before obtaining a resolution due to the high cost of private lawyers. While community legal centres do very important work, these centres are chronically under-resourced and can generally only provide limited or ad hoc assistance rather than full representation. Law firms play an important role by representing clients on a pro bono basis, however the capacity of firms is similarly inadequate to meet the overwhelming demand.

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Separately, the risk, however remote, of the older person having to pay the legal costs of the younger person if they are unsuccessful in court litigation is a barrier to older persons enforcing their rights, and is commonly relied upon by the lawyers acting for the younger person to put pressure on the older person to abandon their claim or to accept an out-of-court settlement (which often involve the older person having to making considerable compromises or concessions).

### **3 Recommendations for reform**

Some possible legislative interventions to address the highlighted issues include:

#### **1 A dedicated Alternative Dispute Resolution pathway**

The creation of an ADR process for financial elder abuse which incorporates reduced complexity and cost compared to the traditional court system could greatly facilitate just outcomes for older persons. This process could be incorporated in the Queensland Civil and Administrative Tribunal or the court system itself. There is an Australian precedent for both in differing contexts.<sup>1</sup>

Ideally, the ADR process would adopt rules relating to legal costs whereby each party is expected to bear their own legal costs, or where legal costs are awarded only in certain circumstances, such as where one party acts unreasonably or vexatiously.<sup>2</sup>

#### **2 A legislated presumption of undue influence or exploitation**

The Parliament could legislate a presumption that a transaction has been procured by undue influence or exploitation of the older person, either where that transaction involves a person over a designated age, or any transaction involving family members.

The transaction would need to be 'rebuttable', meaning that the presumption could be displaced by clear evidence of there being no undue influence or exploitation (such as if the older person has obtained independent legal advice). Such a presumption could facilitate the just and efficient resolution of disputes, as it would greatly strengthen the older person's legal position in the common situation where there is minimal or no written evidence regarding the arrangement with the younger family member.

Given that many older persons willingly enter into financially risky arrangements out of love and trust, a rebuttable presumption of undue influence could provide crucial protection without completely restricting decision-making autonomy.

#### **3 Mandatory written agreements for transfers of property or financial assets between family members**

The Parliament could legislate to require that transfers of property or financial assets be required to be recorded in writing. Where this does not occur, the Parliament could legislate an appropriate implication: for example, the transfer

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<sup>1</sup> In Victoria, the Victorian Civil and Administrative Tribunal has jurisdiction to hear disputes between co-owners of real property, which would cover some instances of elder abuse financial exploitation. Similarly, many Courts in Australia including the Magistrates' Court of Queensland have the power to refer certain civil disputes to arbitration, which is generally quicker and more cost effective than the traditional court process.

<sup>2</sup> For an example, see the costs rules in employment claims: section 570 of the *Fair Work Act 2009* (Cth).

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could be made to be voidable at the election of the older person (able to be set aside or reversed, at their discretion), or could create liability to a civil penalty.

This would again strengthen the older person's legal position, and decrease the prevalence and complexity of resulting legal disputes. Such a requirement could also prompt the parties to ensure they have clearly thought out possible eventualities, such as relationship breakdowns or the need for the older person to enter out-of-home care, which are commonly a prevailing factor contributing to disputes arising.

A clear disadvantage of mandatory written agreements is the increased cost, however we consider this would generally be justified in the context of the risk and the value of the assets involved (such as a house).

#### **4 Mandatory independent legal advice**

Similarly, the Parliament could require that the older person (or both parties) be required to obtain legal advice prior to entering into transactions involving the transfer of their property or assets.

If this does not occur, the transaction could, for example, be voidable or attract liability for a civil penalty. This would also have the effect of creating an additional avenue of redress for older persons who have been provided with negligent advice, as the older person may then have an actionable claim against their solicitor.

#### **5 Civil penalties for financial elder abuse**

A civil pecuniary penalty regime could discourage the younger party from seeking to take advantage of their older relative. It could also create a form of redress if the older person is able to seek that the penalties be paid to the older person directly, which commonly occurs in employment claims where an employer has contravened a civil remedy provision of the *Fair Work Act 2009* (Cth).

#### **6 Mandatory reporting regime**

The Parliament could introduce mandatory reporting obligations, for example, for financial institutions, lawyers, or accountants who become aware of suspicious transactions or arrangements that could involve financial elder abuse. Similar mandatory reporting regimes exist in relation to other vulnerable cohorts, such as the obligation of certain professions to report suspected instances of child abuse in Queensland. This intervention may only be effective in combination with another intervention, such as the introduction of an Ombudsman.

#### **7 Ombudsman**

The Parliament could introduce an Ombudsman to take action in response to instances of financial elder abuse, of which similar models exist in different contexts.

For example, the Fair Work Ombudsman (**FWO**) exists to receive complaints from employees relating to breaches of employment laws, institute investigations and even issue legal proceedings on behalf of employees. The FWO has the power to issue compliance notices, which can facilitate subsequent legal action taken by it (because the FWO then only needs to establish that the compliance

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notice was not complied with, rather than establish that the underlying breaches of the employment legislation occurred).

#### **4 Key considerations for reform**

It is crucial that any legislative action to address financial elder abuse gives due consideration to respecting the autonomy of older persons, and to balancing the clear legal need with avoiding the creation of unnecessary bureaucracy, complexity or cost.

Overly paternalistic approaches may lead to unintended consequences, such as depriving the older person of economic freedoms enjoyed by younger members of society, or preventing the older person from obtaining the care they need from family members due to disproportionate bureaucracy, noting that there is a place for genuine and ethical 'asset for care' type arrangements between family members.

Given a major factor in financial elder abuse cases is the significant power imbalance between the older person and the younger family member, particularly when the older person relies on the younger person for care, legislative reforms must acknowledge that even seemingly consensual transactions can occur under implicit pressure. Policy solutions should include preventative safeguards rather than relying solely on retrospective legal action, which often fails to provide meaningful recovery.

#### **5 Case studies**

Below are a selection of true case studies<sup>3</sup> from our work assisting clients with issues relating to financial elder abuse.

##### **Case study 1**

In the late 1990s, CS1 wished to purchase a house using a deposit she had inherited from her late father. However, despite being able to afford the necessary loan repayments, CS1 did not qualify for a loan due to her sole income being the Aged Pension.

CS1's son volunteered to purchase the property and obtain the loan in his name, with the agreement being that CS1 would pay all of the loan repayments and all of the other outgoings relating to the property. CS1 agreed, but the agreement was not recorded in writing, and CS1 did not obtain legal advice. CS1 found a property she liked, and for 25 years, she lived there and treated the property as her own, meeting all expenses. When asked about the balance of the loan, her son would prevaricate or provide vague answers.

After 25 years, CS1 told her son she would not be paying any further loan repayments, as she understood the loan ought to have been repaid by then. Her son then issued a notice to vacate, claiming there had never been an agreement for CS1 to own the property and that she had always been a tenant.

CS1 has been required to issue court proceedings, which are currently on foot.

##### **Case study 2**

In the early 2000s, CS2's daughter, who was a financial planner, convinced her to invest in a speculative investment managed through a unit trust. CS2's daughter proposed that they

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<sup>3</sup> Certain identifying details have been modified to preserve the anonymity and confidentiality of our clients.

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would both invest, and each purchase one unit in the trust. CS2 agreed, but unbeknownst to CS2, her daughter registered both units in her own name (and not CS2's name).

A few years later, CS2's daughter suggested that, rather than making her mortgage repayments in cash at the bank branch, CS2 could provide access to her bank account to the daughter, who would then pay the mortgage using online banking.

Over the next decade, CS2 made unauthorised cash withdrawals from the bank account totalling approximately \$70,000. CS2 did not regularly review her bank statements, and did not notice the transactions, despite being of relatively modest means.

By the time CS2 discovered that her daughter had registered the unit trust investment in her own name, and that she had been making the unauthorised withdrawals, CS2 sought legal advice from Hall & Wilcox. We were able to negotiate with CS2's daughter to have the unit trust investment transferred back into CS2's name. However, unfortunately, because of how much time had passed and as the withdrawals were made in cash, we were unable to obtain sufficient evidence that the daughter had made the unauthorised withdrawals to enable us to issue court proceedings on behalf of CS2.

### **Case study 3**

About 15 years ago, CS3's daughter asked CS3 to move up to Far North Queensland to help with her grandchildren. CS3 agreed, and sold her house in Victoria and moved to Queensland.

Shortly thereafter, CS3 was diagnosed with a life-threatening illness, and suffered from extremely poor health for the following few years. During this time, her daughter and her son-in-law convinced CS3 that she should purchase a house in Far North Queensland for CS3 to live in. Because CS3 intended to bequeath the house to her daughter in her Will, her daughter convinced her that it would be preferable for the house to be purchased in the daughter and son-in-law's names rather than in CS3's name, with CS3 to be permitted to live there for the remainder of her life. CS3 did not seek legal advice, and the agreement was not recorded in writing.

Partly due to the significant stress caused by her health issues, CS3 agreed to her daughter's proposal, and provided the purchase money for the property in Far North Queensland to her daughter, which she could afford to purchase outright without a mortgage. The money represented the entirety of CS3's 'nest egg'.

Rather than using the money for the house, however, her daughter spent most of the money, and obtained a mortgage for approximately 80% of the property's value to purchase the house.

Recently, the daughter and son-in-law have split up, and are involved in family law proceedings. The mortgage had not been paid in some time, and CS3 was evicted by the mortgagee, who sought to exercise its power of sale. Once the mortgage is paid, it appears there will be minimal remaining equity in the property.

CS3 has filed an application to intervene in the family law proceedings to seek an order that any net sale proceeds from the sale of the property be paid to her rather than to her daughter and son-in-law, and compensation for the balance of the money CS3 had provided them for the property purchase. The daughter and son-in-law deny that CS3 has any interest in the property and say the money she provided was a gift. The application has yet to be determined.

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With no significant assets or funds, CS3's daughter and son-in-law are unlikely to be in a position to compensate CS3. It is likely that CS3 will recover only a small portion - estimated at \$5,000 to \$10,000 of the \$200,000 she contributed - contingent on proving the money was not provided as a gift.

#### **Case study 4**

Since around 1990, CS4 lived and owned her house with her husband in the Redlands Bay area of Brisbane. After her husband passed away in around 2010, CS4, then retired and on the Aged Pension, found herself unable to continue to afford her mortgage, which was approximately 1/3 of the value of the property.

CS4 reached an agreement with her son and daughter-in-law that they would purchase a 1/3 interest in the property, which they would fund by obtaining their own mortgage, leaving CS4 debt-free. It was intended that the son and daughter-in-law, and their children, would come and live with CS4 at the property.

Unfortunately, to qualify for a mortgage, the bank required that the son and daughter-in-law own the entirety of the property. The solicitor that acted for CS4 in relation to the transfer warned her that there were significant risks associated with transferring the entire property to her son and daughter-in-law, particularly if the agreement was not recorded in writing, but CS4 decided that she was prepared to trust her son and daughter-in-law and disregarded the advice.

Several years later, CS4's son and daughter-in-law separated, and her son left the property. CS4's daughter-in-law became increasingly violent to CS4, and eventually forced her to leave the property.

CS4 has issued court proceedings against her son and daughter-in-law, who have denied that CS4 has any interest in the property.

#### **Case study 5**

In around 2010, CS5 received an inheritance of around \$200,000 from her late mother. CS5 had no other assets or savings, and was then living on the Aged Pension and renting.

CS5 agreed with her daughter and son-in-law that CS5 would provide all of the inherited money to her son-in-law, who owned a property outside of Brisbane. It was agreed that the money would be used to construct a 'granny flat' on the property, which CS5 would be permitted to live on for the rest of her life. The daughter and son-in-law lived in the main house on the property.

CS5 did not obtain legal advice, and the agreement was not recorded in writing.

Several years later, the daughter and son-in-law separated, and the daughter left the property. For several months, CS5 remained on the property while her son-in-law engaged in increasingly oppressive and threatening behaviour to force her out. Eventually, the son-in-law permanently disconnected the electricity to the granny flat, and CS5 was forced to vacate.

CS5 initiated court proceedings against her son-in-law, resulting in a settlement where she was to be repaid most of her contribution, in instalments. However, CS5 has since defaulted in making the agreed instalments, and CS5 has been required to commence further legal proceedings to enforce the settlement agreement.