

HOUSING, OLDER PEOPLE AND ABUSE IN AUSTRALIA

ABSTRACT

Private home ownership brings advantages to older people because it provides a source of wealth and ontological security. Increasing home values and the accumulation of assets — however modest — over time has provided many older people with a comfortable ‘nest-egg’ in later life that serves as a buffer against the vagaries of financial insecurity in older age. However, an unfortunate downside to these outwardly fortunate circumstances is that older people may become vulnerable to various forms of elder abuse, often rooted in the acquisitiveness and expectations of those in a relationship of trust with them. Indeed, in an environment of declining housing affordability and constrained economic circumstances, the home can become a site of competing interests leaving the older person in conflict with family, which can make them vulnerable to abuse. This article will explore elder abuse perpetrated by family members who are associated with the older person’s ownership of a private dwelling from two perspectives: (1) the home as a setting; and (2) the home as a target for abuse. The article also exposes the disconnect between prevention strategies and the implementation of meaningful legal responses to this issue — a challenge that will only intensify with our ageing population.

I INTRODUCTION

For many older Australians, private home ownership has been both an aspiration and an achievable goal.¹ The Australian Bureau of Statistics Survey of Income and Housing revealed a strong trend toward home ownership among older Australians with almost 82% of individuals aged 70 to 74 owning their homes.²

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¹ Note that ‘older person’ refers to a person who is aged 65 or older in this article. This is the definition adopted by Lixia Qu et al, *National Elder Abuse Prevalence Study* (Final Report, Australian Institute of Family Studies, 22 July 2021) xiii.

² Australian Bureau of Statistics, *Housing Occupancy and Costs, 2019–20* (Catalogue No 4130.0, 25 May 2022). See also ‘Home Ownership and Housing Tenure’, *Australian Institute of Health and Welfare* (Web Page, 12 July 2024) <<https://www.aihw.gov.au/reports/australias-welfare/home-ownership-and-housing-tenure>>.

The benefits of home ownership are wide-ranging.³ As an asset, a house can offer financial security whereby accumulated wealth can be utilised to service changing needs throughout retirement. Most older people prefer to reside in their own homes for as long as possible, with their home 'inextricably linked to personal identity, social status and [the] sense of having control over one's life'.⁴ Homes provide security of housing, tenure, and associated health and social benefits. This security is well documented, with numerous studies concluding that older people in their own homes have the highest levels of ontological security compared to those in longer term rentals or permanent public housing.⁵ Similarly, as older people place more value on the security and constancy of their home, circumstances that threaten a person's security of tenure will adversely impact their wellbeing.⁶ Moreover, art 11 of the *International Covenant on Economic, Social and Cultural Rights*⁷ provides for the right to an adequate standard of living, including adequate housing. 'Housing' has been interpreted as encompassing not only shelter, but 'the right to live somewhere in security, peace, and dignity'.⁸ Home as a 'place' offers security, permanence and continuity while maintaining connection with family and

³ This is not to ignore that there are also risks associated with home ownership in later life. They include costs of maintenance, mortgage stress exacerbated by diminishing income and risks of foreclosure in uncertain economic times: Alexander Hermann, Christopher Herbert and Jennifer Molinsky, *The Association Between High Mortgage Debt and Financial Well-Being in Old Age: Implications for the Financial Education Field* (Report, February 2020), cited in Christopher Herbert and Jennifer H Molinsky, 'Home Ownership Amongst Older Adults: A Source of Stability — or Stress?' (2020) 44(2) *Generations Journal* 1, 5.

⁴ Sue Adams, 'No Place Like Home? Housing Inequality in Later Life' in Paul Cann and Malcolm Dean (eds), *Unequal Ageing: The Untold Story of Exclusion in Old Age* (Policy Press, 2009) 77.

⁵ See, e.g., Rosemary Hiscock et al, 'Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure' (2001) 18(1–2) *Housing, Theory and Society* 50. See also: Eileen Webb, 'Housing an Ageing Australia: The Ideal of Security of Tenure and the Undermining Effect of Elder Abuse' [2018] (18) *Macquarie Law Journal* 57; Philippa Howden-Chapman, Louise Signal and Julian Crane, 'Housing and Health in Older People: Ageing in Place' (1999) 13(13) *Social Policy Journal of New Zealand* 14; World Health Organisation, *Health Principles for Housing* (1989); Mortimer Lawton and Jacob Cohen, 'The Generality of Housing Impact on the Well-Being of Older People' (1974) 29(2) *Journal of Gerontology* 194.

⁶ Sheelah Connolly, 'Housing Tenure and Older People' (2012) 22(4) *Reviews in Clinical Gerontology* 286, 288.

⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11. See also the emphasis on living environments in: World Health Organisation, *United Nations Decade of Healthy Ageing: Plan of Action 2021–2030* (Report, 14 December 2020); Norah Keating, 'A Research Framework for the United Nations Decade of Healthy Ageing (2021–2030)' (2022) 19(3) *European Journal of Ageing* 775.

⁸ Committee on Economic, Social and Cultural Rights, *General Comment No 4 (1991): The Right to Adequate Housing (Article 11(1) of the Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 6th sess, UN Doc E/1992/23 (13 December 1991).

community.⁹ These factors are just as, if not more, important to an older person as a place reflecting one's ideas and values, or as an indicator of social status.¹⁰

While the advantages of home ownership are well documented, regrettably, an older person's home can also become a source of exploitation and motivation for people to commit elder abuse, particularly financial and psychological abuse. We illustrate this dilemma through an examination of the home both as a *setting for* and *target of* abuse.

The taxonomy we have used is not absolute as the categories tend to overlap. However, the classification is useful in examining the scope of abuse connected to the home. The first considers examples of when the 'setting' of the home provides the opportunity for exploitation or elder abuse. This 'situational' abuse includes abuse exacerbated by the confinement and isolation of individuals brought about during the COVID-19 pandemic. Of course, abuse arising in this context is not confined to privately owned dwellings (for instance, rental accommodation). However, we examine the potential for abuse in the home environment, in contrast to an institutional setting. Another instance where the setting of the home provides the opportunity for abuse is when invitees — family members or friends who have been welcomed to stay temporarily — subsequently refuse to leave. In some circumstances, they may claim an entitlement at law to continue to reside in the dwelling. Obduracy demonstrated by a refusal to leave and the disregard of the home owner's exercise of choice could also indicate a propensity to engage in other forms of elder abuse, be it physical, verbal, financial or psychological.

The second avenue we explore are those forms of financial abuse that target the 'house' as a financial asset. 'Inheritance impatience' is a term describing when adult children, who experience fiscal or mortgage stress, consider tapping into their anticipated inheritance as a solution to their problems. A submission to the Victorian Royal Commission into Family Violence recognised inheritance impatience in the following terms:

Financial elder abuse may begin with the best intentions — with a child acting as their mother's financial power of attorney thereby managing her finances. This can quickly progress to a sense of entitlement, particularly when adult children have mortgages or debts ... The children may justify their actions by saying: 'Mum doesn't need money now, and it's going to be mine anyway'.¹¹

As a valuable asset, the family home is a prime target for such abuse. While parents are often willing to assist adult children financially, a sense of entitlement to a parent's property, or opportunistic exploitation can result in transactions being

⁹ Lorna Fox O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Bloomsbury Publishing, 2007) 4.

¹⁰ Janine Wiles et al, 'The Meaning of "Aging in Place" to Older People' (2012) 52(3) *Gerontologist* 357, 360–2.

¹¹ *Royal Commission into Family Violence* (Final Report, March 2016) vol 5, 71.

undertaken as consequence of pressure, undue influence or unconscionable conduct (or indeed fraud). Once a transaction is complete, unless the older person has the resilience to commence proceedings to recover the property, this behaviour is likely to be both financially and psychologically devastating. Under this conceptualisation, we also consider the rise in disputes involving family accommodation agreements. Although transfers of property pursuant to these agreements are not (necessarily) of themselves examples of elder financial abuse, these arrangements can be undertaken pursuant to undue influence. Even when the older person willingly consents to transfer property, the denial of restitution of any property or equivalent compensation if the arrangement fails can fall within the accepted definition of elder financial abuse. The pitfalls associated with these arrangements can, if they fail, leave the ageing parent at best in a precarious legal position, or at worst, homeless.¹²

The loss of one's home through financial abuse or a threat to the security provided by one's home, can have devastating consequences. One study focussing on the impact of the loss of one's home in later life stated that the

[h]ome has become so integral to life itself and such an intimate part of the older adult's being that when older adults lose their home, they also lose the place closest to their heart, the place where they are at home and can maintain their identity, integrity and way of living.¹³

Yet, despite the critical importance of these considerations and the serious financial and emotional consequences for older individuals, the law often remains ill-equipped to address these challenges. Numerous inquiries — including the Australian Law Reform Commission's extensive examination of legal shortcomings in responding to elder abuse¹⁴ — have led to arguably piecemeal solutions, even following the introduction of the *National Plan to Respond to the Abuse of Older Australians*

¹² Caitlin Fitzsimmons, 'Elderly People at Risk of Homelessness When "Granny Flat" Agreements Fail', *Sydney Morning Herald* (online, 23 February 2020) <<https://www.smh.com.au/money/super-and-retirement/elderly-people-at-risk-of-homelessness-when-granny-flat-agreements-fail-20200221-p5439t.html>>; Eileen Webb and Teresa Simes, 'Housing Stress and Homelessness Among Older Women: An Australian Perspective' (Paper presented at Law and Society Association, 2019); Teresa Simes, 'Identifying Vulnerability: The Argument for Law Reform for Failed Family Accommodation Arrangements' (2019) 12(1) *Elder Law Review* 1 ('Identifying Vulnerability'); Teresa Simes and Eileen Webb, 'What Role for Caveats in Protecting an Older Persons Interests Under a Failed Family Accommodation Arrangement?' (2021) 29(3) *Australian Property Law Journal* 352 ('Caveats'); Patricia Lane, 'Reform in Elder Law — Granny Flats' (2018) 92(6) *Australian Law Journal* 413, 413.

¹³ Catharina Gillsjö, Donna Schwartz-Barcott and Irène von Post, 'Home: The Place the Older Adult Cannot Imagine Living Without' [2011] (11) *BMC Geriatrics* 1, 1.

¹⁴ Australian Law Reform Commission, *Elder Abuse — A National Legal Response* (Final Report No 131, May 2017).

(‘*First National Plan*’).¹⁵ There are ongoing consultations for the second.¹⁶ The recent evaluation of the *First National Plan* has found that various Commonwealth, state and territory governments have engaged in actions such as

funding service provision, including awareness-raising campaigns, education and training, advocacy, legal assistance, legislative and policy reforms, aged care reforms, including quality and safeguarding frameworks, and establishing investigative agencies.¹⁷

However, a closer examination of these government actions reveals that the focus has been in the areas of education and prevention, while minimal legal responses have been introduced to address the abuse once it has occurred.

Furthermore, upon review of Focus Area 2 (enhance legal frameworks and adult safeguarding responses) in the consultation draft of the *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (‘*Second National Plan*’),¹⁸ a critical gap emerges in the proposed approach to elder abuse. While the draft outlines several priority actions, with the exception of priority 2.4 (strengthening safeguarding frameworks) and partially 2.3 (considering Disability Royal Commission recommendations),¹⁹ the proposed measures centre predominantly on education and prevention strategies. This approach, while valuable, neglects circumstances where abuse has already led to serious consequences for the older person — for example, interference with or loss of the home. Like the results in the *First National Plan*, the *Second National Plan* also arguably lacks investigation of robust mechanisms for legal intervention and access to justice in active cases of elder abuse.

As discussed elsewhere in this article, even the proposed safeguarding systems, though welcome additions, may prove only marginally effective when confronting matters that require direct legal intervention. This creates a significant gap in the protection framework, leaving victims of ongoing abuse with insufficient pathways to justice.²⁰

Put simply, this gap in legal protection remains largely unaddressed despite ongoing policy development efforts. Indeed, in its submission to the *Second National Plan*,

¹⁵ Council of Attorneys-General, *National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Report, 8 July 2019) (‘*First National Plan*’).

¹⁶ Attorney-General’s Department, *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (Public Consultation Draft, 12 December 2024) (‘*Second National Plan*’).

¹⁷ Australian Institute of Family Studies, *Findings from the Evaluation of the National Plan to Respond to the Abuse of Older Australians (Elder Abuse) 2019–2023* (Research Snapshot, July 2024) 2 (emphasis added).

¹⁸ *Second National Plan* (n 16) 49.

¹⁹ See *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, 29 September 2023) vol 8.

²⁰ Ben Livings, Eileen Webb and Haemish Middleton, *Achieving the Right(s) Balance: Towards Effective Adult Safeguarding in South Australia* (Report, 2021).

the Law Council of Australia suggested an increase in access to support for victims of abuse including: (1) increases in legal support and government compensation; and (2) a move to simplify access to compensation and counselling for victims of crime.²¹ Action plans could address the impact and consequences of abuse and mistreatment of older people.²² It was also noted that the draft *Second National Plan* should also consider providing more accessible legal remedies to assist in the removal of adult children who are persons causing financial, psychological and/or physical harm, from their older parents' family home, when they have no legal right to remain there.²³

II ELDER ABUSE

'Elder abuse' is an umbrella term that encompasses a broad range of behaviours, including psychological, physical, sexual, financial, and chemical abuse, as well as neglect.²⁴ There is no single agreed definition of 'elder abuse', and the varied conceptualisations are informed by the different frameworks and contexts through which the phenomena is being analysed.²⁵ A prevalence study conducted by the Australian Institute of Family Studies defined elder abuse as

a single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person.²⁶

The recent public dialogue and media attention given to elder abuse has brought the issue to the forefront of our social conscience, and it is regarded by the Australian public as a significant problem demanding urgent solutions.²⁷ While experts

²¹ Law Council of Australia, Submission to the Attorney-General's Department (Cth), *National Plan to End the Abuse and Mistreatment of Older People 2024–2034* (26 March 2025) 12 [33].

²² Ibid [34]

²³ Ibid [33].

²⁴ Melanie Joosten, Freda Vrantidis and Briony Dow, *Understanding Elder Abuse: A Scoping Study* (Report, June 2017) 6.

²⁵ Rae Kaspiew, Rachel Carson and Helen Rhoades, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35, Australian Institute of Family Studies, November 2018) 1–3; Briony Dow and Melanie Joosten, 'Understanding Elder Abuse: A Social Rights Perspective' (2012) 24(6) *International Psychogeriatrics* 853; Somes, 'Identifying Vulnerability' (n 12) 1–19.

²⁶ Qu et al (n 1) 17.

²⁷ See, e.g.: Eileen O'Brien, Catriona Stevens and Loretta Baldassar, 'About 1 in 6 Older Australians Experiences Elder Abuse. Here Are the Reasons They Don't Get Help', *The Conversation* (online, 10 November 2023) <<https://theconversation.com/about-1-in-6-older-australians-experiences-elder-abuse-here-are-the-reasons-they-dont-get-help-216827>>; Briohny Kennedy and Joseph Ibrahim, 'Safe at Home? We Need a New Strategy to Protect Older Adults From Violent Crime', *The Conversation*

from disciplines such as gerontology, social work and medicine have for many years recognised the phenomenon of elder abuse, ‘abuse’ is not a legal concept. Indeed, relative to other disciplines, the analysis of elder abuse from a legal perspective is in a nascent stage. So, when we categorise behaviour that reaches the doctrinal requirements of liability (for example, undue influence or unconscionable conduct) as elder abuse, we interpret legal doctrines through the lens of a different conceptual framework. In many ways, this perspective highlights the shortcoming of the law when applied to elder abuse scenarios. To illustrate this, the burden of proving a transaction has been unduly influenced requires the older claimant to prove the transaction was an exercise of their free will,²⁸ and ‘so substantial, or so improvident, as not to be reasonably accounted for on the grounds of friendship, relationship, charity or other ordinary motives on which ordinary persons act’.²⁹ In the context of family relationships it is often difficult — except in the most egregious factual circumstances — to prove whether the motivation for a transaction is natural love and affection, generosity, obligation, affection, familial responsibility or guilt, emotional blackmail, pressure, or fear. The burden of proving the elements of the cause of action, along with the legal processes necessary to challenge a transaction and the potential to cause upset within the family unit, deter many older people from undertaking legal action. Consequently, while we recognise certain behaviours as falling within the definition of ‘elder abuse’, addressing such behaviour through legal avenues for many is simply unrealistic or impossible. Under these conditions, when the transactions involve their home, the older person is at risk of losing their most valuable asset and/or their place of ontological security.

Characterising these transactions as a form of elder abuse does have advantages. ‘Abuse’ locates the phenomenon within the wider field of familial abuse — for instance, domestic abuse and child abuse — with theories developed in these fields assisting in identifying the appropriate scope of elder abuse for legal analysis.³⁰ Furthermore, attention directed at examples of elder abuse has focussed society’s

(online, 15 July 2021) <<https://theconversation.com/safe-at-home-we-need-a-new-strategy-to-protect-older-adults-from-violent-crime-163260>>; Floralyn Teodoro, ‘A “Silent Crisis” Unfolds: Older Women Allegedly Killed in Domestic Homicides’, *Your Life Choices* (online, 27 January 2025) <<https://www.yourlifechoices.com.au/crime/a-silent-crisis-unfolds-older-women-allegedly-killed-in-domestic-homicides/>>.

²⁸ *Thorne v Kennedy* (2017) 263 CLR 85, 119 [88] (Gordon J).

²⁹ *Quek v Beggs* (1990) 5 BPR 11, 761, 764 (McLelland J), cited in *Courtney v Powell* [2012] NSWSC 460, [38] (Ball J). See also *Bank of New South Wales v Rogers* (1941) 65 CLR 42, 54 (Starke J). However, even transactions that are not manifestly disadvantageous may still be voidable through undue influence if it can be shown the weaker party lacked an independent and voluntary will: *Baburin v Baburin* [1990] 2 Qd R 101.

³⁰ See, e.g., Briony Dow et al, ‘Barriers to Disclosing Elder Abuse and Taking Action in Australia’ (2020) 35(4) *Journal of Family Violence* 853, 853–5. But see Australian Association of Gerontology, Submission No 23 to the Parliament of New South Wales, *Inquiry into Elder Abuse in New South Wales* (15 November 2015), who observe that ‘making comparisons between elder abuse and child abuse, and drawing on responses used in child protection, is ageist and generally not appropriate’: at 4.

attention, and importantly political attention, on strategies to educate people, detect abuse and minimise its effect.³¹ Consequently, the topic is placed within the broader political aims of addressing abuse, such as the need for a coordinated national response to the problem.³² Heightened media attention raises awareness and older people may be encouraged to exercise greater caution before undertaking financial transactions by, for example, obtaining legal advice beforehand.³³ In addition, aligning the topic with elder abuse can act as a deterrent to those whose aim is to take unfair advantage of an older party.

Nonetheless, the findings of the 2021 National Prevalence Report conducted by the Australian Institute of Family Studies concluded that one in six older people have been subject to elder abuse, and the main perpetrators of that abuse are adult children.³⁴ For financial abuse, children are the largest perpetrator group constituting 33%.³⁵ Sons are almost two times more likely than daughters to perpetrate abuse.³⁶ While the National Prevalence Report does not distinguish elder financial abuse relating specifically to the home as a specific subset,³⁷ by drawing on decided cases we are able to identify instances of elder abuse where the home or house is an integral part of the abusive conduct.³⁸

The detection and reporting of any form of elder abuse can be problematic, however, financial abuse poses particular problems when there is difficulty distinguishing between legitimate gifting and financial abuse. Indeed, some commentators estimate that for every reported case of elder financial abuse, a significant number

³¹ Australian Law Reform Commission (n 14); Australian Institute of Family Studies, *Evaluation of the National Plan to Respond to the Abuse of Older Australians* (Web Page, 2024) <https://aifs.gov.au/research_programs/elder-abuse-research/evaluation-national-plan-respond-abuse-older-australians>.

³² Wendy Lacey, 'Neglectful to the Point of Cruelty?' (2014) 36(1) *Sydney Law Review* 99, 104; Australian Law Reform Commission (n 14) 203–30.

³³ Law Council of Australia, *Guide for Legal Practitioners in Relation to Elder Financial Abuse* (Report, 15 June 2023); Kelly Purser et al, 'Strengthening the Response to Elder Financial Abuse and the Proposed Enduring Power of Attorney Register: Suggested First Steps' [2023] (2) *University of New South Wales Law Journal Forum* 1.

³⁴ Qu et al (n 1).

³⁵ Australian Institute of Family Studies, *Elder Abuse in Australia: Financial Abuse* (Research Snapshot, August 2022) 2.

³⁶ Qu et al (n 1) 72.

³⁷ Ibid.

³⁸ *McFarlane v McFarlane* [2021] VSC 197 ('*McFarlane*'); *Badman v Drake* [2008] NSWSC 1366; *Farrell v Stephenson* [2008] NSWSC 1350; *Fisher-Pollard v Fisher-Pollard* [2018] NSWSC 500 ('*Fisher-Pollard*'). See generally Eileen O'Brien and Teresa Somes, 'Property, Housing, and Aged Care' in Nicole Graham, Margaret Davies and Lee Godden (eds), *The Routledge Handbook of Property, Law and Society* (Routledge, 2022) 165.

remain unreported.³⁹ A recent study into risk factors associated with financial abuse reported that: (1) financial abuse is most prevalent where the victim needs daily support; and (2) that older people are most vulnerable to such abuse in their own home.⁴⁰ We know that older people are 10 times more likely to be living with a child or family member than a non-family member,⁴¹ but if the older person is reliant on the abuser for care, they may be reluctant to draw attention to any abuse for fear of being moved into institutionalised care.⁴²

Further, abuse occurring within the confines of the home can be hidden from outsiders or indeed denied by the older person for fear of creating family conflict.⁴³ In particular, the complexity of the relationship between a parent and child, and the feeling of parental failure associated with being a victim of abuse by one's own child can inhibit many people from reporting abusive behaviour.⁴⁴ Without reporting, the law can do little to assist in these circumstances. Even then, as mentioned above, the behaviour must be seen to fall within recognised legal principles to enable any relief to be granted.

III THE HOME AS THE SETTING FOR ELDER ABUSE

A *The Impact of the COVID-19 Pandemic*

During the height of the COVID-19 pandemic and its aftermath, much was written concerning the challenges posed by the pandemic for those in aged care facilities. Studies indicated that aged care residents were forced into isolation, suffering

³⁹ Thomas L Hafemeister, 'Financial Abuse of the Elderly in Domestic Settings' in Richard J Bonnie and Robert B Wallace (eds), *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (National Academies Press, 2003); Norman Hermant, "'Significant, Insidious" and Often Unreported, Financial Elder Abuse is Increasing, Lawyers Say', *Australian Broadcasting Corporation* (online, 5 August 2022) <https://www.abc.net.au/news/2022-08-05/lawyers-say-financial-elder-abuse-in-families-significant/101300242?utm_source=sfmc&utm_medium=email&utm_campaign=abc_news_newsmail_am_sfmc&utm_term=&utm_id=1919044&sfmc_id=305497502>.

⁴⁰ Tracey West, 'Risk Factors Associated with Elder Financial Abuse' (2021) *SSRN Electronic Journal* 1, 3–5.

⁴¹ Australian Bureau of Statistics, *Reflecting a Nation: Stories From the 2011 Census: Where Do Australia's Older People Live?* (Catalogue No 2071.0, 21 June 2012) cited in Australian Law Reform Commission, *Elder Abuse* (Discussion Paper No 83, December 2016) 157 [8.56].

⁴² Dow et al (n 30) 854.

⁴³ Ibid. See, e.g.: *McFarlane* (n 38); Jill Wilson et al, 'Older People and Their Assets: A Range of Roles and Issues for Social Workers' (2009) 62(2) *Australian Social Work* 155, 160.

⁴⁴ Fran Ottolini and Vicki Edwards, Northern Suburbs Community Legal Centre, Submission to the Western Australian Legislative Council Select Committee into Elder Abuse, *Inquiry into Elder Abuse* (1 December 2017) 11, 18.

loneliness and poor mental health.⁴⁵ Similarly, those living in their own home — either alone or with family members — were required to restrict interpersonal contact to prevent the spread of the virus.⁴⁶ Measures imposed to protect older people from infection unfortunately increased risk factors for abuse. Duke Han and Laura Mosqueda explained that social distancing and isolation requirements were likely to increase the older person's dependency on others for essential products and services.⁴⁷ This dependency on people, who are traditionally in a position of trust, may consequently increase the potential for elder abuse.⁴⁸

With community and interpersonal relationships restricted, extended periods of time spent in the home and the psychological stresses associated with lockdowns, the potential for elder abuse was exacerbated.⁴⁹ Additionally, given that financial stress has been recognised as a risk factor for interpersonal violence,⁵⁰ it is likely that the economic impact of the pandemic on many individuals increased the risk of financial or other forms of abuse. Indeed, family members who are often relied upon by older people for assistance are not immune from pandemic induced stress, financial hardship and competing responsibilities. For example, in many instances the pandemic created financial stresses through the loss of employment or divorce, necessitating adult children to seek assistance from older parents or even requiring them to move into the older person's home.⁵¹ Therefore, many older people were

⁴⁵ See generally: Aida Brydon et al, 'National Survey on the Impact of COVID-19 on the Mental Health of Australian Residential Aged Care Residents and Staff' (2022) 45(1) *Clinical Gerontologist* 58; Marie Beaulieu, Julien Cadieux Genesse and Kevin St-Martin, 'COVID-19 and Residential Care Facilities: Issues and Concerns Identified by the International Network Prevention of Elder Abuse (INPEA)' (2020) 22(6) *The Journal of Adult Protection* 385; Susan M Benbow et al, 'Invisible and At-Risk: Older Adults during the COVID-19 Pandemic' (2022) 34(1) *Journal of Elder Abuse and Neglect* 70.

⁴⁶ Eileen O'Brien, 'Older Australians During the COVID-19 Pandemic: Experiences and Responses' in Mala Kapur Shankardass (ed), *Handbook on COVID-19 Pandemic and Older Persons: Narratives and Issues from India and Beyond* (Springer, 2023) 257.

⁴⁷ Duke Han and Laura Mosqueda, 'Elder Abuse in the COVID-19 Era' (2020) 68(7) *Journal of American Geriatrics Society* 1386, 1386.

⁴⁸ Ibid.

⁴⁹ O'Brien (n 46) 268–70.

⁵⁰ Deborah Capaldi et al, 'A Systematic Review of Risk Factors for Intimate Partner Violence' (2012) 3(2) *Partner Abuse* 231, cited in E-Shien Chang and Becca R Levy, 'High Prevalence of Elder Abuse During the COVID-19 Pandemic: Risk and Resilience Factors' (2021) 29(11) *American Journal of Geriatric Psychiatry* 1152, 1153.

⁵¹ Jemimah Clegg, 'The Adult Kids Forced Back Home in the Wake of COVID-19', *Domain* (Web Page, 28 March 2020) <<https://www.domain.com.au/news/the-adult-kids-forced-back-home-in-the-wake-of-covid-19-944724/>>. According to the Federal Circuit and Family Court, divorce rates are the highest in more than a decade due to pandemic related stress and conflict and related financial stress being major factors: Caitlin Fitzsimmons, 'Divorce Applications Up as Marriages Hit the Rocks', *Sydney Morning Herald* (online, 3 July 2022) <<https://www.smh.com.au/national/divorce-20220628-p5axco.html>>.

finding themselves in close proximity to others in often stressful, financially constrained circumstances. Moreover, because the pandemic precluded older people from leaving their home, the qualities of security and safety that their home previously offered instead became an environment where abuse could be both perpetrated and undetected.⁵²

B *Close Proximity and Multigenerational Households*

Australia's housing affordability crisis, which intensified following the pandemic, has dramatically reshaped living arrangements for many families. Skyrocketing property prices and rental costs have driven a significant increase in intergenerational households, with adult children and their families increasingly moving in with ageing parents.⁵³ While often framed as mutually beneficial arrangements — providing care for ageing parents while addressing housing affordability challenges — these living situations can inadvertently recreate many of the problematic dynamics that emerged during pandemic lockdowns.

Furthermore, despite the lifting of COVID-19 restrictions, older people in shared households may continue to experience forms of isolation and control that mirror pandemic conditions. While theoretically free to visit doctors, attend religious services, or maintain social connections, subtle restrictions often materialise within these arrangements. Adult children may gradually assume control over transportation, financial decisions, or social schedules under the guise of protection or convenience. What begins as assistance can evolve into surveillance and limitation, particularly when property ownership or financial contributions create power imbalances within the household.⁵⁴

The physical design of most Australian homes compounds these challenges, as few dwellings are constructed with multigenerational living in mind. Conventional homes typically lack private entrances, separate kitchen facilities, or dedicated living spaces that would allow older residents to maintain independence while sharing a property.⁵⁵ This architectural limitation often forces uncomfortably close

⁵² See: Anna Gillbard and Chez Leggatt-Cook, *Elder Abuse Statistics in Queensland: Year in Review 2020–21* (Report, Uniting Care, 2021) 49; Lena Makaroun, Rachel Bachrach and Ann-Marie Rosland, 'Elder Abuse in the Time of COVID-19 — Increased Risks for Older Adults and Their Caregivers' (2020) 28(8) *American Journal of Geriatric Psychiatry* 876; Bianca Brijnath et al, 'Australian Frontline Service Response to Elder Abuse During COVID-19: Learnings, Successes, and Preparedness for Disaster' (2023) 43(6) *Journal of Applied Gerontology* 723.

⁵³ Somes, 'Identifying Vulnerability' (n 12); Somes and Webb, 'Caveats' (n 12).

⁵⁴ Australian Law Reform Commission (n 14) 268–70 [8.5]–[8.12].

⁵⁵ Jane Knowler and Eileen O'Brien, "'Grandly Designing" Cohousing for Older People in Australia: Overcoming the Challenges', in Christie M Gardiner and Eileen O'Brien Webb (eds), *The Age-Friendly Lens* (Routledge, 2023) 136.

living arrangements that erode privacy and autonomy, creating friction that can escalate into more serious forms of elder abuse.⁵⁶

Financial entanglements present additional complications, particularly when property ownership becomes blurred. Adult children who contribute to mortgage payments or renovations may develop a sense of entitlement to the property, creating pressure on ageing parents to adjust wills or transfer ownership. These tensions can intensify when grandchildren are involved, as emotional leverage (for instance, 'You'll never see your grandchildren if you don't cooperate') becomes a powerful tool for manipulation.⁵⁷

The normalisation of these living arrangements in response to the housing crisis has also reduced external scrutiny. Unlike living arrangements in the pandemic, when health authorities were actively concerned about isolated older individuals,⁵⁸ these new household formations are viewed primarily through an economic lens rather than as potential sites of elder vulnerability.⁵⁹ Health professionals, social services, and legal advisors are less likely to question these arrangements or identify warning signs of exploitation.⁶⁰

⁵⁶ There is a growing and substantial body of research examining the intersection between elder abuse and various aspects of the built environment. This expanding literature documents how physical spaces, architectural design, and environmental factors can either facilitate or help prevent mistreatment of older adults. See, e.g.: Noe Garin et al, 'Built Environment and Elderly Population Health: a Comprehensive Literature Review' (2014) 10(1) *Clinical Practice and Epidemiology in Mental Health* 103; Nana Asiamah et al, 'Abuse and Neglect of Community-Dwelling Older Adults: Index Generation, an Assessment of Intensity, and Implications for Ageing in Place' (2022) 12(2) *Advances in Gerontology* 176; Mehmet Öçal and Özge Kutlu, 'Two Sides of the Coin in Ageing in Place: Neighbourhood Safety and Elder Abuse' in Nestor Asiamah et al (eds), *Sustainable Neighbourhoods for Ageing in Place: An Interdisciplinary Voice Against Global Crises* (Springer, 2023) 71.

⁵⁷ Elder Abuse Action Australia, 'Grandparent Alienation — Why We Need to Start Recognising It as Elder Abuse', *Compass* (online, 7 October 2021) <<https://www.compass.info/news/article/grandparent-alienation-why-we-need-to-start-recognising-it-as-elder-abuse/>>; Kaspiew, Carson and Rhoades (n 25) 15.

⁵⁸ O'Brien (n 46) 257, 268–70.

⁵⁹ Multigenerational living is often promoted as an affordable alternative to traditional arrangements. However, the focus is on the economic benefits and an often romanticised concept of family living that neglects potential complications: Henrique Vicente and Liliana Sousa, 'The Multigenerational Family and the Elderly: A Mutual or Parasitical Symbiotic Relationship?' in Lillian Sousa (ed), *Families in Later Life: Emerging Themes and Challenges* (Nova Science Publishers, 2009) 27; Adéla Souralová and Martina Žáková, 'My Home, My Castle: Meanings of Home Ownership in Multi-Generational Housing' (2020) 37(8) *Housing Studies* 1446.

⁶⁰ Lidia Engel and Cathrine Mihalopoulos, 'The Loneliness Epidemic: A Holistic View of Its Health and Economic Implications in Older Age' (2024) 221(6) *Medical Journal of Australia* 290; Australian Human Rights Commission, *Collateral Damage: What the Untold Stories From the COVID-19 Pandemic Expose about Human Rights in Australia* (Report, March 2025) 48–50.

C *Financial and Inheritance Issues*

During the pandemic, several state and territory governments passed legislation allowing electronic signing and witnessing of documents. For the older population, these measures ensured that despite isolating they were still able to: (1) execute wills; (2) create enduring guardianship documents; and (3) create or revoke enduring powers of attorney ('EPA').⁶¹ This was a prudent step, with the National Elder Abuse Prevalence study noting that having legal documents in place, such as a will, an EPA or an advanced care document, were effective tools to prevent and respond to elder abuse.⁶² These measures have been made permanent in relation to estate planning documents in several jurisdictions including New South Wales and South Australia.⁶³ Having access to these legal safeguards is an important step to prevent elder abuse. However, this initiative can be a two-edged sword; some commentators have expressed concern that the absence of a face-to-face meeting could in fact exacerbate the risk of abuse, particularly in circumstances where the older person is living with their abuser.⁶⁴

Therefore, while electronic witnessing offers advantages for older and perhaps less mobile clients, legal practitioners must recognise its significant challenges. These include the heightened possibility of elder abuse through undue influence or coercion, particularly when the practitioner cannot observe the full environment surrounding the client. Practitioners may also face increased difficulty in accurately confirming mental capacity without in-person assessment, which may require additional verification steps. The digital divide would seem to present another substantial barrier, as many older individuals and those in regional or remote communities may lack adequate access to audio-visual link technology, potentially excluding vulnerable populations from necessary legal protections. Additionally, it would be prudent for practitioners to implement robust verification of identity protocols in the absence of physical document examination. Finally, the remote nature of these interactions necessitates more comprehensive documentation of client communications than traditional face-to-face meetings, creating an additional administrative burden that ensures transparency and accountability

⁶¹ See, e.g.: *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW); *Electronic Transactions Act 2000* (NSW) pt 2B, as amended by *Electronic Transactions Amendment (Remote Witnessing) Act 2021* (NSW); *COVID-19 Emergency Response (Section 17) Regulations 2020* (SA).

⁶² Qu et al (n 1) 98.

⁶³ *Electronic Transactions Act 2000* (NSW) pt 2B; *COVID-19 Emergency Response 2020* (SA) s 17. See also: *Oaths Regulations 2021* (SA); related Codes of Practice created under the *Oaths Act 1936* (SA) s 33(1)(b); *Corporations Amendment (Meetings and Documents) Act 2022* (Cth) sch 1; Law Society of New South Wales, *Implications of the Electronic Witnessing Provisions* (Report, December 2021) 3.

⁶⁴ See, e.g.: Kay Patterson, *Financial Elder Abuse and the Importance of Enduring Documents by The Hon Dr Kay Patterson AO* (Report, 29 April 2024) 4; Law Council of Australia (n 33).

in the witnessing process.⁶⁵ While this added requirement may indeed turn the witnessing solicitor's attention to the potential for abuse, it may not be an adequate safeguard against ongoing pressure imposed by someone who both resides with the ageing client, and whom the ageing client relies upon.⁶⁶

D *Family and Domestic Violence*

Another instance of abuse within the home is domestic and family violence. This can involve a domestic partner but can also involve adult family members such as adult children. There is a considerable body of evidence establishing that domestic violence affects a significant number of older people, particularly women, and can result in adverse consequential impacts upon housing circumstances.⁶⁷ Indeed, this can lead to injury and even death.⁶⁸ It is assumed that statistical rates are low because of a reluctance to report the incidents rather than the non-occurrence of abuse.⁶⁹ Also, because of the cultural and social stigma of family violence remaining prevalent among older women, they tend to stay with family or friends rather than seeking the assistance of specialist homelessness services.⁷⁰

⁶⁵ For example, in a position paper published in 2020, Justice Connect proposed that solicitors who witness documents remotely should add a clause to enduring powers of attorney and guardianship documents certifying that they are satisfied that the client has given instructions freely and voluntarily: Justice Connect, *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW) — Changes to Witnessing Requirements for Enduring Powers of Attorney and Enduring Guardianship Appointments* (Position Paper, April 2020) 3–4.

⁶⁶ Law Society of New South Wales (n 63) 3; Kelly Purser, Tina Cockburn and Bridget J Crawford, 'Wills Formalities Beyond COVID-19: An Australian–United States Perspective' [2020] (5) *University of New South Wales Law Journal Forum* 1.

⁶⁷ In an Australian context, the Australian Institute of Health and Welfare noted in February 2025 that 39% of older women cited 'domestic and family violence' as the main reason they were seeking assistance: 'Family, Domestic and Sexual Violence', *Australian Institute of Health and Welfare* (Web Page, 28 February 2025) <<https://www.aihw.gov.au/family-domestic-and-sexual-violence/responses-and-outcomes/housing>>.

⁶⁸ For example, the concern over rising instances of matricide in Australia: Catherine Barrett et al, *The [un]Silencing of Older Women: A Life Stages Approach for the National Plan to End Violence Against Women and Their Children* (Report, 2024). Note the comments in the submission by the Law Council of Australia which observed that 'an analysis by The Guardian of government data has found that, in the 10 years to 2023, nearly 200 women over the age of 55 were allegedly killed in family violence related homicides in circumstances where sons, as well as intimate partners, have been perpetrators': Law Council of Australia (n 21) 12 [34].

⁶⁹ Silvia Fraga Dominguez, Jennifer Storey and Emily Glorney, 'Help Seeking Behavior in Victims of Elder Abuse: A Systematic Review' (2021) 22(3) *Trauma, Violence and Abuse* 446.

⁷⁰ SafeLives, *Safe Later Lives: Older People and Domestic Abuse* (Report, October 2016); Council to Homeless Persons, 'Framing the Issue — Older Women Experiencing or at Risk of Homelessness', *Council to Homeless Persons* (Web Page, 18 June

Older people experiencing family or domestic violence in rental situations face unique vulnerabilities, especially when the lease is in their name. The older person encounters the twin challenges of age and gender discrimination.⁷¹ This is especially the case with older women who may have devoted decades to traditional caregiving roles with limited workforce participation, resulting in financial insecurity and housing vulnerability that severely restricts their options when facing abuse.⁷²

When an older person holding a lease needs to escape family or domestic violence, their options vary dramatically depending on which Australian jurisdiction they reside in. Western Australia and New South Wales offer the most accessible approach through declaration-based systems that allow women to terminate leases without engaging police or courts.⁷³ These tenant-friendly systems permit termination through declarations signed by qualified professionals such as medical practitioners, nurses, social workers, or family violence support workers.⁷⁴ With notice periods typically between 7–14 days, confidentiality requirements for landlords and protection from financial penalties beyond standard lease break provisions, this approach acknowledges the reluctance of older women to engage with formal systems when the perpetrator is a family member.⁷⁵

In contrast, several jurisdictions impose medium-barrier court/tribunal order systems requiring formal documentation like family violence restraining orders, tribunal hearings, or court-ordered perpetrator exclusion.⁷⁶ These processes, while providing legal clarity, create significant obstacles for older women who may be intimidated by formal proceedings, lack financial resources for legal representation, or fear retaliation during hearing waiting periods. Most concerning are jurisdictions with limited or no provisions, where women must break leases and

2024) <<https://chp.org.au/parity/framing-the-issue-older-women-experiencing-or-at-risk-of-homelessness/>>.

⁷¹ Guiomar Merodio et al, 'The Impact of Gendered Ageism and Related Intersectional Inequalities on the Health and Well-being of Older Women' (2024) 12(2) *Research on Ageing and Social Policy* 146. Note that a lack of opportunities for employment also factor into older women's prospects for affordable housing: Colin Duncan and Wendy Loretto, 'Never the Right Age? Gender and Age-Based Discrimination in Employment' (2004) 11(1) *Gender, Work and Organization* 95.

⁷² Eileen Webb et al, *Impact of Tenancy Laws on Women and Children Escaping Violence: Final Report for Department of Social Services* (Report, March 2021) 57–8; Lyn Craig and Catherine Hastings, 'Intersectionality of Gender and Age ('gender*age'): A Critical Realist Approach to Explaining Older Women's Increased Homelessness' (2024) 23(4) *Journal of Critical Realism* 361.

⁷³ Webb et al (n 72) 14.

⁷⁴ Ibid 145, 171; Eileen O'Brien, 'New Laws in Western Australia Will Help Victims of Family Violence End Their Tenancies', *The Conversation* (online, 10 May 2019) <<https://theconversation.com/new-laws-in-western-australia-will-help-victims-of-family-violence-end-their-tenancies-116800>>.

⁷⁵ Webb et al (n 72) 12.

⁷⁶ See, e.g., O'Brien (n 74). See also Webb et al (n 72) 88.

accept financial penalties, navigate complex tribunal processes without specialised domestic violence provisions, and remain legally responsible for property damage caused by their abusers.⁷⁷

However, terminating a lease due to domestic violence is only the first step in a challenging journey for older women seeking safety. While legal provisions for lease termination provide immediate relief, they do not address the critical question of where these women can go. Moreover, the severe shortage of affordable housing creates a significant barrier for older victims on fixed incomes. Public housing waiting lists often stretch into years, making this option unavailable during immediate crises.⁷⁸ Meanwhile, the private rental market presents formidable challenges with high rents, competitive application processes favouring stable employment histories, and substantial upfront costs.⁷⁹ This creates a troubling paradox; where an older woman may have the legal right to leave an abusive situation, but without viable housing alternatives, exercising this right could lead to precarious living arrangements or even homelessness. For many, this uncertainty becomes another factor keeping them trapped in dangerous living situations.⁸⁰

E *Family Members as (Unwelcome) Guests*

A further example of behaviour that constitutes abuse against older people in their home is when individuals — often family members — move in as temporary ‘guests’, but then refuse to leave.⁸¹ The relationship between the ‘unwelcome lodger’ and elder abuse is an under-researched phenomenon.⁸² This is so, despite recent statistics gathered by Uniting Care in Queensland revealing that the most common

⁷⁷ Webb et al (n 72) 57, 64–73.

⁷⁸ Josh Nicholas, ‘As 190,000 Households Wait for Social Housing, Application Numbers are Only Increasing’, *The Guardian* (online, 17 April 2024) <<https://www.theguardian.com/news/ng-interactive/2024/apr/18/as-190000-households-wait-for-social-housing-application-numbers-are-only-increasing>>.

⁷⁹ National Older Women’s Housing and Homelessness Working Group, *Retiring into Poverty: A National Plan for Change: Increasing Housing Security for Older Women* (Report, 23 August 2018) 9.

⁸⁰ ‘What Are the Real Costs of Australia’s Housing Crisis for Women?’, *Australian Housing and Urban Research Institute* (Research Brief, 7 March 2024) <<https://www.ahuri.edu.au/analysis/brief/what-are-real-costs-australias-housing-crisis-women>>.

⁸¹ This issue has been noted by the Law Council of Australia, suggesting that the *Second National Plan* should provide more accessible legal remedies that facilitate the removal of adult children who are causing financial, psychological, and/or physical harm by remaining in their ageing parents’ family home: Law Council of Australia (n 21) 12 [33].

⁸² However, see Richard McCullagh, ‘Property and Elder Law: Beware the Lonesome Lodger: Dealing with Guests Who Outstay Their Welcome’ [2019] (61) *Law Society Journal* 88.

form of elder financial abuse is non-contribution.⁸³ Non-contribution occurs where the perpetrator lives with the victim and does not contribute towards expenses such as electricity or groceries.⁸⁴ An example of the dilemma is demonstrated by the following question, which was posted on an online forum for the aged in the United Kingdom:

My grandma lost her husband around 3 years ago. Even before he died my aunt and her daughter made themselves at home and have been sleeping upstairs. 3 years on they are still in the house, they don't pay bills and they actually have their own house. My grandma is 90 and she would like them to leave. They ask to 'lend' money (usually around £100 every couple of weeks), the aunt's daughter has drug issues and is very angry/aggressive. How do we help my grandma to get the unwanted guests out of her house? She has asked them to leave but they have refused, and they keep coming back.⁸⁵

The circumstances giving rise to a perpetrator residing in a victim's property can vary. They may have originally been welcomed into the house due to financial insecurity, divorce, housing stress, circumstances related to the COVID-19 pandemic, or even to initially assist the older person. Alternatively, the pretext for moving in may stem from the assumption that as a former 'family home', adult children maintain an entitlement to move back in, regardless of the wishes of the parent owner. Regardless of the motivations for their presence, their refusal to leave presents the home owner with significant challenges.

Despite there being legal avenues to pursue, the older home owner is initially faced with the challenge of confronting the occupant with a demand to leave. If the occupant is a family member, the home owner may be reluctant to commence legal action for fear of fracturing relationships, out of concern for the family member, or being intimidated or frightened.⁸⁶ Financial dependence, unemployment, substance abuse, and mental illness can lead to complex family dynamics and expose the

⁸³ Gillbard and Leggatt-Cook (n 52) 5. See also Anna Gillbard, *Elder Abuse Statistics in Queensland: Year in Review 2023–24* (Report, 2024) 19. Although statistics indicate a downward trend in cohabitation, the issue remains.

⁸⁴ Gillbard and Leggatt-Cook (n 52) 5.

⁸⁵ 'Uninvited Family Members Won't Leave 90 Year Old Grandma's House. How Do We Help My Grandma to Get Them Out of Her House?', *Aging Care* (Forum Post, May 2018) <<https://www.agingcare.com/questions/uninvited-family-members-wont-leave-90-year-old-grandmas-house-how-do-we-help-my-grandma-to-get-them-439345.htm>>.

⁸⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (Report, September 2007) 165–6 [5.35]; Jan R Greenberg, Martha McKibben and Jane A Raymond, 'Dependent Adult Children and Elder Abuse' (1990) 2(1–2) *Journal of Elder Abuse and Neglect* 73, 80–1.

ageing home owner not only to financial abuse, but also verbal, physical, and psychological abuse.⁸⁷

If the older home owner is empowered to seek a legal solution, their first challenge is characterising the legal status of the arrangement. As is common amongst families, there is rarely any agreement concerning the nature and duration of the occupancy. It is possible that the arrangement may fall under the *Residential Tenancies Act 2010* (NSW), the *Residential Tenancies Act 1995* (SA), or other state and territory equivalent legislation. For example, the *Residential Tenancies Act 2010* (NSW) covers any arrangement, written or oral, 'under which one person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence', whether exclusively or not.⁸⁸ Providing 'value' for the right to stay does not need to equate to market rent, and some form of monetary contribution to the outgoings could be sufficient.⁸⁹ Unless the period of tenancy has come to an end, the home owner will need to argue there is a breach of the Act in order to terminate the tenancy. If the facts permit, a right to occupation of the property may be argued on the basis of estoppel.⁹⁰

The doctrine of proprietary estoppel can fundamentally alter property rights in family situations. When a person makes a clear promise to another that they can reside in a home indefinitely, this verbal assurance can create binding obligations in certain circumstances.⁹¹ The doctrine becomes particularly relevant in a family situation when the adult child subsequently takes substantial actions in reliance on this promise — perhaps surrendering their own housing arrangements, declining career opportunities in other locations, or investing significant personal funds into improving or maintaining the property. These decisions, made in good faith based on the parent's assurances, may constitute detrimental reliance; meaning the adult child has positioned themselves in a worse situation than they would have been otherwise. The courts recognise that if these elements are established — a clear promise, reasonable reliance, and resulting detriment — it would be fundamentally unjust to permit the parent to renege on their word. Consequently, even without formal written agreements or property transfers, an adult child may successfully

⁸⁷ Greenberg, McKibben and Raymond (n 86) 84–5; Karen A Roberto, Pamela B Teaster and Joy O Duke 'Older Women Who Experience Mistreatment: Circumstances and Outcomes' (2004) 16(1) *Journal of Women and Aging* 3, 7–8.

⁸⁸ *Residential Tenancies Act 2010* (NSW) s 13. See also *Residential Tenancies Act 1995* (SA) s 3.

⁸⁹ *Case v Frimont* [2021] NSWCA 30, [24]–[28] (Leeming JA).

⁹⁰ For the elements of proprietary estoppel see: *Kramer v Stone* (2024) 421 ALR 106, 115–16 [36]–[40]; Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 159–67.

⁹¹ See *Sullivan v Sullivan* [2006] NSWCA 312, [38] (Handley JA) involving a husband and wife allowing the husband's sister to reside in a property for life.

establish legal rights to remain in the property through proprietary estoppel.⁹² This effectively prevents eviction, despite the absence of traditional tenancy protections or ownership documentation.

IV THE HOME AS THE TARGET OF ELDER ABUSE

In an environment of declining housing affordability and constrained economic circumstances, the older person's home can become a site of competing interests and conflict amongst family members.⁹³ Alongside these tensions, the phenomena of inheritance impatience and entitlement, coupled with the parental financial 'obligation' felt by many parents in favour of their children, can often give rise to an environment where undue pressure, abuse and exploitation can occur.⁹⁴ This Part will examine three circumstances where the older person's house may be the target of financial elder abuse. These include situations where: (1) the parent has agreed to use their property as security or guarantee for a family member's loan; (2) transactions involving the older person's property have been procured by either undue influence or unconscionable conduct; and (3) the loss of property through failed family accommodation agreements.

A Mortgages or Guarantees for the Benefit of Other Family Members

Older people are particularly susceptible to being persuaded to act as guarantors for their adult children who are in need of financial assistance. In some circumstances, the agreement may be made pursuant to undue influence or unconscionable conduct,⁹⁵ but there are other reasons why it may occur. Parents can act out of a sense of love and affection, responsibility, guilt, or emotional pressure.⁹⁶ In acting as guarantor, loans are secured against the older person's home. This exposes them to a significant risk that the borrower will default, and could result in the loss of the older person's home. Unfortunately, many older people enter into such transactions

⁹² See, e.g., *Milling v Hardie* [2014] NSWCA 163. The Court granted Milling's daughter and her husband the right to occupy the property for the life of the defendant home owner. This decision was based on the daughter having spent money on the property with the expectation that she would receive an interest in it: at [71] (Macfarlan JA).

⁹³ Wilson et al (n 43) 156.

⁹⁴ While there has been considerable analysis of the balance of power and influence in intimate family relationships, the law has been slow to recognise the relationship between parent and child as one where the parent is at a disadvantage, owing to their sense of obligation towards their children. And, while there is no legal obligation on a parent towards an adult child, our law has embedded within it a strong confirmation of the moral and financial obligations flowing 'downwards'; for instance, testator's family maintenance, and the presumption of advancement.

⁹⁵ See *Coldunell Ltd v Gallon* [1986] 1 QB 1184.

⁹⁶ In some circumstances, emotional pressure may amount to undue influence. However, subtle forms of emotional pressure may not be sufficient to satisfy the doctrinal threshold of undue influence.

without being fully aware of the nature of the transaction and the extent of the consequences of the lender defaulting.⁹⁷ Courts have also recognised the vulnerability of parents who are acting as guarantor for their adult children. In *Watt v State Bank of NSW Ltd*, Higgins CJ and Crispin J observed that

the real vulnerability of parents usually stems not from a failure to comprehend the nature of the transactions in which they have been asked to participate or from insufficient information concerning their implications. It stems from their love of their children. Their desire to help and protect them, to advance their interests, to maintain a close relationship, to avoid causing disappointment, hurt or distress, to maintain the relationship may all make it difficult to say 'no'.⁹⁸

In a similar case involving parents acting as guarantors, Crispin J again alluded to the vulnerability experienced by parents arising from the sense of obligation parents feel towards their children.⁹⁹ His Honour described how the parents proceeded with a transaction 'because of their affection for their children, a perception that a refusal might be damaging to the relationship with them, and/or a conviction that they deserve the chance to make good'.¹⁰⁰ Again, so long as the lender is not a party to the relevant conduct, the older person will be bound by the mortgage or guarantee over their property.¹⁰¹

Of course, in some cases, the older person may not be consulted at all and becomes the victim of fraud. In the recent decision in *Issa v Owens*,¹⁰² Mrs Issa was the registered proprietor of two properties; one located in Queensland and another in Victoria. While managing her assets, her son Mr Karbotli, who had taken control of the family, encountered severe financial difficulties. Mr Karbotli resorted to fraud by forging his mother's signature on loan documents, creating fraudulent mortgages without her knowledge or consent. To further this deception, Mr Karbotli enlisted his solicitor, Mr Picken, who falsely certified witnessing Mrs Issa's signature on both the mortgage and personal guarantee documents. Mr Picken compounded this fraud by completing a combined appointment and identification certificate, in which he

⁹⁷ See, e.g., *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 ('*Amadio*').

⁹⁸ *Watt v State Bank of NSW Ltd* [2003] ACTCA 7, [22] (Higgins CJ and Crispin P) ('*Watt*'). See also: *Permanent Mortgages Pty Ltd v Vandenberg* (2010) 41 WAR 353; Juliet Lucy Cummins, 'Relationship Debt and the Aged: Welfare vs Commerce in the Law of Guarantees' (2002) 27(2) *Alternative Law Journal* 63. The lengths to which a parent will go in order to look after an adult child can be seen in a decision from the High Court in the UK. Here, an older blind man endured physical and emotional abuse from his son but felt obliged to look after him. The Court found that 'the essence of [the parent's] vulnerability is, in fact, his entirely dysfunctional relationship with his son': *Southend-On-Sea Borough Council v Meyers* [2019] EWHC 399 (Fam), [34] (Hayden J).

⁹⁹ *Janesland Holdings Pty Ltd v Simon* [2000] ANZ ConvR 112, [120] (Crispin J).

¹⁰⁰ *Ibid.*

¹⁰¹ *Amadio* (n 97) 459 (Gibbs CJ).

¹⁰² [2023] QSC 4.

falsely claimed to have conducted a face-to-face verification of Mrs Issa's identity, when no such meeting occurred. The situation escalated when Mr Karbotli eventually defaulted on the fraudulently obtained loans. As a consequence, the mortgagee took possession of Mrs Issa's Queensland property and promptly arranged for its sale at auction.¹⁰³ Mrs Issa only discovered the existence of the mortgage shortly before the scheduled auction.¹⁰⁴ Mrs Issa sought legal advice, lodged a caveat and notified the police and Registrar of Titles. The property was subsequently sold at auction to the Morecrofts, who were unaware of the fraud. Mrs Issa reluctantly removed her caveat for \$40,000 while 'reserving all rights', allowing settlement to proceed. The Registrar of Titles confirmed that the mortgage was fraudulent after settlement. When the Morecrofts attempted to register their transfer, they were blocked by the Registrar of Titles' caveat.¹⁰⁵

In a dispute between Mrs Issa and the Morecrofts as to who had the best right to the property, the Court determined that the mortgagees had failed to comply with identity verification requirements under the *Land Title Act 1994* (Qld), meaning they had not obtained indefeasible title.¹⁰⁶ As a result, the Court cancelled both the mortgage and transfer registrations, allowing Mrs Issa to retain her property. The State of Queensland was ordered to compensate the innocent Morecrofts \$2.7 million under the *Land Title Act 1994* (Qld), representing the market value of the property.¹⁰⁷

B *Transactions Made Pursuant to Undue Influence and Unconscionable Conduct*

As mentioned above, an older person's decision to secure an adult child's debt by using their home as security may be motivated by natural love and affection. However, it may also be procured by undue influence or unconscionable conduct. Transfers of an older person's home, whether for value or not, can be set aside pursuant to these equitable doctrines.¹⁰⁸ For the transferor to prove undue influence, they must prove that the transferee exerted such ascendancy and influence over a weaker person's decision-making, that the weaker person who relied upon them cannot be taken to have exercised their own free will.¹⁰⁹ While there is no presumption that a parent is subject to the undue influence of an adult child, it has been observed that a presumption of undue influence could arise where 'the alleged victim is an ageing parent [who] is living alone and is no longer in good health [and] that the child alleged to have influence is one who, in large part, is responsible for

¹⁰³ Ibid [1]–[11] (Crowley J).

¹⁰⁴ Ibid [15]–[19].

¹⁰⁵ Ibid.

¹⁰⁶ Ibid [120]–[126].

¹⁰⁷ Ibid [399]. The decision in relation to compensation was upheld in *Queensland v Morecroft* [2024] QCA 11.

¹⁰⁸ Or a contract for sale or transfer.

¹⁰⁹ *Thorne v Kennedy* (n 28) 101–2 [34] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

his care'.¹¹⁰ Presumably, influence could more readily be assumed if the parties were under one roof.

Unconscionable conduct is a closely related doctrine and is often pleaded alongside undue influence on the same facts. For a transaction to be set aside due to unconscionable conduct, the court must be satisfied that: (1) the transferor suffered from a 'special disadvantage'; (2) the transferee was aware of that disadvantage; and (3) the transferee took unconscientious advantage of the disadvantage.¹¹¹

Case law in this area reveals numerous examples involving older adults in which undue influence or unconscionable conduct is alleged.¹¹² These cases demonstrate that older people may be placed in a vulnerable position when they become dependent on others, and that the relationship of dependency has a very real risk of being misused. In *McFarlane v McFarlane*,¹¹³ an older woman transferred her house, her only valuable asset, to her son for consideration of 'natural love and affection'.¹¹⁴ In an application made on her behalf by the Victorian State Trustee to have the transfer set aside on the grounds of both undue influence and unconscionable conduct, it was revealed that her son consistently subjected her to verbal, psychological, and at times physical abuse. While he lived in her house, she was dependent on him for transport, and he controlled her food and medication. Nonetheless, the older plaintiff was reluctant to deny his request that the house be transferred, as she was both frightened of him, and felt guilty that his father had abandoned him at a young age.¹¹⁵

The risk is particularly acute in instances where the plaintiff suffers some degree of cognitive impairment. For instance, in *Farrell v Stephenson*,¹¹⁶ an ageing widow was left property worth \$1.5 million. In the absence of independent legal advice, she transferred all her property to the defendants for consideration of one dollar. This transfer was ostensibly to enable a larger house to be purchased for the widow, and to allow the two defendants to ultimately reside together. At the time of the transfer, she was suffering from the early stages of Alzheimer's dementia, was easily manipulated and suggestible and had reduced capacity to manage her own affairs

¹¹⁰ *Hogg v Hogg* [2007] EWHC 2240 (Ch), [43] (Lindsay J), cited in Brian Sloan, 'Due Rewards or Undue Influence? — Property Transfers Benefitting Informal Carers' [2011] (19) *Restitution Law Review* 37, 42. See also *McFarlane* (n 38).

¹¹¹ *Amadio* (n 97) 474 (Deane J). See also: *Blomley v Ryan* (1956) 99 CLR 362; *Louth v Diprose* (1992) 175 CLR 362; *ACCC v Samton Holdings Pty Ltd* (2002) 117 FCR 301; *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Thorne v Kennedy* (n 28).

¹¹² See, e.g.: *Jansen v Jansen* [2007] NSWSC 1344; *Darmanin v Cowan* [2010] NSWSC 1118; *Meiners v Gunn* [2020] WASC 18.

¹¹³ *McFarlane* (n 38).

¹¹⁴ *Ibid* [1] (Richards J).

¹¹⁵ *Ibid* [45]. See also: *Wardle v Wardle* [2021] NSWSC 1529; *Wilce v Wilce* [2022] QSC 94.

¹¹⁶ *Farrell v Stephenson* (n 38).

and protect her own interests.¹¹⁷ When the matter was heard, the plaintiff was residing in an aged care facility and was in danger of defaulting on her fees. Chief Judge Young in Equity referred to this as a ‘classic elder law case’.¹¹⁸ The money was actually used by the defendants to undertake property speculation, which was disastrously unsuccessful. Just over \$106,000 was left from the sale of the ‘developed’ property and held in a solicitor’s trust account. The Court declared that the initial transfers from the widow to the defendants were voidable by reason of equitable fraud, and therefore the money traced from these transactions to the trust account belonged to the widow in equity.¹¹⁹ In *Badman v Drake*, Young CJ in Eq took the opportunity to warn practitioners of the need to exercise caution when acting in a transaction involving an older ‘at risk’ person. His Honour noted it was ‘impermissible for any solicitor to take the view that because monies are going to flow [to their] client, they can close their eyes to fraud that may be being perpetrated on the vulnerable person’.¹²⁰

*C The Failed Family Accommodation Arrangement and the
Impact on the Experience of Home*

Family accommodation agreements arise when an older person makes a financial contribution to a family member, relative or friend in exchange for accommodation for life.¹²¹ The financial contribution may contribute towards the construction of a granny flat, a home extension, or the older person moving into a newly constructed home with family. The key criterion is that there is a monetary advantage provided to the adult child in return for accommodation provided in a caring environment.¹²² Most often, these arrangements are entered into voluntarily and provide each party with mutual benefits. However, in some circumstances, the arrangement may be made pursuant to undue influence or unconscionable conduct. These doctrines have been successfully argued to have transfers that were made pursuant to a family accommodation agreement set aside.¹²³ Adult children experiencing difficulties in entering the housing market because of rising house prices or high levels of mortgage debt may encourage or pressure parents to ‘step in’ and assist. The accommodation arrangement is one method in which parents transfer money or property to their children whilst believing they are securing accommodation and benefits for themselves. Nonetheless, if successful, the arrangement can be a considerable source of ontological security.¹²⁴ The goals provided by the arrangement — to be

¹¹⁷ Ibid [48] (Young CJ in Eq).

¹¹⁸ Ibid [61].

¹¹⁹ Ibid [68]–[69].

¹²⁰ *Badman v Drake* (n 38) [56], [84] (Young CJ in Eq).

¹²¹ See: Somes, ‘Identifying Vulnerability’ (n 12) 1–3; Seniors Rights Victoria, *Assets for Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse* (Guide, 18 September 2024) 33.

¹²² Somes, ‘Identifying Vulnerability’ (n 12) 2; Australian Law Reform Commission (n 14) 203 [6.1].

¹²³ *Fisher-Pollard* (n 38) [551]–[552].

¹²⁴ Aviva Freilich et al, *Security of Tenure for the Ageing Population in Western Australia* (Report, Council on the Ageing Western Australia, 2014) ch 1.

safe, looked after and to remain close to family — reflect many characteristics of home that are given greater priority in older age. If, however, the arrangement fails and the older person is required to leave the home, then the resulting tenuous legal and financial position they are placed in threatens these very goals. In addition, when an older person must relocate voluntarily or involuntarily, support formerly provided by friends or family within a community is likely to be affected and must be provided in some other way.¹²⁵

At the outset, it is important to acknowledge that a failed accommodation arrangement is not always a result of the older person being 'kicked out' of their home, nor is the conduct of the adult child necessarily a form of fraud or elder abuse. On occasion, the ageing parent may voluntarily leave for circumstances such as the need for specialised care that requires a change in accommodation.¹²⁶ Yet in many cases, the dispute between the parties results in the parent being told to vacate the very property that was their home; the place where they anticipated they would live and be cared for.¹²⁷ In these situations, the denial of the reimbursement of some or all of the older party's financial contribution would likely be regarded as financial elder abuse.¹²⁸

Once there is a denial by the adult child of any restitution of the older person's contribution towards the adult child's property, the older person's legal position is precarious, and claiming an interest in the property is extremely problematic. The transactions in which the older person has contributed to the adult child are usually entered into without a written contract and without consideration of contingencies such as the breakdown of the agreement, the need for the adult child to sell the property (for financial reasons or as the result of a divorce), or the older person's health deteriorating to an extent that residential aged care is necessary.¹²⁹ While legal avenues are available to the older party, navigating the existing law is fraught, due to its inaccessibility and complexity. Moreover, the law applies certain presumptions that create significant barriers for a parent to overcome in the event of a dispute. For instance, the presumption of advancement presumes any transfer of property made from a parent to a child is a gift, with the onus resting on the parent to rebut the presumption.¹³⁰ Therefore, the older party must possess the emotional and financial resources to commence proceedings, and then be willing to invest time in litigating a dispute against a member of their own family, or a close

¹²⁵ Webb (n 5) 60.

¹²⁶ See, e.g., *Richardson v Lindsay* [2019] NSWCA 148, [4]–[13].

¹²⁷ Margaret Hall, 'Care Agreements: Property in Exchange for the Promise of Care for Life' (2002) 81 (Spring) *Reform* 29, 31. Hall states that '[a]necdotal and case law evidence indicates that most care agreements fail because of relationship breakdowns'.

¹²⁸ Australian Law Reform Commission (n 14) 203 [6.1].

¹²⁹ See, e.g.: *Seniors Rights Victoria* (n 121) [33]–[34]; *Somes*, 'Identifying Vulnerability' (n 12) 11–12; *Somes and Webb*, 'Caveats' (n 12) 354–5.

¹³⁰ *Nelson v Nelson* (1995) 184 CLR 538, 547 (Deane and Gummow JJ); *Flourentzou v Spink* [2019] NSWCA 315, [17], [20] (Barrett AJA); *Anderson v McPherson (No 2)* (2012) 8 ASTLR 321, 342 [140]–[141] (Edelman J).

acquaintance.¹³¹ Such a process is lengthy and expensive, as matters can only be brought in supreme courts and in some jurisdictions, district courts.¹³²

The loss of home often involves an unanticipated and unplanned change in an older person's living conditions and may result in an inability to re-establish themself. This can have a detrimental effect on the health and wellbeing of an older person.¹³³ In some instances, the request to leave has left the older person homeless or reliant on public housing.¹³⁴ Indeed, the Australian Institute of Criminology noted that in the context of the effect of fraud and financial crime, the impact on the older person can be profound:

Not only can a comfortable lifestyle collapse, but they may not have the time or the opportunity for financial recovery. A blow to financial security is often a permanent and life-threatening setback, characterised by fear, lack of trust, and is often the onset of acute and chronic anxiety. Loss of assets may ruin a person's otherwise well-planned retirement ... it has also been found that the personal, emotional and psychological consequences of fraud for older persons are much more profound than for younger persons.¹³⁵

V LEGAL GAPS IN ELDER HOUSING PROTECTION: BEYOND PREVENTION

For older Australians, housing security constitutes more than basic shelter — it provides ontological security, personal identity, and individual autonomy.¹³⁶ When abuse threatens this fundamental pillar of well-being, affected seniors have little choice but to turn to the legal system. This Part critically examines the legal responses available to an older person when the home serves as both a setting for and a target of elder abuse. Unfortunately, this critical intersection of elder abuse and housing security has remained largely unaddressed in legal and policy reforms. The current legal framework remains, in our view, woefully inadequate to address

¹³¹ Teresa Somes and Eileen Webb, 'What Role for Real Property in Combatting Financial Elder Abuse through Assets for Care Arrangements?' [2016] (22) *Canterbury Law Review* 120, 127.

¹³² Somes, 'Identifying Vulnerability' (n 12) 34–5. See also Teresa Somes, 'Cutting the Gordian Knot of Failed Family Accommodation Agreements: Identifying Vulnerability to Improve Access to Justice for Older People' (PhD Thesis, University of South Australia, 2023) ('Cutting the Gordian Knot').

¹³³ Lorna Fox O'Mahoney, 'The Meaning of Home: From Theory to Practice' (2013) 5(2) *International Journal of Law in the Built Environment* 156, 157.

¹³⁴ See *Spink v Flourentzou* [2019] NSWSC 256, [177] (Robb J).

¹³⁵ Australian Institute of Criminology, Submission No 40 to Parliament of Australia, *Inquiry into Older People and the Law* (20 September 2006) 1, cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, the Parliament of Australia, *Older People and the Law* (Report, September 2007) 12 [2.4].

¹³⁶ See, e.g.: Adams (n 4) 77; Hiscock et al (n 5).

these complex and often time-sensitive situations, leaving a troubling protection gap for one of society's most vulnerable populations.

A *The Prevention–Response Disconnect*

Australia's approach to elder abuse has evolved significantly since the establishment of the *First National Plan*,¹³⁷ yet fundamental questions remain about the adequacy of legal protections for older Australians. As policymakers grapple with an ageing population and increasing reports of elder abuse, the balance between preventive measures and remedial legal frameworks should be considered. The development of the *Second National Plan* represents an important milestone in this ongoing effort, but its emphasis on prevention over legal remedies raises important questions about its comprehensiveness and effectiveness.

The recent consultation draft of the *Second National Plan* — while commendable for its emphasis on prevention and early intervention — fails to remedy significant legal gaps that leave vulnerable older Australians exposed when preventive measures prove insufficient. The *Second National Plan* emphasises '[e]nhance[d] legal frameworks and adult safeguarding responses', but predominantly focusses on early identification and prevention rather than strengthening remedial legal pathways.¹³⁸ While prevention is vital, a comprehensive approach must also include robust legal remedies for cases where prevention fails. This creates a dangerous gap in protection, particularly regarding housing — arguably an older person's most significant asset and source of security.

While early intervention strategies are valuable, they cannot address all instances of elder abuse, particularly those involving complex family dynamics or sophisticated financial exploitation. A truly effective national response must therefore balance prevention with remediation, ensuring robust and accessible legal pathways exist when prevention fails.

B *Critical Legal Shortcomings Requiring Reform*

The burden of proving undue influence places older people in the difficult position of demonstrating that transactions with family members were improvident and not motivated by natural affection. This standard ignores the complex emotional dynamics within families where love, obligation, guilt, and manipulation often intertwine. Legal frameworks should recognise these nuances through adjusted evidentiary standards for vulnerable older adults; for example, a presumption of undue influence in transactions involving older parents and adult children. Similar considerations arise in relation to establishing unconscionable conduct.¹³⁹

¹³⁷ *Second National Plan* (n 16).

¹³⁸ *Ibid* 49.

¹³⁹ See *McFarlane* (n 38) [6] (Richards J). The Court found both undue influence and unconscionable conduct where a son orchestrated the transfer of his mother's home to himself for inadequate consideration. While this case resulted in a favourable outcome,

The presumption of advancement fundamentally disadvantages older parents in property disputes by assuming that transfers to children are gifts.¹⁴⁰ This outdated principle fails to reflect contemporary realities where ageing parents transfer property under complex arrangements in the expectation of care or accommodation for life. Reform should reverse this presumption for vulnerable older adults or create specific exceptions for family accommodation agreements.¹⁴¹

Jurisdictional barriers often force older victims to navigate supreme court litigation — a process that is prohibitively expensive, emotionally draining, and often practically inaccessible.¹⁴² The incorporation of these issues into specialised tribunals with simplified procedures and lower costs could dramatically improve access to justice in elder housing disputes.¹⁴³

The ambiguous status of informal living arrangements leaves older home owners vulnerable when family members refuse to leave their property. Current tenancy laws provide inadequate guidance on these complex scenarios that lie at the intersection of family and property law. Clearer legal frameworks specifically addressing family cohabitation would help to fill this gap.

Insufficient protections for older guarantors fail to recognise the unique vulnerabilities and familial pressures that may lead to older people securing loans against their homes. Parental love creates a distinctive vulnerability that current banking regulations inadequately address.¹⁴⁴ Mandatory independent legal advice and strengthened lender responsibility provisions could better protect these vulnerable guarantors. Consumer protection laws have made some inroads, but older people remain vulnerable to exploitation.¹⁴⁵

it is significant that success was achieved through the substantial legal resources and expertise of the Victorian Public Trustee. This raises important questions about access to justice — it remains highly questionable whether Mrs McFarlane, acting independently without institutional support, would have possessed the financial means, legal knowledge, or emotional fortitude to successfully pursue such complex litigation against her own son.

¹⁴⁰ Lane (n 12) 415; Krasa Bozinovska, 'Rethinking the Presumption of Advancement in Contemporary Australia' [2019] (62) *Law Society Journal* 78; Australian Research Network on Law and Ageing, Submission to the Select Committee into Elder Abuse, *Inquiry into Elder Abuse* (2018) 17; Somes and Webb (n 131) 125.

¹⁴¹ Australian Research Network on Law and Ageing (n 140) 17; Somes and Webb (n 131) 125.

¹⁴² Sarah Ellison et al, *Access to Justice and Legal Needs* (Report Vol 1, Law and Justice Foundation of New South Wales, December 2004) 365.

¹⁴³ See generally Somes, 'Cutting the Gordian Knot' (n 132).

¹⁴⁴ *Watt* (n 98) [22].

¹⁴⁵ For example, the responsible lending provisions in the *National Consumer Credit Protection Act 2009* (Cth) ch 3 and the unjust transaction provisions of the *National Consumer Credit Protection Act 2009* (Cth) sch 1 ('*National Credit Code*') cl 76(2) generally, and particularly cl 76(2)(f). See also Australian Banking Association, *Banking Code of Practice* (Code of Practice, 12 December 2019) pt 7.

Electronic witnessing vulnerabilities create significant risks when older persons execute important legal documents while potentially under surveillance or influence from cohabitating abusers.¹⁴⁶ Enhanced verification protocols specific to vulnerable older adults would help address these digital-age risks.

Inconsistent tenancy protections across jurisdictions create a postcode lottery for older people experiencing family violence. Some states offer accessible declaration-based systems, while others require intimidating court proceedings.¹⁴⁷ Harmonisation of these protections would ensure all older Australians receive equal protection to leave residential leases without penalty in circumstances of family and domestic violence, regardless of location.

Emotional and financial barriers to legal action against family members represent perhaps the most significant obstacle to justice. Many older victims refuse to pursue legal remedies against their children, despite clear exploitation.¹⁴⁸ Specialised legal assistance programs, emotionally sensitive mediation services, and supportive court processes could help address these barriers.

Reluctance to pursue criminal remedies means that even in clear cases of exploitation, the criminal law's deterrent and protective functions remain largely theoretical.¹⁴⁹ While respecting victims' wishes is important, prosecution policy should recognise the public interest in addressing these crimes, establishing precedents that protect future potential victims.

C Lack of Genuine Legal Pathways and Access to Justice

South Australia and New South Wales have implemented safeguarding legislation with ostensibly robust powers to protect vulnerable older people.¹⁵⁰ However, these legal frameworks have proven largely ineffective in addressing housing insecurity — perhaps the most devastating form of elder abuse.¹⁵¹

The implementation of these safeguarding regimes reveals a critical disconnect between legislative intent and practical outcomes. For example, while the South Australian legislation grants considerable powers on paper, operational realities paint

¹⁴⁶ Law Council of Australia (n 33) 8–9; Law Society of New South Wales (n 63) 11–13; Purser, Cockburn and Crawford (n 66) 13.

¹⁴⁷ For example, New South Wales and Western Australia provide an avenue for obtaining a declaration from a medical practitioner or social worker who is familiar with the case to trigger termination of the lease. Other states still require the person experiencing domestic violence to navigate the court system. See also Webb et al (n 72) ch 3.

¹⁴⁸ Somes, 'Identifying Vulnerability' (n 12) 30–1.

¹⁴⁹ Seniors Rights Victoria, *Elder Abuse and Criminal Law* (Discussion Paper, May 2018) 7–10.

¹⁵⁰ *Ageing and Adult Safeguarding Act 1995* (SA); *Ageing and Disability Commissioner Act 2019* (NSW).

¹⁵¹ See generally Livings, Webb and Middleton (n 20).

a different picture.¹⁵² The overwhelming emphasis on autonomy and consent — while philosophically sound — has created a system that typically intervenes only in cases of immediate danger, leaving those experiencing more insidious forms of housing exploitation without adequate protection.¹⁵³

Law enforcement agencies demonstrate marked reluctance to involve themselves in what they perceive as ‘family matters’, despite clear elements of exploitation or fraud. Meaningful intervention typically occurs only when larger institutions with established legal departments — such as a public trustee or aged care facilities pursuing unpaid fees — advocate for action.¹⁵⁴ Individual older people rarely receive comparable support.¹⁵⁵

Meanwhile, traditional legal safety nets remain inadequate. Legal aid services and community legal centres operate under crushing resource constraints, with elder law expertise particularly scarce.¹⁵⁶ This creates a perfect storm, where vulnerable older people face housing insecurity with limited accessible legal pathways to remedy.

This gap in protection is particularly devastating given that housing insecurity represents perhaps the most profound form of elder abuse.¹⁵⁷ The psychological impact of feeling unsafe in one’s home — or worse, losing it entirely — creates profound trauma and insecurity at a stage of life when stability is most crucial. Yet despite this gravity, current legal frameworks provide few effective accessible remedies,¹⁵⁸ particularly in the context of Australia’s housing affordability crisis, where alternative accommodation options are severely limited.

The result is a protection system that exists more in theory than practice — a paper tiger that provides little meaningful protection for older Australians facing housing exploitation and insecurity. Without significant reform to both legislative frameworks and implementation resources, this critical protection gap will continue

¹⁵² See generally *Ageing and Adult Safeguarding Act 1995* (SA).

¹⁵³ *Ibid.*

¹⁵⁴ Seniors Rights Victoria (n 149) 7. For example, in *McFarlane* (n 38), the older person’s circumstances would not have been revealed if the aged care facility had not acted in relation to unpaid fees.

¹⁵⁵ Note the recent suggestion by the Law Council of Australia for an increase in access to support for victims of abuse, including increases in legal support and government compensation: Law Council of Australia (n 21) 12 [33].

¹⁵⁶ ‘Seniors Rights Victoria Asks for Urgent Investment into Australian Community Legal Centres’, *Seniors Rights Victoria* (Web Page, 18 March 2024) <<https://seniorsrights.org.au/news/seniors-rights-victoria-asks-for-urgent-investment-into-australian-community-legal-centres/>>; O’Brien, Stevens and Baldassar (n 27). Some jurisdictions have introduced an elder law focus within legal aid services, for example, in Western Australia: Legal Aid Western Australia, *Elder Rights WA Strategy 2023–2025* (Report, 2023). See also Dow et al (n 30) 859–60.

¹⁵⁷ See generally Livings, Webb and Middleton (n 20).

¹⁵⁸ Somes, ‘Cutting the Gordian Knot’ (n 132) ch 8.

to leave countless older Australians vulnerable to one of the most devastating forms of elder abuse.

VI CONCLUSION

It is a sad irony that the place where an older person should feel the most secure has become both a setting and target for abuse. Unfortunately, in precarious economic times and with housing affordability declining, this vexing issue is likely to accelerate. For many older Australians, private home ownership has been both an aspiration and an achievement, providing financial security and ontological well-being. However, this article has illustrated how the home can paradoxically become both a setting for, and a target of, elder abuse. When the home becomes a setting for abuse — through isolation, unwelcome lodgers, or multigenerational living arrangements — the very place meant to provide security instead becomes a site of vulnerability. Similarly, when the home becomes a target for exploitation through inheritance impatience, fraudulent mortgages, or failed family accommodation agreements, older people risk losing not just their most valuable asset, but their sense of identity and security.

The legal frameworks currently available to address these forms of elder abuse are frequently inadequate, particularly when the dynamics of family relationships blur the line between generosity and exploitation. Equitable doctrines such as undue influence and unconscionable conduct provide some recourse, but the burden of proof, the emotional cost of litigation against family members, and the presumption of advancement create significant barriers to justice. Even when legal avenues are theoretically available, many older people remain reluctant to pursue them, fearing family conflict or the social stigma associated with acknowledging abuse by their own child.

As housing affordability continues to decline and financial pressures intensify, the vulnerability of older home owners is likely to increase. The emotional and psychological consequences of losing one's home through abuse are profound — particularly for older people who have limited opportunities to recover financially and rebuild their lives. Without coordinated responses that include better legal protections, increased awareness, and support services specifically designed for elder abuse related to housing, many older Australians will continue to face the devastating prospect of having their most secure place become their greatest source of insecurity.