This article considers the degree of legal security of tenure and ontological security in various forms of accommodation utilised by older people. In so doing, the article examines how elder abuse can dilute legal and ontological security and makes suggestions as to how existing real property laws could be utilised and amended to safeguard housing security for older people.

INTRODUCTION

One may gauge the strength or significance of someone’s relationship with an object by the kind of pain that would be occasioned by its loss.²

It is undeniable that Australia will be faced with challenging economic and societal realities over the next 40 years.³ Australia must respond to demographic changes, including an extension to the average working life and increased participation from Australian seniors.⁴ Furthermore, various inquiries that have considered housing affordability in Australia highlight shortfalls in the provision of age-appropriate and affordable housing.⁵ These major demographic and housing issues are closely connected, and are occurring against a background of stagnating economic conditions and an oversubscribed health system.

Security of tenure is a crucial factor in making people of all ages, including older people, feel confident in their housing circumstances. Security of tenure can be defined in a narrow legal sense based on the nature of an interest or the length of tenure in land or, more broadly, to encompass ontological security, the confidence that most human beings have in the continuity of their self-identity and in the constancy of their social and material environments. Ontological security is essential to general wellbeing and the link between secure housing and positive health outcomes is well established.⁶

¹ BA LLB (Hons 1) (QUT), LLM (QUT), PhD (UWA), Dip Ed (UQ). Professor, Curtin Law School.
² Part 1 and 2 of this article utilise material incorporated in a research report of which I was a co-author. Content in this article from the report is content that I was solely responsible for as part of the co-authorship team. Aviva Freilich et al, ‘Security of Tenure for the Ageing Population in Western Australia: Does Current Housing Legislation Support Seniors’ Ongoing Housing Needs. Summary’ (Report, Council on the Aging Western Australia – COTA WA, November 2014) <http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf> (‘Western Australia Security of Tenure for the Ageing Report’). The research was funded by COTA WA and LotteriesWest. Elderly persons in urban and regional Western Australia living in a variety of housing tenures were interviewed for the report.
The spectre of elder abuse, estimated to affect up to 14 per cent of older people, can have a deleterious effect on a person’s security of tenure. Elder abuse undermines not only the physical and emotional welfare of individuals but often has a financial impact. Indeed, in Australia, instances of elder financial abuse account for approximately 42 per cent of reported elder abuse cases. Given that the pivotal asset for many older people is their home, the loss of that asset, or an unintended erosion of equity in the home, is likely to cause considerable stress. Even when older people are not homeowners, elder abuse can lead to the loss of a home. The misappropriation of an older person’s personal assets, for example where a bank account is accessed without the older person’s consent, can lead to the older person being unable to pay rent in the private rental market or fees in an aged care setting. And, the associated psychological impact is multiplied where the loss has been perpetrated by a close relative or acquaintance. Although elder abuse is prevalent and rising, it is interesting that there has been minimal consideration of the role real property laws have to play when encountering elder abuse, including in relation to security of tenure.

Of course, most legislation relevant to real property and residential accommodation is generic and, with the exception of retirement village and aged care legislation, does not make specific reference to older people. However, instances of elder abuse commonly involve some form of real property, such as the fraudulent sale or mortgage of an older person’s home. The strict operation of property laws, for example the indefeasible title bestowed on an innocent third party despite the transfer being the subject of fraud, can have a deleterious effect on an older person’s security of tenure. Furthermore, the result of such frauds or other property related losses – or simply individual circumstances – may result in an older person residing in more marginal types of accommodation such as a private rental, a residential park or a boarding house. All types of accommodation have differing degrees of legal and ontological security of tenure which in turn impact upon an older person’s wellbeing and ability to age well.

This article is in five parts. Part II focuses on older people and examines why it is important to look at older people as a discrete group rather than within the generic population. It also considers the importance of security of tenure for older people’s wellbeing. Part III will discuss the nature of security of tenure and its role and recognition by the law, including references to international human rights instruments. Part III also considers the impact elder abuse may have on older people’s legal security of tenure and, in turn, their ontological security. Part IV examines the legal security of tenure and the ontological security available to older people in different forms of accommodation. The article concludes with suggestions to enhance existing laws, thus ensuring a greater degree of legal security of tenure and ontological security for the ageing population.

II AN AGEING AUSTRALIA

A Older People and Accommodation

The laws relating to housing and accommodation are many and they impact differently on individuals depending on a person’s particular life circumstances. However, the effectiveness of, and any shortcomings in, the law pertaining to housing and accommodation arrangements are likely to present a greater level of stress and anxiety to seniors than other age groups.

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8 ‘Review into the Characteristics of Elder Abuse in Queensland’. This research project was conducted by Barbara Blundell, Joe Clare, Emily Moir, Eileen Webb and Mike Clare on behalf of the Department of Communities, Child Safety and Disability Services (Qld). It was completed in March 2018 but is yet to be tabled in the Queensland Parliament. For more information see <https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/our-progress/enhancing-service-responses/tailoring-responses-meet-needs-vulnerable-queenslanders>. 
Seniors are at a stage in their lives when tenure is especially important. Seniors place a high value on their home environment as they are less likely to be in full-time employment and consequently more likely to spend greater time in their homes and in their immediate neighbourhoods than at any other period in their lives. This stage in a senior's life can be impacted by a variety of issues associated with ageing which may affect accommodation choices. For example, there may not be the variety of accommodation options available to seniors as to younger persons due to physical limitations and the rising cost of accommodation. Illness and age-related health concerns are likely to become more prevalent and there may be changes in the family dynamic due to the necessity for carers, transition to widowhood, and/or the need to reside with or closer to relatives. From a financial perspective, if something goes wrong it is unlikely that seniors will be able to rebuild and recoup losses. Given that the base retirement age is 55 (although most people will be unable to qualify for the pension until 67) and that life expectancy has increased to around 80 years, it is foreseeable that many older people will pass through several forms of accommodation between retirement and end of life. Therefore, while a particular kind of housing may meet a person's needs at one point in time, such needs can change dramatically with the ageing process. Perry, Andersen and Kaplan note that the experience of aging may necessitate transitions in living environments, either through adaptations to current residences or through relocations to more supportive environments. Although such issues may be experienced by other age groups and demographics as well, it is suggested that seniors are particularly vulnerable to their occurrence and may face distinct barriers in accessing assistance.

Why is Security of Tenure Important to Older People?

Whatever the mode of accommodation, security of tenure is a priority for almost all older people. Apart from the obvious desirability of stable accommodation, there are also discernible health, social and economic benefits to safeguarding security of tenure as the population ages. Transitions in later life are complex and ‘challenge older adults to make projections of a future self and to anticipate their emotional, medical and financial needs’. Older people who are secure in the knowledge that they can stay in their accommodation for an extended period – or permanently – exhibit demonstrably better physical and psychological health than those in less stable accommodation. The impact of a change of residence, particularly a sudden or involuntary one, heightens the risk of physical and psychological health implications in both

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10 Indeed a female who was born in 2012 will on average live for an estimated 94.4 years while a male born in 2012 will live on average 91.6 years: Productivity Commission (Cth), above n 4, 50.

11 Three types of relocation over the course of retirement have been described being motivated by lifestyle, adaption to increased needs and finally the need for institutional care: Eugene Litwak and Charles F Longino Jr, ‘Migration Patterns among the Elderly: A Developmental Perspective’ (1987) 27 Gerontologist 266; Tam E Perry, Troy C Andersen and Daniel B Kaplan, ‘Relocation Remembered: Perspectives on Seniors Transitions in the Living Environment’ (2014) 54 Gerontologist 75.

12 Perry, Andersen and Kaplan, above n 11, 76.

13 Ibid 78.

14 Although studies have concluded that older people in their own homes have the highest levels of ontological security, those in longer term rental or permanent public housing experience similar levels. Such levels decline the more precarious the accommodation arrangements: see generally Rosemary Hiscock et al, ‘Ontological Security and Psycho-Social Benefits from the Home: Qualitative Evidence on Issues of Tenure (2001) 18 Housing, Theory and Society 50.'
the short and longer term.\[^{15}\] Furthermore, relocation that takes place without regard to the personal preferences of older people gives rise to feelings of powerlessness.\[^{16}\]

Insecure accommodation may also impact upon older people’s social milieu through a reluctance to engage in their local communities or,\[^{17}\] in the event of having to relocate, the loss of existing support and friendship networks.\[^{18}\] The prospect of possibly having to move weighs heavily on older people, especially where there are limited options for accommodation elsewhere.\[^{19}\]

Finally, there are significant economic costs which may result from the heightened risk of illness and the consequences of actual or potential dislocation. Much attention has been paid to the rising cost of funding the healthcare of older people yet the nexus between secure accommodation and better health outcomes for older people is, for the most part, overlooked.\[^{20}\] Where an older person must relocate, voluntarily or involuntarily, support formerly provided by friends or family within a community is likely to cease and must be provided in some other way. Similarly, if an older person must move from a private arrangement to public housing, more cost falls to the public purse.\[^{21}\]

Despite the obvious benefits of secure accommodation for older people, there has not been a comprehensive response to the focus on security of tenure for older people. Unfortunately, issues affecting seniors are often a low priority for resource allocation and policy innovation because of older people’s relative lack of economic and political power.\[^{22}\] Furthermore, gradual shifts in the nature of society, even with profound consequences, rarely elicit the same scrutiny as immediate policy issues.\[^{23}\]

\[^{15}\] Involuntary relocation has been identified as a factor in increased morbidity. The relocation process has also been linked to the emergence of physiologic and psychosocial disorders such as Relocation Stress Syndrome: Abir K Bekhet, Jaclene A Zauszniewski and Wagdy E Nakhla, ‘Reasons for Relocation to Retirement Communities: A Qualitative Study’ (2009) 31 Western Journal of Nursing Research 462.


\[^{17}\] For example, in the Western Australia Security of Tenure for the Ageing Report, above n 1, 9 n 11, some interviewees from residential parks reported that many older residents do not complain even if conditions in a residential park are poor or essential maintenance is neglected. Some stated the older residents were not prepared to engage with residents’ groups or be seen to engage with other residents for fear of being branded a troublemaker.


\[^{19}\] This was a common thread in many of the interviews in the Western Australia Security of Tenure for the Ageing Report, above n 1, particularly in relation to residents in residential parks on rolling periodic leases (see ch 8) and older people in the private rental market (see ch 5). Studies have, unsurprisingly, recorded heightened quality of life for older people formerly residing in private rentals who have been able to access age appropriate public housing with community supports: Ena Ahern, Older Australians Experience Living in Insecure Tenancies (Housing for the Aged Action Group, 2003).


\[^{21}\] In the Western Australia Security of Tenure for the Ageing Report, above n 1, 9 n 15, a significant number of private tenants and residents of residential parks made the comment that if, in the first case, the rent increased too much, or, in the second case, if the resident was forced to vacate the park, their only option was public housing.

\[^{22}\] Howden-Chapman, Signal and Crane, above n 18.

\[^{23}\] Productivity Commission (Cth), above n 4.
A  What Does Security of Tenure Mean to Lawyers and Non-Lawyers?

In its simplest form, security of tenure is a legal concept that refers to a person’s right to occupy premises for a given time. While it is essential to ground our discussions in the correct legal terminology, we must be mindful that the expression has taken on a broader – more colloquial – interpretation that encapsulates issues of adequate housing and quality of life.24 Both options are problematic: too narrow a focus on a bare legal notion may exclude consideration of pertinent related issues and yet too broad an interpretation will dilute the precision of the ensuing legal discussion.

Tenure can be defined as the conditions under which land or buildings are held or occupied.25 It is the right of a person to hold property, a person’s entitlement to occupy land, the nature of that right and the term and manner of the occupation. For example, a person’s tenure pursuant to a lease gives that person the right to occupy the land for the term of the lease under the terms and conditions stipulated in the lease or as implied by statute. The security of a person’s tenure in any given case is gauged according to the extent of an individual’s right to occupy the land. Legal security of tenure means that, in the eyes of the law, a grantee has a right to remain in occupation of land that the law will enforce.

It is obvious, therefore, that tenure, and thus security of tenure, is not a one size fits all concept. There is a vast array of different tenure arrangements. Determining security of that tenure focuses on a continuum from people who are very secure in their tenure through ownership or long term leases, through to people with little or no security of tenure. In any given case, the degree of security of tenure will depend on the nature of the occupation and the legal rules that will determine the security and the term of the tenure. So, a person who owns their own home will, prima facie, have the most secure tenure. A home owner can occupy the premises for as long as they desire and use the property as they like, subject, of course, to overriding government requirements or any arrangements made with others to occupy the premises, for example a lease. In comparison, under a private residential lease for one year under residential tenancies legislation, the tenant will have the right to exclusive possession of the premises for the term of one year. This right may be impacted upon by the terms of the residential tenancy agreement and/or the provisions of the legislation. Therefore, if the tenant is in breach of his or her obligations under the lease, the lease – and the tenant’s tenure – may be terminated. In a boarding or lodging situation, any notion of security of tenure is illusory; the occupant can be evicted from the premises at will.

B  Extending the Legal Notion of Security of Tenure – The Right to Adequate Housing and Ontological Security

The legal understanding of security of tenure may be quite different to the use of the term in common parlance. Rather than an arrangement between the grantor of the interest and the grantee, the natural conclusion is that it is an interest in the land obtained by the grantee – a relationship between the tenant and the land. There is often a view that the tenant has rights in and over the land for an undefined period. Although in some cases, for example a leasehold

24 While the legal classification serves a valid purpose, the reality is that the concept of security of tenure is generally understood to mean more than the right to occupy ‘four walls with a roof’. See A Home is More than Four Walls and a Roof (Directed by Mark Andrew Job, St James Drop-In Centre, 2010) <https://youtu.be/T9Fyb-oJp1w>, a short subject documentary produced for St. James Drop-In Centre in Montréal, Québec, Canada.

interest, the tenant does obtain an interest in the land, the interest is inferior to that of ownership and is regulated by the agreement between the parties.\textsuperscript{26} Also, security of tenure is often regarded as synonymous with quality of life issues, a matter explored below in relation to the concept of adequate housing. This is not correct in a legal sense. Legal security of tenure has no correlation with quality of life issues, except to the extent that people take comfort in knowing that one’s occupation is secure and long-lasting. Indeed, there may be an inconsistency between the two, for example, where a person in public housing has secure tenure but, in some cases, the stress of neighbourhood dysfunction results in a below average quality of life.\textsuperscript{27}

If the extent of an individual’s security of tenure is limited by and to the characteristics of the form of the tenure, it does not take us very far. An unencumbered home owner will, for the most part, have considerable security of tenure, whereas a boarder in a lodging house has virtually none. This makes a legal analysis of security of tenure relatively straightforward because reference to the relevant statutes, and in some cases the common law, will reveal its nature and extent. However, to most people, security of tenure is not just occupation for a time span. Commentary clarifying art 11(1) of the \textit{International Covenant on Civil and Political Rights (ICCPR)} describes legal security of tenure as one of seven components in the right to adequate housing.\textsuperscript{28} The other six factors are affordability,\textsuperscript{29} habitability,\textsuperscript{30} availability of services, materials, facilities and infrastructure,\textsuperscript{31} accessibility, location,\textsuperscript{32} and cultural adequacy.\textsuperscript{33} As such, security of tenure is but one of several factors that combine to produce adequate housing. Although security of tenure is a – and in many cases the – pivotal element in the mosaic that represents adequate housing, it is not the be-all and end-all. Indeed, after a cursory examination of the common law and real property legislation, the existence of or degree of security of tenure is easily ascertainable. What is a more difficult prospect is examining whether, despite legal security, the housing is adequate to the person’s needs – adequate meaning by reference to these other factors.

Traditionally, the common law in relation to the occupation of a dwelling is constrained. It rarely differentiates between real property (a physical structure upon land with a capital value) and a home (described by Fox-O’Mahoney as a social, psychological, cultural and emotional phenomenon).\textsuperscript{34} Despite recognition in other academic disciplines, it is fair to say that real property law has been slow, even reluctant, to weigh up the importance of a secure and stable living environment for an occupant in a contest with commercial or economic considerations. With the exception of an unencumbered owner of land, an occupant’s tenure was viewed traditionally in terms of length and nature – how long an occupant would be indulged by an owner before the law permitted the occupant to be moved on.

\textsuperscript{26} Or as imposed by statute.

\textsuperscript{27} For example, in the interviews for the \textit{Western Australia Security of Tenure for the Ageing Report}, above n 1, 14 n 26, several senior public housing tenants were quite distressed by the activities and behaviour of some of their neighbours but were told by Housing Authority representatives that it would be several years before they could be transferred to other accommodation.

\textsuperscript{28} \textit{International Covenant on Civil and Political Rights}, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 11(1) (‘ICCPR’).

\textsuperscript{29} Personal or household financial costs associated with housing should not threaten or compromise the attainment and satisfaction of other basic needs. For example, food, education, access to health care.

\textsuperscript{30} Adequate housing should provide for elements such as adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.

\textsuperscript{31} Housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, etc.

\textsuperscript{32} Adequate housing must allow access to employment options, health-care services, schools, child-care centres and other social facilities and should not be built on polluted sites nor in immediate proximity to pollution sources.

\textsuperscript{33} Adequate housing should respect and take into account the expression of cultural identity and ways of life.

But is the focus on security of tenure artificial in relation to the overall wellbeing of older people and the circumstances in which they age? Does security of tenure equate to adequate housing or quality of life? Security of tenure may be a factor that contributes to quality of life – indeed, in some cases the lack of security of tenure is a cause of considerable angst – yet its mere existence does not guarantee a secure lifestyle in the sense of being comfortable in one’s surroundings. When considering security of tenure, it seems appropriate to examine security in the narrow legal but also in a broader sense. This requires looking beyond the time based legal notion, to encompass other issues. Security means a secure condition or feeling, with secure being defined as untroubled by danger or fear, safe, reliable and stable. Therefore a wider view of security of tenure extends beyond the legal notion (which, of course, remains extremely important) and encompasses factors such as those outlined above in relation to adequate housing. Affordable, convenient and secure housing is critical in the lives of seniors, and security in one’s home environment is linked directly to physical and mental wellbeing as people age.

This discussion links well with housing literature, in particular with Giddens’ theory of ontological security – the confidence that most human beings have in the continuity of their self-identity and in the constancy of their social and material environments. Basic to a feeling of ontological security is a sense of the reliability of persons and things. Several commentators have explored the relationship between stable housing and ontological security and, in turn, the link between ontological security and health and social outcomes. Indeed, the World Health Organisation emphasises the quality and environment of housing and its impact on the health of occupants. Affordable and appropriate housing protects people from hazards and promotes good health and wellbeing.

Ontological security is of particular importance to older private homeowners and renters and is undermined by factors influencing insecurity of tenure including housing cost and complex tenancy procedures. While security of tenure does not equate to ontological security, the two concepts overlap and, in reality, the existence of legal security of tenure will, in a predominance of cases, foster the feelings of safety and perceived control essential for a high degree of ontological security. Therefore, it is plain to see that older people who

35 Stevenson and White, above n 25.
37 Hiscock et al, above n 14.
39 Dupuis and Thorns note that home can provide a locale in which people can work at attaining a sense of ontological security in a world that at times is experienced as threatening and uncontrollable: Ann Dupuis and David C Thorns, ‘Home, Home Ownership and the Search for Ontological Security’ (1998) 46 The Sociological Review 24.
44 Hiscock et al, above n 14.
experience elder abuse will, naturally, experience a dilution of ontological security that will be magnified further by conduct that undermines the legal security of tenure in their housing circumstances.

C The Impact of Elder Abuse

Differing conceptualisations of elder abuse can be seen in various disciplines and there is no one accepted definition of elder abuse. However, a commonly utilised definition is: ‘any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse may be physical, sexual, financial, psychological, social and/or neglect.’ Broader scope is often utilised in relation to elder financial abuse with the World Health Organisation describing such abuse as ‘the illegal or improper exploitation or use of funds or other resources of the older person’. This definition incorporates abuses committed by persons outside a relationship of trust so as to include the actions of strangers and institutions.

Experiencing abuse, whether instigated by persons close to or removed from an older person, is likely to have profound psychological and physical impacts upon an older person’s health as well as dilute his/her income and assets in retirement. An older person is unlikely to have the time or the physical, psychological and financial resolve to recover or recoup losses. If the abuse undermines the older person’s ability to retain or find accommodation it is likely there will be a catastrophic impact on the older person’s health and wellbeing.

In a time of decreasing housing affordability and income stagnation, the ‘nest eggs’ believed to be held by older people may become attractive to family, associates or even strangers. ‘Inheritance Impatience’ is a term often used to describe the actions of adult children or grandchildren who do not want to wait until an older person passes away to receive money or property from the older person’s estate. And, some people seek to access these funds through a variety of means such as abusing enduring powers of attorney or dealing with an older person’s property without their knowledge or consent. In an abundance of cases, the conduct is directed at land, particularly the family home, or has consequences that impact upon the older person’s accommodation choices, for example through loss of savings.

Real property laws impact upon accommodation choices. The right to dwell in a property, the term of the residency, the conditions upon which a person can stay in or vacate the dwelling are addressed in various statutes and, in some cases, by the common law. Given that real property laws will determine a person’s legal security of tenure – and the nature of that tenure will also impact upon ontological security – a logical step is to consider the laws regulating different types of accommodation and assess how elder abuse may impact upon those notions.

45 Kaspiew, Carson and Rhoades, above n 7, 47–57.
50 Ibid. See also Nick Goiran, ‘Sense of Entitlement Leads to Elder Abuse’, The West Australian (Perth), 20 September 2017.
A high proportion of older people enter retirement owning their own home.\(^{52}\) Although the home is often the only major asset held, the increase in real estate values over the past few decades means that many of these homes are very valuable indeed. Ironically, the older home owner’s security of tenure can be undermined by the operation of the existing legal framework. Of particular concern are instances of elder financial abuse involving an older person’s real property, a risk that is likely to increase as the population ages. The Torrens system, and its focus on the indefeasibility of title, leaves a defrauded (former) registered proprietor unable to reclaim an unfettered interest in his or her property when it has been registered in the name of an innocent third party.\(^ {53}\) This is the case even where the older person has been defrauded of that property. Although it is hoped that provisions such as s 56C of the \textit{Real Property Act 1900} (NSW) and eConveyancing will make such frauds harder to perpetuate, fraud may occur through forgery of the older person’s signature on the mortgage or transfer instrument, identity fraud or impersonation of the older person, or by the older person being persuaded to sign mortgage or transfer documents while under a misapprehension about the nature of the documents or their effect.\(^ {54}\) In such cases, the fraudulent party may transfer the property into his or her name, sell the property to a third party, or mortgage the property as security for a loan. Such transactions may result from the misuse of an enduring power of attorney.\(^ {55}\) If the property had been transferred into the name of the fraudulent party (or to someone who was directly involved in the fraud), the fraud exception to indefeasibility of title would see the property transferred back to the older person.\(^ {56}\)

The matter becomes more complicated if a third party is involved. While there is a fraud exception to indefeasibility of title, it must, of course, be brought to the present registered proprietor or his or her agent. If the property is transferred to a third party that is not involved in the fraud and the transfer is registered, the title of the third party will be indefeasible. The only option for an older person is to seek compensation from the relevant assurance fund. In some jurisdictions, recourse to the fund is not direct and may require that the older person first proceed against the fraudulent abuser.\(^ {57}\) In many cases, especially when a family member is involved, the older person may not have the financial, emotional or physical capacity to do so.

Where the property is encumbered by a fraudulent mortgage, the mortgage will be enforceable against the registered proprietor if the mortgagee was not implicated in the fraud.\(^ {58}\) If the debt is not repaid, the mortgagee could sell the property to recoup the debt. The older person will

\(^{51}\) Interview HE 4 in \textit{Western Australia Security of Tenure for the Ageing Report}, above n 1, 31.

\(^{52}\) Gavin Wood and Rachel Ong, ‘Can the Private Rental Sector Provide a Secure, Affordable Housing Solution?’, \textit{The Conversation} (online), 19 October 2016 <http://theconversation.com/can-the-private-rental-sector-provide-a-secure-affordable-housing-solution-63880>.


\(^{54}\) Ibid. See also Teresa Somes and Eileen Webb, ‘Close to Home: Legal Dilemmas Surrounding Family Care and Accommodation Arrangements’ (2015) 33(2) \textit{Law in Context} 24.

\(^{55}\) Discussed below in Part V.

\(^{56}\) Presuming they choose to do so.

\(^{57}\) See generally \textit{Western Australia Security of Tenure for the Ageing Report}, above n 1, 33.

\(^{58}\) \textit{Frazer v Walker} (1967) 1 AC 569.
be left with either no property at all or a property encumbered by a registered mortgage. The only recourse may be to the relevant assurance fund. Such a result has a significant impact on legal security of tenure and, with the concomitant psychological impact, undermines ontological security and wellbeing. Furthermore, if the perpetrator is an adult child or person for whom the older person has affection, the likelihood of pursuing the perpetrator is small. Although there has been a fraud, older people are unlikely to seek recourse or report the matter to police in most cases.59

1 Mortgages or Guarantees for the Benefit of Other Family Members

The conduct does not necessarily need to be fraudulent. The natural love and affection between family members means that older people may be persuaded to assist family members by using their home as security for a guarantee or a loan. Such lending is often the result of an agreement with a family member, for example an adult child, to help that person financially by entering into an arrangement where the older person mortgages his or her property and the family member agrees to pay the mortgage. These loans are secured against the older person’s home, which is a huge risk if the loan defaults and the older person cannot service the debt. The failure of (usually) the family member to pay the mortgage or the guarantee can result in the loss of an older person’s home. Unfortunately, many older people enter into such transactions without being fully aware of the nature of the transaction and the consequences of the arrangement going awry. Some such agreements may also come about through undue influence or unconscionable conduct. 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 the property.60

2 Reverse Mortgages

Reverse mortgages and other home equity withdrawal mechanisms can be advantageous in permitting older people to access equity in their homes to improve quality of life in retirement. The downside is that although there may be low or no repayments, interest is, of course, accruing. In some cases, seniors have found themselves in a negative equity situation as such. Although recent legislative amendments have addressed this issue, the products still have some disadvantages and seniors need to be well advised as to the risks involved before entering into such arrangements, particularly for the benefit of relatives.61

3 Family Agreements (Assets for Care Arrangements)

Family agreements, sometimes referred to more specifically as assets for care arrangements, occur when an older person makes a financial contribution to a family member, relative or friend in exchange for accommodation for life. This can be in the form of a granny flat, a home extension or simply moving into a home with family. The common denominator is that the older person makes a contribution to (usually) an adult child, often through selling the family home. The key criterion is that there has been a monetary advantage provided to the adult child in return for agreeing that the older person will be cared for. If the arrangement is successful, it can be a source of a considerable amount of ontological security. However, legal security of tenure is precarious.

The reality is, these arrangements are unregulated and there is little to no legal security of tenure in them. The transactions 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

60 Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447, 474.
61 See generally Western Australia Security of Tenure for the Ageing Report, above n 1, 203–11.
older person’s health deteriorating to an extent that residential aged care is necessary. And, even if the terms of the agreement are written down, often the very contingency not considered in the document is the one that arises.\textsuperscript{62} Entering into these arrangements may also have significant Centrelink ramifications. For example, the contribution to the adult child is likely to exceed the deprived assets (gifting) provisions in the legislation, thus diluting the older person’s right to social security payments.\textsuperscript{63}

If the relationship breaks down, the older person is in a difficult financial position. In most cases, the older person has not been recorded on the title to the land. Therefore, the older person has given a considerable amount of money to the adult child and the value of the adult child’s property has been enhanced by the fruits of that financial contribution (through a home extension, the construction of a granny flat or a cash injection into the household). In most cases the older person’s assets, usually a home, have been sold. If the older person has not been recorded on the title as a registered proprietor, it is difficult for the older person to be reimbursed. Gifts to even adult children are subject to the doctrine of advancement,\textsuperscript{64} and the older person will need to call upon equitable notions such as a constructive trust or estoppel to establish an interest in the land.\textsuperscript{65} Such a process is lengthy and expensive as matters can only be brought in Supreme Courts and in some jurisdictions, District Courts.

B  Private Rental

I was renting this place from an old lady for 12 years. The rent had been the same for a while ($210) but she knew I looked after the place. She died suddenly just before Christmas. Her son came around and said that the unit had been left to his daughters. He said I would have to leave because he wanted to renovate the unit and lease it out at $450 a week. I looked around but there was nothing I could afford. I didn’t want to move out of the area because I had choir, my doctor, shops and the rest. I went to see my member of parliament and the woman in his office told me to just stay put for as long as I could. I didn’t want to do that because if they threw me out I would never be able to rent anywhere again. Finally I spoke to the son and told him I didn’t have anywhere to go. He said he would put off the renovation and I could stay on for six months. The rent rose by $150. I am happy to be staying for a while but I don’t know what’s going to happen when the six months is up.\textsuperscript{66}

Traditionally, as households enter retirement, older people have been very likely to own their homes outright. However, there is a growing minority for whom this is not the case. ‘Critical life events’ such as divorce, inequalities in relation to employment, wages and superannuation (particularly for women) and shifts in affordable housing supply, have resulted in individuals and households either falling out of home ownership and being unable to regain entry, or being unable to ever achieve home ownership at all. In some cases, the loss of the home through fraud or a transaction to assist a relative can lead to the loss of real property and the need to find accommodation in the private rental market.

Ontological security is minimal because with rising costs and low availability older people in rental situations become concerned that if they have to leave the property they are residing in, they may not find another – at least not in a familiar area. Even under a fixed term residential tenancy, security of tenure is for only a short period of time. Upon expiry of the fixed term many older people continue on periodic tenancies that can be terminated without grounds on very short notice. Although cheaper accommodation might be found further out to the fringes

\textsuperscript{62} Mainieri v Cirillo (2014) 47 VR 127.
\textsuperscript{63} Social Security Act 1991 (Cth) s 9(4); Somes and Webb, above n 53.
\textsuperscript{65} Somes and Webb, above n 53; Somes and Webb, ‘Close to Home: Legal Dilemmas Surrounding Family Care and Accommodation Arrangements’, above n 54.
\textsuperscript{66} Interview PR 3 in Western Australia Security of Tenure for the Ageing Report, above n 1, 51.
of the city, older renters tend to be apprehensive about difficulties entailed in travelling greater distances, access to infrastructure and in establishing new networks.67

Legal security of tenure is limited too. Each state and territory has enacted residential tenancies legislation.68 Despite the intention behind the legislation – to balance the legal positions of landlords and tenants – the reality is that renters are, for the most part, in a precarious position in relation to legal security of tenure. Although there are no time restraints upon residential leases, most such leases are for a fixed term of six or twelve months. After the expiry of a fixed term, many leases simply revert to periodic status, meaning that the lease can be terminated after the expiry of a limited notice period, usually without grounds.

Evidence suggests that renting can be difficult for older people due to a lack of willingness on the part of landlords to install age-friendly fittings, such as shower rails.69 If older persons obtained permission to install such aids themselves, the fittings must be removed without damage to the property at the end of the lease. Furthermore, as people age, it becomes more important to ensure that the landlord actually carries out repairs. The refusal of many landlords to allow tenants to keep a pet also impacts upon an older person’s enjoyment of the property. Perhaps unsurprisingly, the lack of legal security of tenure – and a dearth of ontological security – in the private market, has been cited as one of the key reasons for seniors moving into public housing.

C Community Housing and Public Rental

There was something in my roof. I complained about it but nobody came to look. I was terrified; I knew someone was up there. This went on and on and I was beside myself. I wanted to leave but DOH said there was nothing available. I think they thought I was mad. Finally I got someone to have a look up there. It turned out some fellows from another unit could climb up through the man-hole, into the roof and crawl along to my unit. They thought it was a joke to scare me. They got warned but they are still around. I still want to leave.70

Community housing is part of a broader social housing system that also includes public housing. However, community housing differs from public housing in that it is generally owned or managed by a non-government, not-for-profit organisation. Many shires and local government authorities also offer community housing. Public housing is much more secure from a legal security of tenure perspective. As a result, ontological security is usually better than in private rental situations, although some residents do express concerns regarding safety and neighbourhood atmosphere. Such tenants may want to move but are prevented by waiting lists from doing so.

Public housing is managed by state government housing authorities, and residential tenancies legislation extends, at least in part, to public housing tenants. The legislation differs from state to state but it is worth noting here that in Western Australia there is a controversial three strikes policy that can result in eviction of older tenants. This can have harmful repercussions in circumstances where younger family members cause trouble and the older person is evicted. Under s 75A of the Residential Tenancies Act 1987 (WA), the Housing Authority may apply to

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67 Catherine Bridge et al, ‘Age-Specific Housing and Care for Low to Moderate Income Older People’ (Final Research Report No 174, Australian Housing and Urban Research Institute, September 2011) 119. (2011).
68 Residential Tenancies Act 1997 (ACT); Residential Tenancies Act 2010 (NSW); Residential Tenancies Act 1999 (NT); Residential Tenancies and Rooming Accommodation Act 2008 (Qld); Residential Tenancies Act 1995 (SA); Residential Tenancies Act 1997 (Tas); Residential Tenancies Act 1997 (Vic); Residential Tenancies Act 1987 (WA).
70 Interview SH 2 in Western Australia Security of Tenure for the Ageing Report, above n 1, 61.
the court to terminate a tenancy on the basis that the tenant has caused or permitted the
premises to be used for illegal purposes, caused or permitted a nuisance to occur on the
premises, or interfered or permitted an interference to neighbours. A tenant is also responsible
for the behaviour of others on the premises with the tenant’s permission. In a report entitled
‘A Better Way’, the WA Equal Opportunity Commissioner noted that strikes had been issued
to seniors after unruly behaviour of guests outside of their control (including when a tenant
was in hospital).\footnote{Equal Opportunity Commission (WA), ‘A Better Way: A Report into the Department of Housing’s
Disruptive Behaviour Strategy and More Effective Methods for Dealing with Tenants’ (Report,
Government of Western Australia, June 2013) 59.} The Commissioner argued that as public housing was used by people who
could not access the private market, eviction should not be a punitive measure.\footnote{Ibid 2.}

D Retirement Villages

Although clearly the [Retirement Villages] Act seeks to strike a balance between the rights
and obligations of owners and residents, the balance falls heavily in favour of the
protection of the interests of the residents of retirement villages, particularly in the long
term certainty and security of their accommodation.\footnote{Retirement Care Australia (Hollywood) Pty Ltd v Commissioner for Consumer Protection [2013] WASC
219, [175] (Pritchard J).}

The legislative framework regulating retirement villages is complex. All Australian
jurisdictions have domestic retirement village laws.\footnote{Retirement Villages Act 2012 (ACT); Retirement Villages Act 1999 (NSW); Retirement Villages Act 1995
(NT); Retirement Villages Act 1999 (Qld); Retirement Villages Act 2016 (SA); Retirement Villages Act
2004 (Tas); Retirement Villages Act 1986 (Vic); Retirement Villages Act 1992 (WA).}
In addition, the titles to the land and the contracts themselves are extremely complex and difficult to understand.\footnote{Richard McCullagh, ‘Care in Australian Retirement Villages’ (2014) 8 Elder Law Review 4; Western
Australia Security of Tenure for the Ageing Report, above n 1, 71–87.}

So far as legal security of tenure is concerned, a recent report in Western Australia identified
that there are three key events that may directly impact on a resident’s legal right or practical
option to remain in a retirement village, and may result in a resident being forced to leave the
village.\footnote{See generally Western Australia Security of Tenure for the Ageing Report, above n 1, 72.}
These include circumstances in which, firstly, a retirement village ‘fails’ as a result of
operator insolvency or an operator chooses to terminate a retirement village scheme. Secondly,
a residence contract is terminated by an administering body. Or, thirdly, living
conditions in a village become untenable for a resident because of mismanagement and/or
clashes with management.

The reality is that there is a high degree of legal security of tenure in a retirement village.
However, ontological security may not be so robust in many cases. Because of clashes with
residents or management, or a desire to simply move away, residents may attempt to leave
retirement residences. However, they may find that they cannot afford to leave because of the
fees that they are required to pay upon departure or difficulty selling the unit for a price that
would enable the older person to purchase another home elsewhere. This has recently been
the subject of considerable media scrutiny due to the unfair nature of retirement village
contracts, the imposition of deferred management fees, and unconscionable conduct on the part of retirement village administrators and owners. At the time of writing, the Australian Competition and Consumer Commission (ACCC) and the Western Australian Division of Consumer Protection are also investigating issues associated with retirement village contracts.

E Residential Parks

Some of the residents thought they would die in here – to find out now many of them in their 70s and 80s that they are to move with nothing in their pockets, nothing that will buy them anything else.

Sometimes referred to as, inter alia, relocatable, manufactured or mobile home parks, residential parks provide sites upon which (ostensibly) moveable dwellings are placed. Of late, lifestyle villages, where the dwellings resemble strata title or villa accommodation but are governed by the same legislation as other residential parks, have emerged. Residents of lifestyle villages obtain longer leases and enjoy a considerable degree of legal security of tenure through long leases. Levels of ontological security seem to differ depending on the relationships within the park and with management and services available. The reality is that, in more traditional environments, legal security of tenure, and often ontological security, is lacking. This is particularly the case in circumstances involving more vulnerable, low-income older people who need to reside in parks more akin to caravan parks rather than the more expensive and secure, lifestyle villages.

Although the relevant legislation differs from jurisdiction to jurisdiction, legal security of tenure is minimal because most villages have limited availability of fixed term agreements. The term of the agreements are rarely over five years and are most commonly around 12 months. After the expiry of the fixed term it is usual for the leases to simply revert to periodic tenancies. Periodic leases in such instances can be terminated on short notice and without grounds. This lack of security of tenure impacts considerably upon ontological security. Many residents feel insecure and are reluctant to complain about issues of concern or seek repairs.

A concern regarding this form of accommodation is the fate of residents when the land on which the park is situated is sold, often for development. If a resident has to move, dismantling and transporting a park home is expensive. Furthermore, there is a lack of alternative locations

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79 Ibid.


82 Lifestyle villages have become increasingly popular and have become a more specialised form of tenancy arrangement; indeed, separate legislation for lifestyle villages is a consideration of the statutory review of the relevant legislation: Residential Parks (Long-Stay Tenants) Act 2006 (WA).

83 Western Australia Security of Tenure for the Ageing Report, above n 1, 89–103.

84 Ibid.
to place park homes, especially in urban areas. This is likely to mean that a new park will be a considerable distance from the resident’s former surrounding thus undermining networks built up over time. The vulnerable position of residents in the event of the park owner’s insolvency is another area of concern.

F Aged Care

Mr X is a care recipient in a residential aged care facility. He smokes, swears and is generally unpleasant and rude to the staff and other care recipients. He also rides around on a gopher and drives the gopher at staff members at the facility if he doesn’t get his way. He has been told that he can leave the aged care facility but he doesn’t want to. He is still at the facility and he and the staff have come to an accommodation.85

The Aged Care Act 1997 (Cth) provides for the Commonwealth to give financial support through payment of subsidies for the provision of aged care and through the payment of grants for other matters connected with the provision of aged care. Security of tenure in Australian aged care facilities is a topical issue from a legal, economic and societal perspective. Recently, regulation of aged care facilities has seen the introduction of a considerable number of new regulatory measures, including the integration of high care and low care facilities and ‘Community Common Care Standards’. Other legislative changes include variation in the use of accommodation bonds and the mix of high care and low care places. In the future it seems likely that the use of the family home to fund aged care will become a controversial issue.86

In most cases, legal security of tenure is relatively secure. However, it can be undermined, for example, in the following circumstances:

• Where the residential care service is closing.
• Where the residential care facility no longer provides accommodation and care suitable for the care recipient. The approved provider may ask a care recipient to leave if the residential care facility no longer provides accommodation and care suitable for the care recipient, having regard to the care recipient’s long term assessed needs, and has not agreed to provide care of the kind that the care recipient presently needs.87
• Where the operator of the residential care facility asks the care recipient to leave for the reasons set out in s 6(2) of the User Rights Principles 2014. A care recipient may also be asked to leave for certain specified reasons.88
• Where a care recipient is transferred to a new bed or room within a residential care facility.

Elder financial abuse has been an issue in relation to aged care facilities as often the first indication of abuse is where an older person’s fees are not paid because a relative is accessing funds from the older person.

Ontological security is dependent on the conditions within a particular facility. Factors that can impact upon ontological security in aged care facilities are the availability of trained staff in appropriate staff-resident ratios, the conduct of other residents, the quality of food and the amenity of the surroundings.

85 Ibid 110, Interview AC 10.
87 User Rights Principles 2014 (Cth) s 6(2)(b) (‘User Rights Principles 2014’).
88 Western Australia Security of Tenure for the Ageing Report, above n 1, 107.
Boarders and Lodgers

For decades private rooming houses have been at the core of boarding and lodging accommodation in Australia, particularly in inner urban areas. Western Australia is no exception. From their origins as short to long term residences for working single men, the demographic has changed considerably over the years and they now provide refuge for many marginalised people on low incomes and other forms of disadvantage including mental illness and substance abuse.  

Boarders and lodgers throughout Australia have little legal security of tenure or ontological security. Despite this, boarding and lodging accommodation is flexible and, for the most part, more affordable than renting in the public or private tenancy market. It is less expensive to enter into such arrangements as there are lower entry costs and fewer ongoing expenses. Some jurisdictions have introduced legislation affecting rooming houses but elsewhere, for example Western Australia, there is no legislation that directly regulates the relationship between owners and boarders and lodgers. There is little to no legal security of tenure and similarly ontological security is lacking.

Where To Now?

At the outset, this article noted the importance of legal security of tenure in underpinning ontological security and wellbeing in older age. As the population ages, it is essential that older people can obtain, and retain, age-appropriate and affordable accommodation. Apart from the benefit to the individuals concerned, the economy and society benefits too.

In an era of declining housing affordability and a significant reduction in Commonwealth and state government contribution to affordable housing, including the supply of public housing stock, the scourge of elder abuse has become problematic. Much elder abuse, particularly physiological and financial elder abuse, involves the real property or other assets of an older person. Experiencing elder abuse is likely to undermine an older person both physically and emotionally. Victims of elder abuse express feelings of embarrassment, disappointment, betrayal and fear. These effects are compounded by the fact that the abuse is perpetrated by someone in a relationship of trust. And, often the abuse results in a significant financial loss, in some cases involving the loss of a home.

It is rare for a perpetrator to be pursued or money and/or property recouped. Although the conduct may fit within the definition of particular crimes, for example fraud or stealing, law enforcement authorities seem to regard elder abuse as a family or domestic matter. It seems that only cases of considerable physical or financial abuse are pursued. Also, contemplating the criminal, and even the civil, justice system may be intimidating for an older person. Not only are proceedings complex, lengthy and expensive, in most cases older people do not want to pursue the perpetrator because, despite what that person has done, they are in a close relationship and the older person wants to retain the relationship.

So, how can the existing real property framework be tweaked to provide a measure of protection to enhance older people’s legal, and therefore in most cases, ontological security? Furthermore, given that elder abuse is undermining this, what safeguards can be put in place?

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89 Ibid 137.
91 For example, utility connections are not required.
The article concludes with some suggestions to enhance security of tenure in the forms of accommodation discussed in Part IV.

**A Home Ownership**

The Torrens system is prefaced upon the view that the certainty of the register is paramount. As a result, so long as an exception to indefeasibility is not applicable to the circumstances, the registered proprietor, whether a transferee or a mortgagee, has good title. Although compensation may be available for the older person through an assurance fund, the impact upon legal and ontological security of tenure of being faced with the loss of a home is enormous.

1 **Education**

Education is a starting point. It is essential that older people are aware of the risk of elder financial abuse and of measures available to protect their real property. Many older people do not realise they may be vulnerable to abuse, especially where family is involved. Furthermore, education campaigns cannot reach all older people at risk. The reality is that a determined fraudster – or an unscrupulous relative – is likely to be able to perpetuate a fraud even with the availability of education programs. Therefore, it is necessary to consider alternative strategies.

2 **Sales**

Where an interest in land is transferred to an innocent third party through fraud, little can be done to assist the older person. As mentioned, recourse to the assurance fund may be available. However, in such circumstances, compensation is unlikely to assist an older person who would need to find alternative accommodation – in all likelihood not in a familiar area.

Consideration should be given to an alert on dealings with a person’s property. This need not be applicable to just older people – it may be a useful safeguard generally. If there is a need to make contact with the registered proprietor prior to a transfer – or the registration of a mortgage – potential fraudulent registration could be discovered before the transaction proceeds too far. It is suggested that an automated system of notification could trigger contact with a registered proprietor and evade the end result of loss of a property.

3 **The Conduct of, and Consultation with, Lenders**

The Banking Royal Commission has revealed a litany of procedural breaches with regard to lending. When a consumer applies for credit, the *National Consumer Credit Protection Act 2009* (Cth) obliges a credit provider to make reasonable inquiries about the consumer’s financial situation and their requirements and objectives. In so doing, the credit provider must take reasonable steps to verify the consumer’s financial situation. This means that payments must be able to be made without substantial hardship to the consumer.

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93 For examples of such programs see materials produced by COTA WA and Advacare.
94 It is acknowledged that this would not be foolproof.
Unfortunately, it is thought that often these steps are not adequately followed by lenders. Also, from the older person’s perspective, it is not always that the older person is vulnerable per se, but that they are ‘situationally vulnerable’ because of concern for the well-being of a child, or the desire to maintain relationships. The reality is that it is often difficult for the older person to refuse to enter into such transactions. Even if the steps within the legislation are followed, the legislation does not define ‘substantial hardship’. There is a presumption that if a consumer must sell their principal residence to pay back a loan, this demonstrates substantial hardship. In many cases of older people obtaining loans or entering into mortgages, this is the case. However, banks still continue to lend in these types of transactions.

In instances of fraud, banks and financial institutions are, to a considerable degree, protected against fraudulent transactions. As noted above, a mortgage will only be set aside where the fraud is brought home to the bank. Australian case authority suggests that this will only occur in extreme circumstances of complicity. Reckless practices within banks have not been regarded as sufficient to enable the fraud to be ‘brought home’ to the lender. However, the major cases in this area pre-date the responsible lending regime. It is suggested that, in future, courts may pay more heed to the role banks play in ‘enabling’ fraud to occur through non-compliance with responsible lending conduct. Consideration could be given to an application of deferred rather than immediate indefeasibility in instances of reckless conduct by mortgagees. If this were the case, as has been the position in New Zealand for quite some time, banks may be encouraged to tighten up procedures and abolish reckless practices.

4 **Awareness of Elder Financial Abuse among Bank Staff**

The Australian Bankers Association has taken steps to enhance training of staff in relation to elder financial abuse. While such programs are to be welcomed, it is suggested that persons involved in providing loans should receive additional training regarding the problematic nature of lending involving older people, especially where the loan is being entered into for the benefit of another person. In such cases there needs to be a rigid assessment of the application in accordance with responsible lending provisions. It is imperative that mortgage brokers also receive such training.

5 **Abuse of Enduring Powers of Attorney**

Many instances of elder abuse occur through the misuse of an enduring power of attorney (EPA). An EPA is a legal agreement that enables a person to appoint another person or
persons to make financial and/or property decisions on their behalf. When used correctly an EPA is a prudent safeguard. The attorney has authority to make financial decisions on another person’s behalf because that person is unable to due to illness or loss of capacity. Unfortunately, when misused, EPAs can lead to considerable financial and/or property losses. Pitfalls associated with EPAs include issues of accountability, transparency and vulnerability to abuse. As Wuth argues, the lack of scrutiny of EPAs enhances the likelihood for financial abuse.\footnote{\textit{Elders' Assets Study} (Research Report, Faculty of Medicine, Nursing and Health Sciences, Monash University, 2010).} This statement is borne out by findings that nominate powers of attorney as one of the main sources of financial abuse.

Many fraudulent activities regarding property are the result of a misuse of a power of attorney. The Australian Law Reform Commission (ALRC) \textit{ALRC Elder Abuse Final Report} notes that such documents may facilitate abuse by the very person appointed by the older person to protect them. Evidence suggests that financial abuse is the most common form of elder abuse and that, in a significant minority of cases, the financial abuse is facilitated through misuse of a power of attorney.\footnote{Natalia Wuth, ‘Enduring Powers of Attorney: With Limited Remedies – It’s Time to Face the Facts!’ (2013) \textit{7 Elder Law Review} 1, 3.}

Given the concerns regarding enduring powers of attorney, it is suggested that relevant legislation should include penalties for misuse of an EPA. The ALRC has recommended that tribunals should have jurisdiction to award compensation when duties under an enduring document have been breached.\footnote{\textit{ALRC Elder Abuse Final Report}, above n 104, 159–60 [5.2].} However, so far as security of tenure is concerned, such measures may be too little, too late. It is likely that if the misuse involves dealings with the older person’s land, the same issues discussed above in relation to fraudulent transfer or mortgage of the older person’s land will arise.

\section*{B \hspace{1em} Family Agreements (Assets for Care)}

Such agreements were given considerable attention by the ALRC. Indeed, the ALRC recommended that tribunals be given jurisdiction over such disputes within families. In the ALRC’s view, access to a tribunal provides a low cost and less formal forum for dispute resolution – in addition to the existing avenues of seeking legal and equitable remedies through the courts.\footnote{Ibid 160 [5.3].} The ALRC noted further that social security laws and Centrelink processes relating to eligibility for the Age Pension may be resulting in family agreements that are disadvantageous to the older person if the agreement fails. To this end, the \textit{Social Security Act 1991} (Cth) should be amended to require that assets for care agreements be expressed in writing in order for the older person to continue to be entitled to the Age Pension.\footnote{Ibid [6.4].}

While the recommendations of the ALRC are sound, more needs to be done in this area. It is important to revisit the doctrine of advancement in relation to gifts of money or property to adult children. Furthermore, measures such as a caveat to protect such interests and legislation to provide some form of regulation of these arrangements would be welcome.\footnote{Ibid [6.5].}
Private and Public Rental

Residential tenancy legislation does not consider the age of tenants. However, given that home ownership is decreasing and that more and more Australians are becoming life-long renters, more people will be entering retirement in the rental market. Enhanced security of tenure can be obtained through longer leases and provision for age-friendly features and ‘home comforts’, for example a pet, to be permissible.

Although it is unlikely to be popular with the real estate industry, consideration should be given to tightening the existing residential tenancy acts to safeguard older, and in some cases, all tenants. In comparison, in Europe and in some US jurisdictions, there is a much higher percentage of the population who rent throughout their lives. Residential rental terms are, for the most part, lengthy. There are strict limitations upon termination and, in some cases, additional protections for older tenants. And, unlike Australia where 76 per cent of private rentals are owned by smaller investors, in Western Europe there are large landholding institutions that treat their housing assets as long term secure investments that provide a steady return. This provides for greater legal security of tenure and, as a consequence, ontological security. For example, in France the minimum term of a lease in most cases is three years where the landlord is an individual and six years where the landlord is a corporation. Unless there is a valid notice to vacate, leases are renewed by operation of law for the same period and on the same conditions. There are caps on rent for lengthy time periods, safeguards against excessive rents, and landlords must show just cause to terminate a lease. Interestingly, older renters again receive additional protections.

The recent inquiry into residential tenancy legislation in Victoria has recommended several initiatives such as longer periods of tenure, limitations upon termination and the ability to keep a pet in rental accommodation. Despite the significant degree of security of tenure available to public and community housing tenants, issues regarding neighbourhood amenity, waiting lists, and repairs need to be addressed.

Retirement Villages

Although legal security of tenure is high in relation to retirement villages, the ontological security of many residents is undermined through conditions in the villages. Some residents complain that the terms of the contracts, and the general atmosphere in some villages, contribute to dissatisfaction and a decline in ontological security.


114 Bradbrook, above n 113.

115 Ibid.

It is an interesting period in relation to retirement villages. Most state governments have amended the relevant legislation considerably to recalibrate the bargaining positions of operators and residents. It is anticipated that the present consideration of retirement village contracts, in particular identification of unfair contract terms and unconscionable conduct by operators, will lead to improvements that will enhance the experience of residents of retirement villages.

E Residential Parks

It is important to draw a distinction between residential parks and lifestyle villages. Although, for the most part, these forms of accommodation are regulated under the same legislation, the reality is that the two situations are very different. Lifestyle village residents enjoy considerable security of tenure through long leases, the only possible issue being the consequences if the operators become insolvent. In comparison there are considerable difficulties with tenants in park accommodation more akin to a tourist park. Although there have been some attempts by various state governments to support such tenants, the reality remains that the residents are merely leasing the land from the operator and, if the operator wants to sell the land, the resident must leave. Furthermore, as most tenants are on short leases, termination periods can be relatively short, especially where it is difficult to find another place to reconstruct the home.

Park home accommodation is marketed as an affordable retirement option. It is of concern that older people buy into villages and then may be forced to leave in a short time. Legislation must do more to balance the rights of the operator with those of the residents. Like the discussion about private rental, there needs to be longer, secure terms. There should also be provision for sufficient compensation for residents to move in the event of a park closure.

F Aged Care

Again, security of tenure here is almost guaranteed, except in very limited circumstances. However, it is essential that to ensure ontological security, aged care facilities adopt appropriate safeguards and strategies to ensure the safety and amenity of residents, including appropriate staff-resident ratios.

G Boarders and Lodgers

Older people residing in boarding houses enjoy little legal security of tenure and often lack ontological security. Indeed, ShelterSA has noted that the sector ‘lacks sufficient or consistent regulation and is ill-suited to the diverse and often severely compromised health and personal circumstances of vulnerable residents.’ Research in this area notes the lack of security of tenure, poor housing conditions and issues affecting safety and privacy. Even in states where there is legislation extending to rooming houses, much more could be done to assist older boarders. Examples are the provision of rights akin to tenants under the residential tenancies acts, training and certification for operators, and more links to support services.

VI  CONCLUDING COMMENTS

If Australian seniors are to be living longer, healthy lives and retiring later, it is in the national interest to foster an environment supportive of these aspirations. Research in a variety of disciplines, including gerontology, social work, medicine and, of course, housing, underscores the symbiotic relationship between stable and secure accommodation on a continuing basis and positive health, social and economic outcomes. Such literature emphasises the importance placed by older people on secure, long-term tenure and the insecurities that may arise – thus undermining quality of physical and emotional health – where their occupation is uncertain or threatened.

Australian seniors are far from a homogenous group and live in a variety of dwellings: homes on green title blocks, units and villas, ‘granny flats’, residential parks, retirement villages, aged care facilities, and boarding houses. No matter what the form of dwelling however, many older people can experience vulnerability in relation to their accommodation – including that brought about, directly or indirectly, through instances of elder abuse.

There is a symbiotic relationship between stable and secure accommodation on a continuing basis and positive health, social and economic outcomes. To obtain these benefits, it is essential to safeguard older people’s legal security of tenure and maximise ontological security. Real property laws and practice – and an eye to the growing incidence of elder abuse in relation to property and assets – can contribute to this goal with a relatively small amount of recalibration.

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