IDENTIFYING VULNERABILITY: THE ARGUMENT FOR LAW REFORM FOR FAILED FAMILY ACCOMMODATION ARRANGEMENTS

*TERESA SOMES

> The identification of a social problem as a legal need rather than as some other sort of problem altogether is dependent on the place that law occupies in the society concerned, and especially the extent to which legalism permeates social consciousness. To identify a problem as a legal need is to make a particular judgement about appropriate solutions to that problem and then to recast the conception of the problem to accord with the nature of the proposed solution.[1]

Abstract

The purpose of this article is to rationalise the need for law reform in family accommodation arrangements.[2] It does so by examining the nature, source and effect of vulnerability experienced by a parent or donor when a family accommodation arrangement fails, and demonstrates how theorising the legal issues faced by the parent through the lens of vulnerability can assist in identifying why law reform in this area is both necessary and justified. In doing so, it explains why construing the problem as one of vulnerability, rather than elder abuse, allows the focus of the law reform to be concerned with the systemic issues affecting access to justice.

I INTRODUCTION

The demand for housing and care for older people is one consequence of Australia's ageing population.[3] As such, arrangements between parents and their adult children, whereby

*Associate Lecturer, Macquarie University, Sydney; PhD student, University of South Australia, Adelaide.

[1] Pat O'Malley, *Law, Capitalism and Democracy* (Allen & Unwin, 1983) 104, cited in Stephen Bottomley and Simon Bronitt, *Law in Context* (4thed, 2012, The Federation Press) 162.

[2] 'Family accommodation arrangement', 'asset for care arrangements' are used interchangeably. They have also been referred to as 'private care arrangements': see Margaret Isabel Hall, 'Care for Life: Private Care Agreements Between Older Adults and Friends or Family Members' (2003) 2 *Elder Law Review* 24.

[3] In 2017, there were 3.8 million Australians aged 65 and over (comprising 15% of the total population) — increasing from 319,000 (5%) in 1927 and 1.3 million (9%) in 1977. The number and proportion of older Australians is expected to continue to grow. By 2057, it is projected there will be 8.8 million older people in Australia (22% of the population); by 2097, 12.8 million people (25%) will be aged 65 and over: Australian Institute of Health and Welfare, 'Older Australians at a Glance' (Web Report, 10 September 2018) 1 https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile

accommodation and often care for parents is provided in exchange for a financial or proprietary benefit, have become increasingly popular in recent years.[4] While the specific terms of the arrangement will vary, they most commonly involve a parent selling their property and building a 'granny flat' or extension on the adult child's property, paying off or contributing to a child's mortgage, or transferring real property to the adult child in exchange for accommodation, and oftentimes, care for the parent.

When carried out successfully, the parties can enjoy the reciprocal social and financial benefits the arrangement brings, as well as the societal advantages gained by reducing the demand for state provided aged care. Yet, like most agreements, the arrangement becomes 'problematic' when obligations agreed upon are unfulfilled. The scope of the problem is exacerbated by it occurring within a family context. As the quotation by O'Malley (above) suggests, a social or political problem can be characterised as a legal problem, only if one accepts the law has a role in resolving the particular problem.[5] While strategies can be adopted to educate parties concerning the pitfalls of entering such arrangements, or to anticipate and provide for distribution of property should the arrangement continue,[6] inevitably people will enter such arrangements without planning for a range of contingencies.[7] Unsuccessful accommodation arrangements between families can be theorised as a social and political problem, but when the accommodation arrangement has broken down and the avenues for non-legal dispute resolution have been exhausted, the issue takes on a legal dimension.[8] The nature of Australian property law requires a court to either adjust proprietary interests or, if appropriate, order a monetary

[4] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [6.10].
[5] Pat O'Malley, *Law, Capitalism and Democracy* (Allen & Unwin, 1983) 104, cited in Stephen Bottomley and Simon Bronitt, *Law in Context* (4thed, 2012, The Federation Press) 162.
[6] For instance, seeking legal advice or the drafting of a contract specifying the allocation of property on the discontinuing of the arrangement.
[7] One objective of vulnerability theory is to enable governments to devise systems and institutions that increase resilience across vulnerable groups. The provision of education and greater awareness concerning the potential legal problems an older person may face on the breakdown of the relationship is one way governments could assist. By doing so, the state empowers the donor of property to protect themselves and have agreements in place to deal with a range of contingencies. The focus however of this article the circumstances when this has not occurred.
[8] Family accommodation arrangements can be theorised through the lens of many distinct, albeit interrelated contextual frameworks that can come under the umbrella of 'social and political issues'. These contexts include, but are not limited to, social policy and responsibilities of the state, housing, economic security, taxation and social security, health, filial responsibility, family conflict, gerontology, cultural norms, care of the aged, elder abuse, gender, as well as the legal context.

sum.[9] Yet people faced with this dilemma too often eschew any legal action owing to the combination of personal circumstances[10] and the inaccessibility of the legal system.

The analysis engages with vulnerability theory and, in particular, the tripartite theory of vulnerability conceived by Rogers, Mackenzie and Dodds.[11] Vulnerability theory recognises that, as human beings, we all experience vulnerability at various stages of our lives, and being vulnerable is a fundamental characteristic of human experience.[12] The approach taken by Rogers et al develops the theory as suggested by Fineman, and enables the position of the parent/donor to be analysed from the perspective of their inherent, situational and pathogenic (or structural/systemic) vulnerabilities and the manner in which these impact one another. By applying this theoretical framework in the context of family accommodation arrangements, it can be shown that factors which contribute to the parent/donor experiencing situational vulnerability can be exacerbated by any inherent vulnerability, but it is the institutional responses to those vulnerabilities that are deeply flawed. It is this pathogenic vulnerability caused by the shortfalls in legal structures where the opportunity for state intervention and law reform lies.

Part II of this paper will explore the participants in family accommodation arrangements and explain why the analysis specifically focusses on the vulnerabilities experienced by an older person. It critiques why the 'elder abuse' paradigm is not the appropriate framework for analysis and explains why vulnerability theory offers a more appropriate framework for

[9] Legal action is most commonly an equitable claim for adjustment of ownership by way of resulting or constructive trust, failed joint venture, estoppel and/or compensation for the value of contributions made. See for example *Spink v Flourentzou* [2019] NSWSC 256. While parties may pursue alternative dispute resolution avenues such as mediation, any property adjustment would have to occur by consent.

[10] Personal circumstances such as a lack of financial resources, a reluctance to undertake complex, lengthy litigation, particularly involving one's own children, see many claims not being made by the parent themselves but after death as part of the administration of the estate: see for example *Karastamatis v Tzanavaras* [2013] SASC 163; *Scheps v Cobb: Estate of Dagobert Scheps deceased* [2005] NSWSC 455.

[11] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics*, 11; Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Introduction', in Mackenzie, Rogers and Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014); Wendy Rogers, Vulnerability and Bioethics' in Mackenzie, Rogers and Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014); Catriona Mackenzie and Wendy Rogers 'Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act' (2013) 9 *International Journal of Law in Context* 37.

[12] Martha A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) *20 Yale Journal of Law and Feminism* 1; Onora O'Neill, *Towards Justice and Virtue'* (Cambridge University Press, 1996) 191-192; M H Kottow, 'The Vulnerable and the Susceptible' (2003) 17 *Bioethics* 460, 461-2 cited in Katrina George, 'Autonomy and Vulnerability at the Death Bed' (2006) 10 *University of Western Sydney Law Review* 139, 142.

isolating the need for law reform. Part III introduces Fineman's vulnerability theory and its relevance to access to justice concerns. It further explains how the theory has been refined by Rogers, Mackenzie and Dodds. Part IV applies this refined theory to family accommodation arrangements and identifies the scope of vulnerability experienced by the parent/donor.

II IS ELDER ABUSE THE RIGHT FRAMEWORK FOR FAMILY ACCOMMODATION ARRANGEMENTS?

This part identifies the participants in the family accommodation agreement and concludes that owing to the relationship of trust that characterises the arrangements they are most commonly undertaken between a parent and their adult child. However, despite the precarious legal position of the parent/donor in the event of failure of the arrangement, characterising the situation as one of elder financial abuse is of limited value when assessing the need for law reform.

A. *Family Accommodation Agreements and the 'Elderly'*

An asset for care arrangement could conceivably be entered into between any two parties, irrespective of their age or familial relationship, provided one person was willing to exchange assets or property for the promise of care. However, it is the undertaking of the agreement in the context of a relationship that is characterised by intimacy and personal trust that generates many of the problems associated with these arrangements. This explains why the discussion in this article is premised on the parent/child relationship as the dominant paradigm. Data provided by the Australian Bureau of Statistics reveals that older people are ten times more likely to be living with a child or family member than a non-family member.[13] In addition, case studies and interviews conducted by organisations such as the Council of the Ageing (COTA)

[13] Australian Bureau of Statistics, *Reflecting a Nation: Stories from the 2011 Census: Where Do Australia's Older People Live?, Cat No 2071.0* (2013) cited in Australian Law Reform Commission "Elder Abuse" (DP 83) 8.56.

(WA),[14] Northern Suburbs Community Legal Centre (WA),[15] and Seniors Rights Victoria,[16] as well as anecdotal support from the legal profession,[17] corroborate the view that the vast majority of asset for care arrangements occur between a parent and their adult child. The transfer of property or assets within a relationship of trust, or where there is an expectation of trust places the parent /donor in a vulnerable legal position.[18] Owing to a belief in the integrity of the relationship, parent/donors fail to consider outcomes should the arrangement fail, nor do they take precautions to protect their financial or proprietorial interests.[19] It is more likely that an arrangement with a person not coming within the definition of family or close personal relationship would be subject to more scrutiny and formality than those made with a family member.

Even assuming that family accommodation agreements are predominately undertaken between parents and their adult children, there is no requirement that the donor be 'elderly' - a parent could conceivably be in their forties. The analysis undertaken in this article therefore does not target a group because they are 'elderly'; that is, there is no prerequisite that the donor falls within a certain age range. The observations of MacKenzie are pertinent here, when she says:

> Interventions that target specific groups identified as vulnerable and subject them to restrictions or forms of surveillance not applied to the rest of the community, that treat persons who are so targeted as incompetent…and that are primarily focussed on reducing perceived risks to society rather than concerned with fostering autonomy count as objectionably paternalistic.[20]

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[14] A.Freilich et al, 'Security of tenure for the ageing population in Western Australia – Does current housing legislation support Seniors' ongoing housing needs?' November 2014 Council of the Aged (COTA) Western Australia,http://www.cotawa.org.au/wp-content/uploads/2014/11/Housing-for-older-people-summary.pdf. (Ethics approval granted by the University of Western Australia Ethics Committee September 2012). See also Australian Law Reform Commission, *Elder Abuse – A National Legal Response* Report No 131 (2016) Chapter 6.

[15] Fran Ottolini 'Assets for Care Arrangements' Paper delivered at Elder Law Forum- Addressing Elder Abuse, Law Society of Western Australia, 3 November 2017.

[16] Assets for care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse, http://www.seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf

[17] Patricia Lane, 'Reform in Elder Law: Granny Flats' (2018) 92 *Australian Law Journal* 413; Louise Kyle, 'Out of the Shadows – A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder Law Review*, Article 4.

[18] As to what constitutes a 'relationship of trust' or an expectation of trust see Ray Kaspiew et al, (2019). *Elder Abuse National Research – Strengthening the Evidence Base: Research definition background paper*. Melbourne: Australian Institute of Family Studies.

[19] Hence the personal-situational vulnerability gives rise to legal-situational vulnerability.

[20] Catriona MacKenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in MacKenzie, Rogers and Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014) 47.

However, one must acknowledge that the combination of factors that motivate people to enter these arrangements are closely linked to the age and associated circumstances of the donor party. For instance, inherent vulnerabilities such as cognitive impairment and physical frailty may arise in elderly people resulting in increased dependence and reliance on others. As such, some of the problems identified concerning access to the legal system are analysed with reference to the advancing age of the donor.

Despite the parent/adult child relationship being the normative one, not all accommodation arrangements are necessarily entered into with adult children. In some cases, such arrangements can be made with other family members, friends, carers or even acquaintances. This was addressed specifically in the Australian Law Reform Commission's Final Report.[21] The Commission considered the breadth of the definition of family and family-type relationships, where the core elements of the relationship involve the qualities of trust that characterise relationships between family members.[22] It is the degree of trust inherent in the relationship that inhibits people from protecting their legal position. Therefore the 'family type' relationship could extend to individuals should that association become close and characterized by trust over time. The Commission proposed that a broader definition of 'family' as defined in the *Family Violence Protection Act 2008* (Vic), s 8 should be used as a template. The section is set out below:

> **Meaning of family member**
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> S 8 (1) For the purposes of this Act, a "family member", in relation to a person (a "relevant person"), means—
>
> (a) a person who is, or has been, the relevant person's spouse or domestic partner; or
>
> (b) a person who has, or has had, an intimate personal relationship with the relevant person; or
>
> (c) a person who is, or has been, a relative of the relevant person; or
>
> (d) a child who normally or regularly resides with the relevant person or has previously resided with the relevant person on a normal or regular basis; or
>
> (e) a child of a person who has, or has had, an intimate personal relationship with the relevant person.

[21] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017).
[22] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [6.73-80].

(2) For the purposes of subsections (1)(b) and (1)(e), a relationship may be an intimate personal relationship whether or not it is sexual in nature.

(3) For the purposes of this Act, a "family member" of a person (the "relevant person") also includes any other person whom the relevant person regards or regarded as being like a family member if it is or was reasonable to regard the other person as being like a family member having regard to the circumstances of the relationship, including the following—

(a) the nature of the social and emotional ties between the relevant person and the other person;

(b) whether the relevant person and the other person live together or relate together in a home environment;

(c) the reputation of the relationship as being like family in the relevant person's and the other person's community;

(d) the cultural recognition of the relationship as being like family in the relevant person's or other person's community;

(e) the duration of the relationship between the relevant person and the other person and the frequency of contact;

(f) any financial dependence or interdependence between the relevant person or other person;

(g) any other form of dependence or interdependence between the relevant person and the other person;

(h) the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person;

(i) the provision of sustenance or support between the relevant person and the other person.

Example

A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members.

(4) For the purposes of subsection (3), in deciding whether a person is a family member of a relevant person the relationship between the persons must be considered in its entirety.[23]

This definition includes not only the traditional conception of a family member but includes contextual factors that indicate a position of trust. For instance, the reputation or recognition

[23] *Family Violence Protection Act 2008 (Vic)* s 8.

within the community that the relationship is familial relationship (ss 8(3)(c), (d) and financial dependence or interdependence (s 8(3)(f)).

B. *Family Accommodation Agreements and Elder Abuse*

The circumstances and outcomes of the failed family accommodation agreement are commonly regarded as an illustration of elder abuse. 'Elder abuse' is an umbrella term that encompasses a broad range of behaviours, including psychological, physical, sexual, financial, chemical abuse, and neglect.[24] 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 now regarded by the Australian public as a significant problem demanding urgent solutions.[25] Family accommodation agreements have featured in this ongoing commentary, and have been characterised as an example of elder abuse and, more specifically, financial elder abuse.[26] This is not surprising; when we hear accounts of older people who have transferred assets in return for care and accommodation that has not been forthcoming, we intuitively respond by judging the outcome as wrong. The phrase 'financial abuse' reflects the dominant narrative associated with failed family accommodation agreements. It captures our condemnation of what we assume to be exploitative conduct on behalf of the perpetrator, as well as our alarm concerning

[24] Melanie Joosten, Freda Vrantsdis and Briony Dow, (2017) '*Understanding Elder Abuse: A Scoping Study'*, Melbourne: University of Melbourne and the National Ageing Research Institute, 6.

[25] See for instance: http://www.news.com.au/finance/money/wealth/the-shocking-rise-of-financial-abuse-involving-wills/news-story/66539c4ed7dc78e90829e3f76133aff6; http://www.themercury.com.au/news/tasmania/nursing-home-case-prompts-elder-abuse-probe/news-story/8ebcff15288c981dda17801b29420828; http://www.canberratimes.com.au/act-news/australias-hidden-issue-call-out-for-people-who-have-experienced-elder-abuse-20160609-gpf8hc.html; https://www.theage.com.au/national/victoria/warning-to-elderly-on-financial-abuse-20130831-2sxps.html; https://www.sbs.com.au/news/national-plan-to-tackle-elder-abuse-long-overdue-senior-rights-advocates;http://www.abc.net.au/news/2018-03-04/the-shocking-tales-of-elder-abuse-victims/9504798

[26] For example, Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017). Chapter 6 of the ALRC report was devoted entirely to 'Family Agreements'. Similarly, Seniors Rights Service CEO Russell Westacott in an interview leading up to the 5th National Conference on Elder abuse refers to failed family accommodation arrangements as an example of financial abuse. See also Teresa Somes and Eileen Webb, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children? The Case of Family Accommodation Arrangements' (2015) 33 (2) *Law in Context* 24, 26; 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; Seniors Right Victoria, *Assets for care: a guide for lawyers to assist older clients at risk of elder abuse* http://www.seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf; Louise Kyle, 'Out of the Shadows – A Discussion on Law Reform For the Prevention of Financial Abuse of Older People', (2013) 7 *Elder Law Review* 4; Rosslyn Munro, 'Family Agreements: All with the best intentions' (2002) 27(2) *Alternative Law Journal* 68; Thomas L Hafemeister, 'Financial Abuse of the Elderly in a Domestic Setting' in RJ Bonnie & RB Wallace (eds) *Elder Mistreatment: Abuse, Neglect and Exploitation in Aging America* (2003, National Academies Press) 1.

the financial suffering experienced by the older person. Consequently, commentary on failed family accommodation arrangements is almost always included within the broader normative framework of elder abuse.[27]

1 *Advantages of Characterising Failed Family Accommodation Agreements as Elder Abuse*

There are advantages in using the context of abuse when problematising the family accommodation arrangement. 'Abuse' locates the phenomena within the wider field of familial abuse, (for instance, domestic abuse and child abuse) and the theories developed in these fields can be drawn upon and assist in delineating the appropriate scope of elder abuse for legal analysis.[28] Increased attention given to elder abuse has focussed society's attention, and importantly political attention, on family accommodation arrangements. 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.[29] More recently, the commencement of the Royal Commission into Aged Care Quality and Safety has sustained the momentum of interest in issues related to the treatment of older people,[30] and family accommodation arrangements continue to attract critical attention.[31] Such attention can achieve a greater awareness of the pitfalls associated with transferring assets for a promise of care. Parties may be encouraged to

[27] Ibid. For instance, access to justice solutions proposed by the Australian Law Reform Commission were framed within the context of the older person having suffered financial abuse: Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [6.1].

[28] Although, it has been observed that analogies between child abuse and elder abuse are seen as problematic in some respects, as 'making comparisons between elder abuse and child abuse, and drawing on responses used in child protection, is ageist and generally not appropriate': Australian Association of Gerontology, Inquiry Into Elder Abuse in New South Wales, (2015) Submission to Legislative Council Inquiry Into Elder Abuse in New South Wales (Submission No. 23). Sydney: NSW Legislative Council.

[29] There is general consensus from both government and non-government sources that the legal position of the older party in family accommodation arrangements warrants review. See for instance Australian Law Reform Commission *Elder Abuse – A National Legal Response* Report No 131, (2017) 203-30; Select Committee into Elder Abuse, Western Australian Legislative Council, '*I never thought it would happen to me': When trusts is broken* (2018) 102-5; Seniors Right Victoria, *Assets for care: a guide for lawyers to assist older clients at risk of elder abuse* http://www.seniorsrights.org.au/assetsforcare/wp-content/uploads/Assets-for-Care.pdf; Barbara Blundell et al, (2017) '*Review into the Prevalence and Characteristics of Elder Abuse in Queensland*' Perth , WA Curtin University and Murdoch University, 104-106. Regarding the need for a national response to elder abuse, see Wendy Lacey, 'Neglectful to the Point of Cruelty?' (2014) 36 *Sydney Law Review* 99, 104. On 20 February 2018 the Attorney General, in response to the recommendations of the Australian Law Reform Commission, announced the Council of Attorneys-General (CAG) had agreed a National Plan to address Elder Abuse be developed. To assist the development of the National Plan the federal government established a working body (Elder Abuse Action Australia or EEAA) to investigate policy initiatives across Federal and State governments, and assist with system design.

[30] Royal Commission into Aged Care Quality and Safety (established 8 October 2018)

[31] Patricia Lane, 'When Granny Flats go Wrong: Perils for Parents Highlight the Need for Law Reform', *The Conversation* (online, February 22, 2019) https://www.domain.com.au/news/when-granny-flats-go-wrong-perils-for-parents-highlight-need-for-law-reform-803578/

exercise greater caution before entering into the arrangements and look to obtaining legal advice to protect them against future disputes. 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.

2 *Disadvantages of Characterising Failed Family Accommodation Agreements as Elder Abuse*

Despite the positive consequences achieved through characterising the arrangement as an instance of elder abuse, there are compelling reasons why evaluating the problem as one of vulnerability is more constructive, both in determining the rationale and scope of law reform and in the wider social context.

First, there is no consensus on what behaviour constitutes elder abuse. The varied conceptualisations are informed by the different frameworks and contexts through which the phenomena is being analysed.[32] Recent attempts to define the parameters of the term suggest it is being given a broad meaning, which covers behaviour outside of what is caught by criminal or tortious liability, but involves harm to the older person by someone with whom they are in a relationship of trust.[33] This broad definition captures a wide range of conduct bringing it within the scope of scrutiny as abuse. In everyday discourse however, the term 'abuse' carries

[32] Rae Kaspiew, Rachael Carson and Helen Rhoades, (2016) '*Elder Abuse: Understanding issues, frameworks and responses*', Australian Institute of Family Studies Research Report No 35; Briony Dow and Melanie Joosten, 'Understanding Elder Abuse: a social rights perspective', (2012) 24 (6) *International Psychogeriatrics* 853;

[33] The World Health Organisation describes elder abuse as 'a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person': http://www.who.int/ageing/projects/elder_abuse/en/ This approach is consistent with the definition adopted by the authors of a recent report commissioned by the Victorian Government, which defines elder abuse as '[a]ny act occurring within a relationship where there is an implication of trust, which results in harm to an older person': Department of Human Services Victoria (DHS) 2009, With Respect to Age – 2009: Victorian Government Practice Guidelines for Health Services and Community Agencies for the Prevention of Elder Abuse, Aged Care Branch, DHS Victoria, Melbourne, 5. In Scotland, the *Adult Support and Protection (Scotland) Act* 2007 avoids the use of the term 'abuse' and prefers the use of the term 'harm'. 'Harm' is defined as including all harmful conduct and, in particular, conduct which causes physical or psychological harm, unlawful conduct which appropriates or adversely affects property, rights or interests (e.g theft, fraud, embezzlement or extortion), or conduct which causes self-harm. It should be noted that 'conduct' is also defined in this section as including neglect and other failures to act. See also Ray Kaspiew et al, (2019). *Elder Abuse National Research – Strengthening the Evidence Base: Research definition background paper*. Melbourne: Australian Institute of Family Studies, 22 where it is stated that: '[i]n broad terms, the working definition is consistent with the WHO definition but is more specific in some areas and is extended in others. The key area of extension is in the addition of the term 'power imbalance' to the term 'expectation of trust' in the context of the circumstances in which abuse of an older person occurs.' Recent legislation enacted in South Australia provides a definition of 'abuse' and 'vulnerable adult' however the definitions contain a degree of circularity. For instance, s4 (1) (b) states that 'abuse' incudes 'financial abuse or exploitation of the vulnerable adult'. Some circumstances encountered in a failed family accommodation arrangement would not come within this definition of abuse.

serious negative connotations. It suggests that within a particular scenario, there is a perpetrator, and a victim, and a need for intervention to address the abusive behaviour.

Hugman observes that a definition of 'elder abuse' is vital for the establishment of policies and practices in response to violence towards older people. Hugman explains that,

> A concern with definition is not simply an exercise in semantics. That certain acts come to be defined as 'abuse' establishes the basis for interventions by professional experts, usually in health and welfare fields. The discourse of 'abuse' establishes the legitimacy of a clinical focus to social responses, in which the needs of both the older person and of 'the abuser' are addressed as necessary targets of intervention.[34]

Hugman argues that labelling very harmful acts such as rape or extreme neglect as 'abuse' can diminish the criminality of the behaviour. Yet broadening the definition to acts that would not otherwise come within the meaning of abuse may unjustly label people as abusers where it is not warranted. Additionally, we risk labelling people 'victims' of abuse, which counterintuitively may prevent them from coming forward because of the stigma attached to that label.[35] This is not to deny that there have been examples of behaviour on the part of adult children which are consciously harmful, or where arrangements that commence on an amicable footing may degenerate into abuse or exploitation of an older person over time.[36] In these circumstances, the behaviour may give rise to a specific cause of action.[37]

Using a pejorative term to describe all manner of family conflict fails to account for the multitude of circumstances that give rise to the breakdown of the family accommodation arrangement. The abuser/victim paradigm perpetuates the narrative, to the exclusion of counter narratives, of the aged as weak and open to manipulation, and the adult child as uncaring and

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[34] Richard Hugman, 'The Implications of the term 'elder abuse' for problem definition and response in health and social welfare' (1995) 24 (4) *Journal of Social Policy* 493, 495.

[35] In a paper delivered at the Western Australian Law Society, the author observed that '[t]he term 'abuse' is also not well received by older people. One of the OPRS clients blackened out the word because she didn't want her family to know that she was being abused'; Fran Ottelini, 'Older People's Rights Service – A Specialist Elder Abuse Service in WA'. Paper presented at the Law Society of Western Australia Elder Law Forum, 3 November 2017, 2. See also Barbara Cottrell and Peter Monk, 'Adolescent to parent abuse: a qualitative overview of common themes' (2004) 25 *Journal of Family Issues*, 1072–1095, 1089.

[36] Margaret Isabel Hall, 'Care for Life: Private Care Agreements between Older Adults and Friends or Family Members' (2003) 2 *Elder Law Review* 24.

[37] For instance, undue influence or unconscionable conduct, or in extreme circumstances the behaviour may come with the fraud exception under *Real Property Act 1900* (NSW) s42 or its state equivalents.

grasping.[38] It fails to distinguish between inter-personal violence, and exploitation, which rests on the abuse of a position of trust or power, and family conflict or disputes that arise because of complex, intra-familial obligations and expectations. The abuse framework is a 'blunt instrument' to characterise all family accommodation failures. For instance, the arrangement may fail because the adult child is no longer able to provide the level of care required, or the parent may voluntarily leave the home. If this occurs after a period of time, how are parties to calculate the return of contributions, and who is to bear the hardship?[39] While each circumstance raises issues of vulnerability, characterising the parties as victim and abuser is inappropriate. While each circumstance is legitimately within the scope of the law, they differ in the need for either regulation or the provision of mechanisms for resolution. Therefore, they are distinct from an historical, theoretical and a culpability perspective.

Lastly, law reform focussed on the elimination of elder abuse may lead to paternalistic or ageist responses. To demonstrate using an extreme example, the potential of abuse within family accommodation agreements could be removed entirely by disallowing these arrangements to take place. The removal would ensure the elimination of exploitation or abuse. However, such an extreme measure would impact the freedom for people to transfer property as they wish. Hall observes that,

> [d]espite our concerns about the vulnerability of older people when care agreements break down, it is important not to infantalise older adults but to respect their ability to freely contract; '[t]he law has never treated an old person as an infant.' If the senior chooses to go forward with the agreement, it is his or her right to do so - unless, of course, there are issues about the capacity, or undue influence, or the unconscionability of the bargain. [40]

Regulatory measures can (and arguably should) be introduced to protect a parent/donor prior to entering the agreement. Additionally, changes to existing doctrine can be made to address the legal-situational vulnerability of the parent.[41] Yet at present, once the arrangement has failed, the aim of the law is to provide mechanisms for parties to resolve the *consequences* of failure and is therefore not reliant on, or indeed helped by, establishing the *existence* of abuse.

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[38] Margaret Isabel Hall, 'Equitable Fraud: Material Exploitation in Domestic Settings' (2006) *Elder Law Review* 7.

[39] For instance, the return of contributions may require the adult child to sell the home.

[40] Margaret Isabel Hall, 'Equitable Fraud: Material Exploitation in Domestic Settings' (2006) *Elder Law Review* 7 citing *O'Neill v O'Neill* [1952] O.R. 742.

[41] In the United States, the State of Maine has enacted legislation reversing the onus of proof of undue influence so that a presumption of undue influence will arise when an elderly dependant person has transferred assets (either real or personal property, or money) for less than full consideration to either a family member, or a person in a fiduciary position: 33 ME REV STAT ANN (West) § 1022(1) (2001).

For instance, in a situation where an adult child has misused an enduring power of attorney to gain a financial benefit, determining the existence of the wrongful behaviour is critical to how the misuse of the power of attorney is rectified. It this situation, is the minimisation of the risk of wrongful behaviour that is the focus of reform proposals.[42] By contrast, the failure of a family accommodation arrangement is problematic for the parent/donor because of the necessity for a legal determination based on equitable or property law principles to enable the recovery of any assets that have been transferred. While the existence of abuse or exploitation is a possibility within the context of the family and could potentially influence the manner in which a hearing is conducted,[43] law reform is aimed at increasing the older person's access to justice to enable the resolution of a dispute. If a parent/donor is subject to abuse or exploitation, this contributes to their situational vulnerability. Situational vulnerability highlights the critical need to review the legal structures in place to expedite the resolution of the dispute in a manner that is accessible and provides mechanisms for a fair and just outcome.

Despite being given a wide definition, elder financial abuse will not be present in all failed family care arrangements. To do so would necessitate unconscionability being characterised as abuse and perpetuate a narrative that does not reflect the entirety of experiences or circumstances. Even if the behaviour giving rise to the failed arrangement does constitute abuse within a wider definition, some victims would not be prepared to acknowledge they had suffered abuse due to the complexity of the relationship and the feeling of parental failure associated with being a victim of one's own child.[44] While an abuse-based framework assists in raising awareness of the pitfalls of failed family accommodation arrangements, is of limited value when determining the demand and scope for law reform. It is proposed that a vulnerability framework provides greater clarity to identify areas for law reform for failed family care arrangements.

III VULNERABILITY THEORY

In order to apply vulnerability theory to family accommodation arrangements, it is necessary to identify the main principles of vulnerability as conceptualised by Martha Albertson Fineman.

[42] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [5.3].
[43] For instance, it may necessitate the need for legal representation.
[44] Submission by Northern Suburbs Community Legal Centre Inc. to the Western Australian Legislative Council Select Committee into Elder Abuse, (1 December 2017) 11, 18.

Vulnerability has been a consistent theme across a number of disciplines in recent times, and in particular has been applied to a broad range of legal problems.[45] The versatility of the term means it does not lend itself to a single definition; rather, its meaning relies heavily on the particular context in which it is being used and, as such, is both relative and dynamic.[46] Clearly there are a range of interpretations of the term in common usage, and used in its broadest sense, no one is impervious to vulnerability. Depending on our stage of life, there are a multitude of variables in our lives that may expose us to potential harm. Similarly, the actions of others, over which we have limited or no control, means that even the most independent amongst us will never be immune from experiencing vulnerability in some form or another.[47] As Hoffmaster states, the recognition of our vulnerability affirms our humanity.[48] It is this universal vulnerability that is the central tenet of Fineman's theory. Where a more nuanced approach to vulnerability is adopted,[49] vulnerability theory provides a method of theorising the obligations we owe, either individually[50] or as a society, towards those who are exposed to risk, but lack the adequate mechanisms to cope with those risks without external support or intervention.[51]

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[45] See for example, Frank Rudy Cooper, 'Always Already Suspect: Revising Vulnerability Theory' (2015) 93 *North Carolina Law Review* 1339 (racial profiling), Margaret Isabel Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability' (2012) 58 (1) *McGill Law Journal* 61 (guardianship); Ani B Satz, 'Disability, Vulnerability, and the Limits of Anti-Discrimination (2008) 83 *Washington Law Review* 513 (discrimination); Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267 (conduct of lawyers in assessing capacity); Katrina George, 'Autonomy and Vulnerability at the Death Bed' (2006) 10 *University of Western Sydney Law Review* 139 (voluntary euthanasia); Shireen Daft, 'Complex victim-perpetrators: Examining child soldiers through a vulnerability lens' Paper Delivered at Macquarie Law School Conference *Victims, survivors, innocents? Exploring the mobilisation of vulnerability in policy and law,* 23 November 2018 (children participating in armed conflict).

[46] Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 6. See also Fiona Parley, 'What Does Vulnerability Mean?' (2010) 39 *British Journal of Learning Disabilities* 266; Joel Anderson, 'Autonomy and Vulnerability Entwined' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *'Vulnerability: New Essays in Ethics and Feminist Philosophy'* (January 2014, Oxford Scholarship Online) 135 who offers the following definition: 'Vulnerability is thus a matter of effective control, understood as a function of the relative balance of power between the person in question and the forces that can influence her. Vulnerability can be increased by those forces becoming more powerful or the effects more probable but also by the person becoming less able to counter these forces and effects.'

[47] See for example the observations of Justice Beech-Jones, '…all clients of a solicitor are vulnerable if the solicitor acts improperly': *Berger v Council of the Law Society (NSW)* [2013] NSWSC 1080 [138] (Beech – Jones J); see also Titti Mattsson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed) *Elder Law: Evolving Human Perspectives* (Edward Elgar Publishing, 2017) 118.

[48] Barry Hoffmaster, 'What Does Vulnerability Mean?' (2006) 36 (2) *The Hastings Centre Report* 38, 44.

[49] Here I refer to the tripartite approach taken by Rodgers, MacKenzie, and Dodds.

[50] See in particular the approach of Goodin who argues that in recognising vulnerability, we are obliged to not only protect people, but it also may be within our gift to reduce or eliminate the vulnerability: Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (1985, University of Chicago Press, Chicago).

[51] Jacob Dahl Rendtorff, 'Basic Ethical Principles in European Bioethics and Biolaw: Autonomy, Dignity, Integrity and Vulnerability – Towards and Foundation of Bioethics and Biolaw' (2002) 5 *Medicine, Healthcare and Philosophy* 235, cited in Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a

A *Martha Fineman's Vulnerability Theory*

The work of Martha Fineman has been pivotal in establishing a theory of vulnerability.[52] Her theories have provided the basis for an emerging body of literature where social structures and approaches to state intervention are assessed. While Fineman's theory is fashioned in the context of the American social and legal system, the central ideas can be applied universally. At the centre of her theory are a number of key principles; these include the universality and constancy of vulnerability, the primacy of the vulnerable subject over the liberal subject,[53] the movement from formal equality to substantive equality, and the role institutions play in mitigating vulnerability through a more active state. All of these key principles have particular relevance for the parent/donor dealing with a failed family accommodation arrangement. In particular, the recognition of the particular vulnerabilities they experience, highlights the conditions that result in a lack of equal access to the law. The conception of formal equality, relying on people being equal before the law, fails to account for the particular characteristics of individuals who, because of these characteristics, are denied access to justice. State intervention, in the form of legal reform, is therefore necessary to address the source of substantive equality and to ensure equal access.

Fineman's work centres on creating a critical narrative for the law that has a starting point acknowledging our shared vulnerability. Her work highlights the universality and continuous nature of human vulnerability, and the corresponding obligation of the state to respond to that vulnerability in order to ameliorate its consequences.[54] She criticises the idea of the

Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics*, 11, 12; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 2.

[52] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251; Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) *Yale Journal of Law and Feminism* 1; Martha Albertson Fineman & Anna Grear, 'Introduction: Vulnerability as Heuristic – An Invitation to Future Exploration'; Martha Albertson Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman & Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, (Ashgate, 2014).

[53] While a detailed examination of liberalism is beyond the scope of this article, it is worth noting that the term 'liberal' or 'liberalism' encompasses different meanings. Fineman uses the term as derived from John Locke, essentially stating that the liberal model is based on equality of individuals, and that 'all human beings are by nature free and endowed with the same inalienable rights'. She observes that 'we have come to understand "equality" narrowly as the requirement of sameness of treatment, a formal anti-discrimination mandate, primarily enforced through the courts': Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) *Yale Journal of Law and Feminism* 1, 2. See also Martha Albertson Fineman, *The Illusion of Equality: Rhetoric and Reality of Divorce Reform* (University of Chicago Press, 1991) 46.

[54] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 (1) *Yale Journal of Law and Feminism* 1, 8.

autonomous subject in law; we all experience vulnerability throughout our life regardless of age, physical or mental capacity. She suggests it is our shared vulnerability rather than the mythical liberal conception of the autonomous individual that reflects our human condition.[55] Therefore, the ideal of the autonomous individual is neither realistic nor possible, as even the most independently capable individual can experience vulnerability.[56]

Fineman argues that the autonomous subject is the starting point for our western legal systems, which assumes a person is a free, independent adult.[57] The binary perception of the autonomous and the vulnerable leads to a stigmatising of certain groups, separating them and casting the vulnerable as weak or dependant. She argues that, 'the creation of individual stigma has profound implications for both the scope and nature of social policy, and the ability of individuals to address their biological, spiritual, economic and social needs'.[58] Those who are not considered to conform to the autonomous ideal are separated and deemed in need of special treatment, which can lead to paternalism and negative judgement.[59] In Fineman's view, the 'autonomy myth' has created institutional arrangements (including legal frameworks) that fail to take into account the fragility of the human condition. A recognition of this vulnerability, and the role the state should play in assuming responsibility for dependency is at the heart of Fineman's vulnerability theory. As such, people should not be judged on the degree of vulnerability they suffer, but the way the state or relevant institutions respond to and provide us with resilience to our shared vulnerability.[60]

A recognition of universal vulnerability does not, however, assume that everyone is equally vulnerable, which could result in genuine disadvantage such as cognitive impairment, being overlooked. In the context of nursing care, Sellman distinguishes our universal vulnerability from those who are 'more than ordinarily' vulnerable.[61] Herring observes that we are able to

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[55] Ibid 11.
[56] Ibid 9-10. See also Onora O'Neill, Towards Justice and Virtue' (Cambridge University Press, 1996) 191-192 where she states that '[h]uman vulnerabilities are not only characteristic and persistent…but variable and selective'.
[57] Maxine Eichner, 'Dependency and the Liberal Polity: on Martha Fineman's *The Autonomy Myth* (2005) 93 (4) *California Law Review* 1285, 1288.
[58] Martha Albertson Fineman. 'Elderly as Vulnerable" Rethinking the Nature of Individual and Societal Responsibility' (2012) 20(2) *Elder Law Journal* 71, 87.
[59] See, for instance Martha Albertson Fineman, ibid, 84-6. For a critique of Fineman's approach see Nina Kohn, 'Vulerability Theory and the Role of Government', (2014) 26 *Yale Journal of Law and Feminism* 1.
[60] Titti Mattsson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed) *Elder Law: Evolving Human Perspectives* (Edward Elgar Publishing, 2017).
[61] Derek Sellman, 'Towards and Understanding of Nursing as a Response to Human Vulnerability' (2005) 6 *Nursing Philosophy* 2, 4.

claim everyone is vulnerable, while recognising that there are people who experience particular vulnerabilities – not because they are inherently vulnerable, but because there is an absence of state support or an unequal allocation of resources.[62] This indicates that the cause of, and therefore the response to, the vulnerability needs to be focused on the social, or in some cases, legal support. MacKenzie develops this theory in order to separate the 'unavoidable human vulnerabilities' from those that exist because of 'social injustices, oppression, domination and inequality'.[63]

While Fineman's theories are intended to have broad application in proposing a theoretical framework for the allocation of resources, the ideas embodied in the theory are able to be applied to the narrower context of the ability of individuals to access the legal system to enable disputes to be resolved. The considerations of formal and substantive equality feed directly into questions of whether people experiencing vulnerabilities are entitled to special treatment by the law to counter the lack of access to justice. If these justifications exist, the impact of the systemic failure leading to the lack of justice is borne, not only by those individuals, but by society generally. This sentiment was expressed by His Honour Justice French AC, when he observed that,

> [c]hronic and institutionalised lack of access to justice is not just a problem of fairness. It is a problem that goes to societal order and stability. It is also a problem that ends up, if not addressed, generating far more costs, economic and non-economic, to society than ought to be the case.[64]

Since vulnerability theory advocates the role of the state in addressing inequality, questions concerning the allocation of resources by the state to achieve that outcome have been raised. In a powerful article, Nina Kohn explores the shortcomings of a theory that operates at such a high level of abstraction. She argues that '[v]ulnerability theory provides little guidance as to how to prioritise among vulnerable subjects when allocating limited financial resources and political capital.'[65] Kohn observes that governments are unlikely to have the resources necessary to meet vulnerability theory's goal of achieving universal substantive equality.

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[62] Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press, 2016) 23.
[63] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Mackenzie, Rogers and Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014) 35.
[64] The Law Council of Australia, 'The Hon. Robert French AC speaks on access to justice and the Justice Project' (Media Release, 17 October 2018) *https://www.lawcouncil.asn.au/media/news/the-hon-robert-french-ac-speaks-on-access-to-justice-and-the-justice-project*
[65] Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale Journal of Law and Feminism* 1, 13.

Because of the inevitability of limited resources, the government must prioritise certain issues. The failure to clarify the way resources should be apportioned is seen by Kohn as a shortcoming of the theory. More particularly, Kohn criticises Fineman's own application of the theory to the elderly.[66] Kohn suggests that rather than creating a new crime for 'elder fraud', vulnerability theory would better support efforts to address the particular conditions that allow such behaviour to flourish such as social isolation and lack of access to legal resources for victims of fraud.[67] This observation aligns with the position taken in this article. Vulnerability theory can 'help us understand why we might favor laws that provide broad-based social support and why we might be concerned about selectively allocation resources based on group identity'.[68] Applying this reasoning to family accommodation arrangements, vulnerability theory can help us identify the areas where legal frameworks can be reformed allowing greater access to justice.[69] Though rather than being a drain on government resources, as the observation by Justice French AC makes clear, there are greater costs to society by *not* addressing the problem. A person who, because of systemic failures in the legal system, has been unable to achieve some degree of restitution of assets or property will potentially look to government for welfare and support. In extreme cases, the parent/donor person can be left homeless.[70] This outcome clearly has implications not only in relation to the demand for government housing, but the process under the current adversarial system can have a detrimental effect on both the physical and mental health of parties to the dispute. Hence, the assigning of resources to ameliorate this form of vulnerability would, in the long term, conserve state resources rather than contribute to their depletion.

In addressing the question of the extent to which vulnerability theory can be used to improve access to justice in the context of family accommodation agreements, a consideration of the relationship between the concepts is appropriate. Equality before the law and access to justice

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[66] Martha Albertson Fineman, 'Elderly as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71.
[67] Nina Kohn 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale Journal of Law and Feminism* 1, 13.
[68] Ibid.
[69] Kohn's suggestions are more aligned with addressing the situational vulnerability of the elderly. This highlights the essential difference between behaviour that is inherently wrong and should be eliminated (such as fraud), and family accommodation agreements, which of themselves are not problematic. Proposals for addressing the legal situational vulnerability of the older person in family accommodation arrangements are explored in Teresa Somes and Eileen Webb, 'What Role for Real Property Law in Combatting Financial Elder Abuse through Assets for Care Arrangements? (2016) 22 *Canterbury Law Review* 120.
[70] Legal Aid (ACT) Submission No 115 to the Law Council of Australia, *The Justice Report*: *Older Persons* August 2018, 10.

are considered fundamental principles of our legal system and to the rule of law. Their value underpins the quality of our economy and society.

Nonetheless, 'access to justice' is a complex and elusive concept. As Bottomley and Bronitt observe, 'despite the volumes that have been written under the terms 'access to justice, it remains a vague concept within which many assumptions and perspectives are buried'.[71] At the very least, the concept involves the assurance that people should have access to courts or effective dispute resolution mechanisms to protect their rights and interests; that legal services should be available to people regardless of their place of residence, and that people should be entitled to equality before the law.[72]

Access to justice is inextricably linked to the aim that all people should be equal before the law.[73] There are few that would challenge Fineman's views on the limitations of formal equality as she describes it. It is recognised that, although the goal of equality appears to be a positive aim, it may also promote discrimination. Therefore '[d]ifferences of race, ethnicity, religion, sex and economic and cultural circumstances can mean that 'one law for all' protects the values and interests of a majority of citizens at the expense of minorities. It does so by privileging unity and formal equality over cultural diversity and substantive equality.'[74]

However, Fineman's conception of equality before the law assumes that equal treatment under the law involves the formal model of equality under which everyone is assessed and treated without regard to their particular circumstances. Substantive equality requires that individual circumstances and disadvantages are compensated for so that the law has equal outcomes for everyone.[75] Equality can therefore refer to equal or uniform treatment under the law, or it may import notions of substantial equality. This aspect of challenging the notion of 'equality before the law' is particularly relevant to more practical questions of access to justice. The limitations

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[71] Stephen Bottomly and Simon Bronitt, *Law in Context* (4thed, 2012, The Federation Press) 162. See also Hughes and Mosher, who describe access to justice as a concept with 'elasticity' representing a number of ideas often changing with context: Patricia Hughes and Janet Mosher (eds) 'Forward' (2008) 46 *Osgoode Hall Law Journal,* xxix-xxxv, xxix.

[72] Access to Justice Advisory Committee, *Access to justice: an action plan,* AGPS, Canberra, 1994, p. xxx.

[73] Davison M Douglas and Neal Devins, 'Introduction' in Neal Devins and Davison M Douglas (eds) *Redefining Equality* (Oxford University Press, 1998) 4.

[74] The Hon John von Doussa, President, Human Rights & Equal Opportunity Commission Speech delivered at ALTA NZ 2005, (Australasian Law Teachers Association Conference, 6 July 2005). https://www.humanrights.gov.au/news/speeches/one-law-al

[75] For a details thesis on the proposed scope of substantive equality, see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 (3) *International Journal of Constitutional Law* 712.

of formal equality are well recognised, but the scope of 'substantive equality' is less understood. For instance, the aim of reducing barriers to accessing the law for certain groups or individuals and achieving equality, necessarily involves ideas of substantive equality. The Productivity Commission stated that,

> [t]he goal of equality before the law is that all Australians have equal access to legal advice and representation and to the courts and tribunals that decide disputes. Essentially this means that any barriers which prevent people from enforcing their rights should be removed. It also implies that the institutions that define and uphold the law are not biased against particular groups within the community.[76]

Fineman's observations concerning formal and substantive equality are particularly relevant when considering the problems of access to justice experienced by the parent/donor in a failed family accommodation arrangement. Underpinning the entire discussion of vulnerability and the appropriate response of the law, is whether there is a need to distinguish people experiencing particular vulnerabilities that should attract special attention. This poses some unique and challenging concerns in the context of family accommodation agreements. Binding transactions are undertaken every day, and the law has well-developed mechanisms for dealing with circumstances where it is recognised that a transaction should be rescinded, or where some form of relief ought to be granted to a wronged party. In other words, the present law, primarily through the developments of equitable doctrine, exists to aid the vulnerable and 'soften the harshness of the common law' by recognising where there has been unconscionability, unconscionable conduct or undue influence.[77] However, the analysis of the arrangement through the lens of vulnerability theory as proposed by Rogers et al, reveals that whilst the law should not prevent people from entering into financial arrangements of their choosing, that is, allowing people to expose themselves to the situational vulnerability, those experiencing these vulnerabilities find the current legal avenues and responses inadequate.[78] Similarly, if the parent/donor has entered the arrangement pursuant to undue influence, unconscionable conduct or an exploitation of a lack of capacity, the same access to justice issues are present. Both the

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[76] The Productivity Commission 'Access to Justice Arrangements' (72, Australian Government Productivity Commission, 2014) 77, citing Access to Justice Advisory Committee, *Access to justice: an action plan,* AGPS, Canberra, (1994) 27.

[77] '[Equity] qualifies, moderates and reforms the rigour, harshness and edge of the law. [T]he office of equity [is] to support and protect the common law from shifts and crafty contrivances against the justice and the law. Equity therefore does not destroy the law, nor create it, but assist it': *Dudley v Dudley* (1705) 24 ER 118, 119 (Lord Cowper).

[78] Fran Ottolini, 'Older People's Rights Service – A Specialist Elder Abuse Service in WA'. Paper presented at the Law Society of Western Australia, Elder Law Forum, 3 November 2017, 13.

'access' to justice, and the 'justice' are compromised and law reform is required to achieve substantive equality before the law.

B *Refining Fineman's Vulnerability Theory*

Rogers, Mackenzie, and Dodds propose a refined taxonomy of vulnerability whereby the ontological human condition and external contexts are individualised under three headings in the form of inherent, situational and pathogenic vulnerability.[79] Although the authors agree with Fineman concerning our universal vulnerability, their reasoning helps us to distinguish and identify more specifically the nature, source and effect of specific vulnerabilities. The approach enables a more thorough appreciation of the complex causes that prevent the parent/donor from accessing the legal system when faced with a failed family accommodation arrangement. This in turn allows a focus on those shortcomings of the legal system that are able to be addressed by legal reform. While each category bears its own characteristics, there are no bright lines between them. The characteristics identified in each category will invariably overlap to some extent and as demonstrated in the case of family accommodation agreements, will influence and impact each other.

Inherent vulnerability refers to those vulnerabilities that are an underlying consequence of our human condition. It may lead to, but should not be seen as amounting to, dependency.[80] The extent of our inherent vulnerability will depend on a range of factors including age, gender, health status and disability, and the extent to which we are impacted by inherent vulnerability may vary throughout one's life depending on one's own resilience and available social or institutional support.[81] The elderly are not a homogenous group, so advancing age of itself is not indicative of vulnerability. However, there are certain conditions that are associated with ageing, including both cognitive and physical decline.[82] Suffering the effects of a stroke, or diminishing hearing or cognitive impairment would constitute an example of inherent vulnerability.

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[79] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics*, 11,

[80] Susan Dodds, 'Dependence, Care and Vulnerability', in Mackenzie, Rogers and Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford Scholarship Online, 2014);

[81] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics*, 11, 25.

[82] Nina A Kohn, Maria T Brown and Israel Doron, 'Identifying Connections between Elder Law and Gerontology: Implications for Teaching, Research and Practice', (2017) 25 *Elder Law Journal* 69, 80.

Situational vulnerability is context specific and develops from the social, political, economic legal or environmental situation of a person. Situational vulnerability can be short term, intermittent or permanent.[83] It arises from factors operating outside of the person, for instance unemployment, housing issues, or family conflict. Situational vulnerability can be exacerbated by inherent vulnerability, and vice versa. For instance, existing health issues can be worsened by poor or inappropriate housing, or indeed situational vulnerability could cause or exacerbate a health condition. Moreover, our capability to deal with any of these vulnerabilities is closely aligned with our own particular circumstances and our ability to cope.[84] If my house burned down, I would be situationally vulnerable, however the impact of that event would be largely ameliorated if I had been able to afford comprehensive insurance, or whether I had social or family support at the time.

Pathogenic, or structural vulnerability occurs when the institutional responses to inherent or situational vulnerability either exacerbate or create new vulnerabilities. Rogers et al refer to this as a subset of situational vulnerability, and they arise when social policy intervention aimed at addressing either inherent or situational vulnerability have the paradoxical effect of creating or becoming the source vulnerability itself.[85] As well as policy intervention, legal structures can also contribute to pathogenic vulnerability by failing to address the legal needs of a particular group, and act as barriers to certain groups accessing justice.

IV IDENTIFYING VULNERABILTY IN THE CONTEXT OF FAMILY ACCOMMODATION ARRANGEMENTS

This section draws together the previous discussions concerning vulnerability and access to justice. It examines the legal and personal challenges encountered by the parent/donor as a participant in the arrangement, and when the arrangement comes to a premature end. This analysis focuses on the position of the parent/donor. It does not deny the existence of vulnerability on the part of the adult child/recipient. However, the critical features of the legal and familial position of the parent/donor, (identified as legal and personal situational

[83] Ibid.
[84] These circumstances cover a range of variables such as economic status, cultural factors, geographical location, etc.
[85] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5 *International Journal of Feminist Approaches to Bioethics*, 11, 26.

vulnerability) mean that it is their vulnerability, and its manifestation in systemic vulnerability, that create the lack of access to justice.

Structural, (which includes systemic or pathogenic) vulnerability occurs when the mechanisms put in place to ameliorate inherent and situational vulnerability have the counteracting effect of triggering further vulnerability. By adapting and applying the tripartite lens of vulnerability as theorised by Rodgers et al, this analysis aims to demonstrate that factors such as the precarious legal position of the parent brought about by the family accommodation arrangement, or the reluctance to engage in legal proceedings against a child, adversely impacts upon the ability to utilise the legal system. While the factors outlined under the systemic or structural vulnerability such as time, expense and formality of proceeding apply to all litigants bringing actions concerning property and indefeasibility of title (or in rarer cases, breach of contract or unjust enrichment), the particular situational vulnerabilities of the parent/donor exacerbate the legal structural problems. In terms of substantive justice, the particular vulnerabilities highlight the lack of equality before the law and the need for adjustments addressing the structural vulnerabilities. Therefore, recognising vulnerabilities may require special measures in the way of law reform, to enable substantive equality to be achieved.

A *Inherent Vulnerability*

Any inherent vulnerability experienced by the parent/donor may be a key factor in coming to a decision to enter into a family accommodation arrangement, as these conditions can generate a need for help and support from others to mitigate their impact. The need for support may also create a dependency on the adult child/donee that potentially can be exploited. Inherent vulnerability may be exacerbated by situational vulnerability such as family conflict, arising through either the breakdown of the relationship, or the legal dispute that ensues. The impact of legal proceedings causes not only financial stress, but uncertainty surrounding outcomes and housing options can potentially affect the psychological and physical health of those involved.[86] A person experiencing some form of inherent vulnerability may also be disadvantaged by the lack of institutional support provided by the legal system. While the negative impact of legal proceedings is not limited to the parent/donor, the legal position of the donor necessitates legal action to be instigated by the donor to recover property, and the

[86] Legal Aid ACT, Submission No 115 to Law Council of Australia, *The Justice Project*, Final Report (Part 1), *Older Persons,* August 2018, 10.

potential deleterious effect may prove to be a significant deterrent, particularly if the claimant is already suffering some form of inherent vulnerability.[87]

B *Situational Vulnerability*

As explained above, situational vulnerability refers to those vulnerabilities we experience that are referrable to a particular context or environment. Entering into a family accommodation arrangement of itself exposes the parent/donor to vulnerability. These vulnerabilities arise owing to both the legal and personal contexts of the family accommodation agreement. While the proposals for law reform in this article are focussed on the features of the legal system that give rise to pathogenic or structural vulnerability, there is some scope for reforms that address the legal situational vulnerability that arise owing to the nature of the accommodation agreement.[88]

1 *Entering into the accommodation agreement – legal situational vulnerability*

Outside the family context, transactions involving significant assets or money are generally undertaken only after seeking legal advice and putting in place measures to protect financial positions. Conversely, within the family context, where trust and familial bonds are assumed to eliminate the need for protective measures, the parent/donor is often unaware of the inherent risks involved in entering transactions and their own precarious legal position should an arrangement fail. In examining the legal position of the parent in assets for care arrangements, two related but distinct sources of vulnerability emerge. The first is described here as 'legal-situational vulnerability'. It is related to, but can be distinguished from, the vulnerability caused by systemic features of the law when a cause of action is pursued and a remedy sought.[89] Legal-situational vulnerability arises when legal presumptions, doctrines or formalities operate to create significant obstacles to a parent/donor's claiming either in contract or against the

[87] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (September 2007) para 5.41-44; Susannah Sage – Jacobson, 'Access to Justice for Older People in Australia' (2015) 33 *Law in Context* 142, 146.

[88] These doctrinal reforms include measures such as allowing the 'granny flat interest' recognised by Centrelink to be a registrable interest under the Torrens System.

[89] It is acknowledged that there are not bright lines between the two categories of vulnerability – complex causes of action and uncertain remedies could be perceived as legal situational vulnerability. Yet, as most causes of action are equitable and have their genesis in aiding the vulnerable, it is access to justice that is problematic. Therefore, the complexity of the present law and obstacles preventing access amounts to pathogenic or systemic vulnerability.

property, and amount to a 'legal imbalance' against the parent/donor. The consequences of legal- situational vulnerability was recognised in *Anderson v Anderson*, when Justice Dalton observed that:

> [t]he transaction which is impugned by the plaintiff is a very significant transaction. The family home was by far the most significant asset which Mrs Roma Anderson owned. By the transfer she gave it away. There was no protection for her – she retained no right to reside in what had been her home for most of her life.[90]

Most sources of legal situational vulnerability in assets for care arrangements are causally related to the familial setting, and the informality that characterises such arrangements. For instance, the presumption against intention to create legal relations within a family accords with the traditional conception that the family is private, and families do not intend that their private arrangements have legal consequences.[91] Additionally, formal contractual requirements concerning certainty of terms, conditions and time of performance, create significant obstacles for a party to establish that a contract was intended, when often terms are 'far too vague and uncertain to satisfy the common law requirements.'[92] Similarly, compliance with statutory formalities requiring dealings in land to be in writing may not be met in assets for care cases owing to arrangements being made orally, and a reluctance to formalise transactions within the family.[93]

Legally embedded normative assumptions concerning the intentions of parents to financially benefit their children create a further challenge in the form of the presumption of advancement. When there is a transfer of property for no consideration from one person to another equity presumes the recipient holds the property on resulting trust for the donor.[94] Similarly, if two or

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[90] *Anderson v Anderson* [2013] QSC 8, [61] (Dalton J).
[91] *Balfour v Balfour* [1919] 2 KB 571.
[92] *Jones v Padavatton* [1969] 1 WLR 328.
[93] Writing requirements for contracts for the sale or disposition of land or interests in land are found in various State legislative provisions: *Civil Law (Property) Act 2006* (ACT) s 204(1); *Conveyancing Act 1919* (NSW) s 54A(1); *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (QLD) s 59; *Law of Property Act 1936* (SA) s 26(1); *Conveyancing and Law of Property Act 1884* (TAS) s 36(1); *Instruments Act 1958* (VIC) s126(1) and *Property Law Act 1958 (VIC)* s 53(1)(a); *Law Reform (Statute of Frauds) Act* 1962 (WA) s 2 (applying the *Statute of Frauds 1677* (Imp) s 4. If the parent alleges the adult child voluntarily intended to create an interest in the property in the parent's favour, or the adult child held all or part of the property on express trust for the parent, this would need to be evidenced by writing: *Civil Law (Property) Act 2006* (ACT) s201; *Conveyancing Act 1919* (NSW) s23C(1); *Law of Property Act 2000* (NT) s10*; Property Law Act 1974* (QLD) ss10, 11; *Law of Property Act 1936* (SA) s29; *Conveyancing and Law of Property Act 1884* (TAS) s60(2); *Property Law Act 1958* (VIC) s 53(1); *Property Law Act 1969* (WA) s34(1).
[94] Except in some States where a voluntary transfers of Torrens title land will not be treated as held on resulting trust: *Conveyancing Act 1919* (NSW) s 44; *Law of Property Act 2000* (NT) s 6; *Property Law Act 1974* (QLD) s 7; *Property Law Act 1969* (WA) s 38.

more persons contribute to the purchase of property, and that property is put into the names of one of the parties, then equity will presume a resulting trust in favour of the other party proportionate to their contribution.[95] Equity 'presumes' the legal title holder holds the property wholly or partially on trust, as a default rule and in the absence of any contrary explanation.[96] However when transfers have occurred in certain prescribed relationships, including parent to child, equity presumes the transfer was a gift and a resulting trust will not arise.[97] As is the case with the presumption against legal relations, the presumption of advancement can be rebutted by contrary evidence. Yet the requirement that the parent discharge the evidentiary burden operates to further the 'legal imbalance'.

The primary characteristic of the family accommodation arrangement is the transfer by the older person of money or assets to the adult child, in exchange for accommodation and/or care. As such, the adult child obtains indefeasible title to the property, and any exceptions to indefeasibility must be challenged through *in personam* exceptions to indefeasibility.[98] While equity traditionally respond to the personal situational vulnerability of the plaintiff, these exceptions are for the most part complex and expensive to pursue . As the parent/donor does not have any proprietary interest in the property until the matter is heard and determined by a court, any caveat lodged to prevent subsequent dealings with the property may be challenged.

2 *Entering into the Accommodation Agreement – Personal Vulnerability*

(a) The Parent/Child Relationship

The motive of each party in entering the agreement will vary with each family circumstance. The donor parent may act out of self interest in that the accommodation arrangement may allow them to avoid institutionalised care or keep wealth within the family. However, a decision may be driven by considerations other than self-interest when undertaken in the familial environment. This, of itself, is not problematic. Communality is seen as an important feature of family life, and the trust and reciprocity implicit in family arrangements aim to achieve more than financial gain; the happiness of family members is often contingent on the happiness of

[95] *Calverley v Green* (1984) 155 CLR 242, 245-7 (Gibbs CJ).
[96] Charles Rickett and Ross Grantham, 'Resulting Trusts – The True Nature of the Failing Trust Cases' (2000) 116 *Law Quarterly Review* 15, 19.
[97] Joe Campbell, 'The Consequences of Rebutting a Presumption of Advancement' (2018) 46 (3) *Australian Bar Review* 229, 233-234.
[98] *Frazer v Walker* [1967] 1 AC 569.

others.[99] Therefore improvident transactions must be seen in the light of the 'private ordering' of family financial arrangements.[100] As such, Hall's observations in the context of Canadian law are relevant here:

> In transactions that involve property, donor autonomy is central. 'The idea of unfettered individual liberty to dispose of one's property as one wishes, whether wisely or foolishly, is a fundamental - even sacred - tenet of Anglo Canadian law.'[101]

However, transactions that are influenced by a mixture of obligation, affection, familial responsibility or even guilt, rather than commercial or personal gain, expose the parent donor to personal situational vulnerability. For instance, a parent/donor can be encouraged to 'sell up' and transfer assets in order to relieve financial pressure experienced by an adult child. [102] Brian Bix observes, family members who enter into financial agreements with other family member are 'less likely than non-family members to be motivated by their own interests, and less able to protect those interests, because of the greater likelihood in the family context of altruism and coercion'.[103] Whilst any measures aimed at curbing the autonomy to undertake that transaction would be viewed as paternalistic,[104] there exists a need to have appropriate legal mechanisms in place to address a situation when the reciprocal arrangement breaks down. Additionally, many adult children maintain a sense of entitlement to their parent's wealth, and consciously or not, may engage in pressuring a parent in order to obtain a financial advantage. In this sense, the family accommodation arrangements effectively tap into anticipated inheritances, a practice that has been termed 'inheritance impatience' on behalf of the adult child.[105]

The particular dynamic of the parent/child relationship potentially gives rise to a form of 'special disability' on the part of the parents, whose altruism can be exploited.[106] The sense of

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[99] Michael J Trebilcock and Steven Elliot, 'The Scope and Limits of Legal Paternalism' in Peter Benson (ed) *The Theory of Contract Law: New Essays* (2001, Cambridge University Press) 51.

[100] Ibid.

[101] Margaret Isabel Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy and Vulnerability' (2012) 58 (1) *McGill Law Journal* 61, 67.

[102] See for instance *Mainieri v Cirillo* [2014] VSCA 227.

[103] Brian Bix, 'The Public and Private Ordering of Marriage' (2004) *University of Chicago Legal Forum* 295, 308-309, cited in Denise Meyerson 'Rethinking Marriage and its Privileges' (2013) *Acta Juridica* 385, 400-1.

[104] See above, 'Disadvantages of Characterising the Failed Family Accommodation Agreements as Elder Abuse'.

[105] Australian Law Reform Commission, *Elder Abuse* Discussion Paper 83 (2016) [1.88].

[106] In the context of family accommodation arrangements, a parent's 'love and affection' has not been explored as a special disability along the lines of *Louth v Diprose* (1992) 175 CLR 621. However, in *Bridgewater v Leahy* (1998) 194 CLR 457 a transaction between an elderly man and his nephew was set aside on the basis it

obligation that parents experience towards their children can be explained by not only the natural parental bond, but the societal and legal obligations imposed on them to care for children as minors. These obligations are entrenched and, despite generational changes, commonly continue through to adulthood. 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 relationships between parent and child as one where the parent is at a disadvantage owing to this sense of obligation towards their children. And, while there is no legal obligation on a parent towards an adult child, our law has imbedded within it a strong confirmation of the moral and financial obligations flowing 'downwards'; for instance, testator's family maintenance, and the presumption of advancement.[107] Within the context of disputed arrangements, courts have explicitly entrenched those societal norms that embody those obligations. For instance, Justice Orminston recently stated that,

> [i]t would be a sad state of affairs if courts interfered as of course with gifts and beneficial transactions effected in favour of children in circumstances where it could truly be said that they were entered into 'in consideration of the natural love and affection' that parents have for their offspring. Every day of the week, indeed far more frequently, parents make gifts to children though they might be disadvantageous to themselves. On other occasions, as was the case here, children and their parents arrange to employ their funds, primarily the parents' funds, to build 'granny flats' and the like attached to new and old houses, in circumstances where it is more than apparent that the principal benefit will be received by the children either in the short or in the long term. Such demonstrations of natural generosity are not to be discouraged by the law.[108]

This form of vulnerability often arises in cases where parents have agreed to be guarantor for their children. In the absence of any unconscionability of behalf of the bank, a parent's vulnerability is recognised, but not enough to have the transaction set aside. In *Watt v State Bank of NSW t/as State Bank of NSW*, Higgins CJ and Crispin J observed that,

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was an unconscionable bargain. The elderly man was found to be under a special disability owing to his emotional dependence on his nephew.

[107] Blackstone felt the obligations by children to their parents existed by virtue of 'natural justice'. He said that: 'The duties of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they, who protected the weakness of our infancy, are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws': Sir William Blackstone, Commentaries on the Laws of England (1765-69) Book I Chapter VI Of Parent and Child. However unlike the United States of America, some parts of Canada and China, there are no laws demanding filial responsibility by children to their parents in Australia: Donna Harkness, 'What are families for: re-evaluating return to filial responsibility laws (2013) 21 *Elder Law Journal* 305; David De Vaus, 'Children's Responsibilities to Elderly Parents' Family Matters No 45, Australian Institute of Family Studies, Spring/Summer 1996.

[108] *Mitchell v 700 Young Street* [2003] VSCA 42, 42 (Orminston JA)

> 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'.[109]

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. He describes 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'.[110] In the context of the family accommodation agreement, this personal situational vulnerability creates an environment where arrangements are often undertaken as a means of assisting children. As Justice Orminston has stated, the law should not discourage altruism on behalf of the parent. However, a recognition of the specific vulnerability explains the conduct of the parent/donor, and the absence of caution in placing themselves in a position of legal vulnerability.

(b) Reluctance to Commence Proceedings Against Own Children

A further source of personal situational vulnerability connected with the parent/child relationship arises from a reluctance by parents to commence proceedings against their children. In its comprehensive 2018 Report, the Law Council of Australia identified certain barriers to elderly people taking part in legal proceedings, outside of the familial dimension to a dispute. [111] These include findings such as a reluctance to complain about legal issues affecting them, and a lack of confidence in accessing legal resources.[112] This can be attributed to a lack of capacity, a lack of familiarity with technological resources, dependency on others

[109] *Watt v State Bank of NSW t/as State Bank of NSW* [2003] ACTCA 7. See also Permanent Mortgages Pty Ltd v Vandenbergh [2010] WASC 10; Good Relations, High Risks: Financial Transactions within Families and Between Friends, Report of the Expert Group on Financial Vulnerability (Cth) February 1996; Belinda Fehlberg, 'Sexually Transmitted Debt: Surety Experience and English Law (Clarendon Press, 1997); 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 recent decision from the High Court in the UK. Here an elderly, 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) (20 February 2019) [34].
[110] Janesland Holdings Pty Ltd v Francisc Simon & Ors [2000] ANZ ConvR 112 [120] (Crispin J)
[111] Law Council of Australia, 'The Justice Project, Final Report, Part 1 – Older Persons (August 2018) 17-22.
[112] Ibid 15-16.

(and, in particular, a history of dependency on the adult child with whom they are engaged in a dispute).[113] These barriers can be further exacerbated by the inherent vulnerability of the parent if they are from a non-English speaking background, are in the later stages of life, are from remote communities or are from a low socio-economic background.[114] Further to these general barriers, there are several reasons why, in the context of a family accommodation arrangement, parents may be reluctant to commence proceedings against their children.

First, parents may be reluctant to pursue the legal recovery of property on the failure of the family accommodation arrangements as they may prioritise the relationship with their children, and possibly grandchildren, over and above obtaining any proprietorial or financial recompense.[115] In some cases pursuing a legal remedy may extinguish any possibility of saving the relationship with their family and the associated support network. Secondly, parents may be ashamed when finding themselves in conflict with their children, as they feel a responsibility for raising them and hence for their behaviour.[116] As such many older people believe, and may prefer, that disputes arising within families should be kept private.[117] Thirdly, if the property arrangement has been undertaken because of the undue influence or pressure of the defendant/respondent, the parent/donor may not feel empowered to secure their legal position even on the breakdown of the relationship. Having been subject to pressure by the dominant party, in many cases the instigation of legal proceedings against that party requires significant

[113] Bonnie Brandl and Tess Meuer 'Domestic Abuse in Later Life' (2000) 8 *Elder Law Journal* 297, 303.
[114] Law Council of Australia, *The Justice Project*, Final Report, Part 1 – Older Persons (August 2018) 9.
[115] Rosslyn Munro, 'Family Agreements: All with the best intentions' (2002) 27 (2) *Alternative Law Journal* 68; Seymour Moskowitz, 'Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect' (2003) 36 *Loyola LA Law Review* 589: House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (September 2007) para 5.35; Rae Kaspiew, Rachel Carson & Helen Rhoades, 'Elder Abuse in Australia' (2016) 98 *Family Matters* 64, 69; Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [8.18].
[116] Shelly L Jackson & Thomas L Hafmeister, 'Detection and Reporting of Elder Abuse Occurring in a Domestic Setting' (2015) 27 (2) *Journal of Elder Abuse* 121; Rae Kaspiew, Rachel Carson, & Helen Rhoades, (2015). Elder abuse: Understanding issues, frameworks and responses. Melbourne: Australian Institute of Family Studies, Owen Ames and John Harley, 'Elder Abuse: Being Part of the Solution, Not Part of the Problem' (2001) 23(3) *Law Society Bulletin (SA)* 34; Briony Dow, ''Why are we abusing our parents? The ugly facts of family violence and ageism' (2016) Australian Institute of Family Studies https://aifs.gov.au/cfca/2015/12/08/why-are-we-abusing-our-parents-ugly-facts-family-violence-and-ageism; Amanda Holt, 'Responding to Parent Abuse' (2011) 24 *The Psychologist*, 186; Barbara Cottrell, & Peter Monk, 'Adolescent to parent abuse: a qualitative overview of common themes' (2004) 25 *Journal of Family Issues*, 1072–1095; Carolyn Hunter, Judy Nixon, Sadie Parr, 'Mother Abuse; A Matter of Youth Justice, Child Welfare or Domestic Violence', (2010) 37 *Journal of Law and Society* 264, 270; Law Council of Australia, 'The Justice Project, Final Report, Part 1 – Older Persons (August 2018) 19-20.
[117] Lisae Jordan, 'Elder Abuse and Domestic Violence: Overlapping Issues and Legal Remedies' (2001) 15 *American Journal of Family Law* 147, 149.

resilience.[118] The position of the parent/donor is exacerbated if they have been heavily reliant on the adult child for care and support.

(c) Consequences of the Failure of the Arrangement

Assuming the paradigm arrangement whereby the parent/donor is subject to the indefeasible title of the adult child/donor, on the failure of the arrangement parent/donor has no claim to the property or assets they have transferred until determined by a court.[119] The consequences of the failure, and the impact on the parent/donor will vary widely according to the individual circumstances of those involved, and the reasons for the breakdown.[120] If the behaviour of the adult child is particularly egregious, the parent/donor may suffer forms of abuse including financial, physical, emotional or verbal abuse. As outlined above, situational vulnerability can potentially create, or add to the parties existing inherent vulnerability. However, the discontinuing of the arrangement will at the least, lead to an adjustment to the accommodation and care arrangements for the parent/donor. This could mean having to secure accommodation in an aged care facility,[121] or alternative accommodation if the relationship between parent and child has broken down, or the relationship of the child and their partner has broken down. An example of the consequences of the failure of an arrangement was seen in the recent New South Wales case of *Spink v Flourentzou.*[122] In that case an elderly woman sold a unit in Sydney and used the proceeds to buy a property with her daughter and son in law. There was an arrangement between the parties that Mrs Spink would be able to live at the property indefinitely. However, the relationship broke down and she was asked to leave the property by her daughter. At the time of the hearing Mrs Spink was essentially homeless and 'dependent upon the pension and the goodwill of friends and acquaintances for accommodation, as well as being on a waiting list for public housing.'[123]

Mrs Spink's circumstances highlight the precarious position of the parent/donor once money or assets have been transferred. The transfer of wealth in exchange for accommodation

[118] Teresa Somes and Eileen Webb, 'What Role for the Law in Regulating Older People's Property and Financial Arrangements with Adult Children: The Case of Family Accommodation Arrangements' (2015) 33 *Law in Context* 24, 26.
[119] See for example, *Swettenham v Wild* [2005] QCA 264.
[120] As explained above, not all failed accommodation agreements are a consequence of relationship breakdown, or poor behaviour on the part of the adult child.
[121] If the reasons for the failure of the arrangement arose because of the inability of the adult child to provide appropriate care.
[122] *Spink v Flourentzou* [2019] NSWSC 256.
[123] Ibid [5].

impoverishes the parent and leaves them financially vulnerable. The expense of proceedings to recover money or property is a contributing factor to the pathogenic vulnerability they suffer, as legal proceedings are often too expensive to commence. This is discussed below.

C *Pathogenic Vulnerability*

Jerod Auerbach has observed that '[t]he legal process can be threatening, inaccessible, and exorbitant – usually it is all of these for the least powerful people in society.'[124] This accurately describes the law that is applicable to family accommodation arrangements and, it is doctrinal and procedural aspects of the law, designed to resolve the dispute, which counterintuitively create another source of vulnerability experienced by the parent/donor. The primary sources of vulnerability are outlined below. Needless to say, the law that applies to family accommodation agreements does not distinguish the position of the parent/donor from other litigants, such as people or entities in commercial disputes, or in non-familial relationships. The law is applied 'equally', hence formal equality before the law is achieved by equal application. Yet, recognising the particular inherent and situational vulnerabilities of the parent/donor, demonstrates the existence of substantial inequalities which in turn lead to problems in access to justice. It is this source of vulnerability arising through the legal frameworks that are put in place to achieve legal outcomes, which are in need of reform to improve access to justice.

1 *Complexity of the Law and Diversity of Outcomes*

Although intergenerational accommodation arrangements have been a social feature for millennia, attempts to address breakdowns in these arrangements through the law have been a relatively recent phenomenon. Therefore, in order to resolve disputes, judges have analogised legal principles arising from areas such as equity, property and contract law. Along with the issues concerning doctrinal complexity, there may also be matters arising relating to tax law and Centrelink provisions. This has led to the criticism that the current law being applied is uncertain, exceptionally complicated and, from a practical perspective, largely ineffective.[125]

[124] Jerold S Auerbach, 'Justice Without Law? Resolving Disputes Without Lawyers' (Oxford University Press, 1983) Preface.
[125] 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, 124.

For the most part, it has been necessary to argue equitable causes of action to enable the parent/donor to establish a right either to property (through principles of indefeasibility) or relief based on contributions through the transfer of assets or money. Traditionally, the equitable jurisdiction evolved to deal with the harshness of the common law and to assist the vulnerable. Its jurisdictional basis lies firmly in the principles of curing the rigours of the common law and looking to the conscience of parties, rather than the application of strict legal rules.[126] Equity theory, drawing on the doctrines of equitable fraud, allows us to see vulnerability as a source of inequity or unfairness, justifying a legal response directed to the nature and source of that unfairness.[127] In turn, the method of equity has been to adapt to particular circumstances according to contemporary circumstances. Hence, Ashburner stated that,

> [e]quity has developed…not by clinging to antiquated principle and stretching the facts until they suited the principle, but by enlarging the principle until it harmonised with the moral conceptions of the time.[128]

Equity is therefore, at least in principle, the appropriate theoretical framework to resolve the disputes arising from the family accommodation agreement. Paradoxically though, it is this very nature of equity and the use of equitable principles that contributes to the structural vulnerability of the parent/donor. Although equitable remedies are discretionary, the reasoning of the court and the outcome may be dependent on seemingly insignificant facts or conversations. Informal conversations referring to 'our house' could indicate a common intention constructive trust,[129] whether the term 'gift' was used in conversation could determine whether the presumption of advancement should be upheld.[130] The court may find a resulting trust (an implied trust in the amount of the gift or contribution), a constructive trust (arising either from what the court considers to be the common intention of both parties, or because of the unconscionable nature of the arrangement), an equitable lien (using property as security for

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[126] Michael Levenstein, *Maxims of Equity, A Juridical Critique of the Ethics of Chancery Law* (Algora Publishing, 2014) 43, cited in Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts,* (LexisNexis Butterworths, 3rd ed, 2016) 3; *Dudley v Dudley* (1705) 24 ER 118, 119; As to the language of unconscionable conduct and its meanings, see Paul Finn 'Unconscionable Conduct' (1994) 8 *Journal of Contract Law* 37.

[127] Margaret Isabel Hall, 'Material Exploitation and the Autonomy Ideal: The Role of Equity Theory in Adult Protection Legislation' (2008) 5 *Elder Law Review* 9, 26. See also the comments of Justice Somers: 'I think it likely that over the years words such as unconscionable and inequitable have drawn closer to more objective concepts such as fair, reasonable and just': *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 186, 193 (Somers J), but see comments of the plurality in *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 301, 'the relevant principles of equity do not operate at large in an idiosyncratic fashion'.

[128] Ashburner (1933) 62, cited in Young, Croft and Smith, *On Equity* (Lawbook Company, 2009) [1.100].

[129] *Hohol v Hohol* [1981] VR 221; *Zaborskis v Zaborskis* (1982) 8 Fam LR 622.

[130] *Spink v Flourentzou* [2019] NSWSC 256 [92] (Robb J).

the payment of a sum of money) or equitable compensation. Calculation of the relief is based on specific doctrinal reasoning and, therefore, the outcome may differ greatly.[131] As well as these remedies, the court may make any orders it thinks fit in order to achieve a 'just and equitable' outcome. The reluctance of people to put pressure on family relationships by seeking legal advice prior to the commencement of the arrangement[132] means that, in most cases, a family accommodation 'agreement' lacks any legal force and claimants are rarely able to turn to contract law, which denies that many of the promises evince an intent to create legal relations and, consequently, any proprietary remedies. Nor can they turn to family law legislation, which offers remedial flexibility but is under-inclusive in its coverage of relationships governed by the legislation.

Complexity not only relates to the law but to court processes. Both procedurally and evidentially, rules, forms and procedures can make the legal process incomprehensible and inaccessible to the public.[133] The complexity and inaccessibility of the present law is a major disincentive to anyone wanting to resolve a dispute that has arisen pursuant to an asset for care arrangement. This, coupled with the considerations below, means that very few parent/donors have the time, money or personal resilience to proceed with a legal action to resolve the dispute.

2 *Expense of Proceedings*

In most failed family accommodation arrangements, the parent/donor will have a justiciable matter and the right to bring an action to recover either money or property. However, legal rights are illusory and the principle of equality before the law is meaningless if legal costs prevent access to justice and effectively prevent people from enforcing or protecting their rights. Older people generally have less access to earned income and a higher rate of means tested income support.[134] While they are also found to have higher rates of home ownership,

[131] Compare, for example, the differences between the calculating remedies for estoppel, breach of fiduciary duty, failed joint venture and resulting trusts. For further analysis see Susan Barkehall –Thomas, 'Shared Homes, Broken Promises and Constructive Trusts: Why Older Generation Plaintiffs are Frequently Worse Off' (2015) 9 (3) *Journal of Equity* 239.

[132] Victorian government, *Submission Inquiry into Older People and the Law,* p3 cited in Tina Cockburn, 'Equitable relief to enforce family agreements' (2008) 86 *Precedent* 42, 44.

[133] The Productivity Commission, 'Access to Justice Arrangements' (72, Australian Government Productivity Commission, 2014) <http://www.pc.gov.au/inquiries/completed/access-justice/report>, 132.

[134] Sara Ellison et al, 'The legal needs of older people in NSW', (2004) Law and Justice Foundation of NSW, Sydney, 5.

the transfer of property or assets under the agreement means that they can be less able to draw on personal income sources to finance litigation.[135]

With the exception of Victoria, all Australian jurisdictions would hear the above matters in the State Supreme Court or, in some circumstances, the District Court. Litigation in either of these jurisdictions is commonly beyond the resources of many people.[136] For example, in a submission to the Productivity Commission's Inquiry into Access to Justice, the Chief Justice of Western Australia commented that,

> [t]he hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.[137]

For example, the standard fee to file a statement of claim in the common law or equity division of the NSW Supreme Court is $1,101, and the fee for an allocation of hearing date is $2,197.[138] Unless the court orders otherwise, the plaintiff usually pays these fees.[139] In addition to court costs, the legal fees associated with retaining a private lawyer and briefing a barrister are, for many people, prohibitive. Solicitors charge on a time basis, and hourly rates vary depending on seniority. The Productivity Commission suggests that law firm partners charge approximately $600 an hour, and associates around $300 an hour.[140] It is estimated that a three day trial in the Supreme Court of NSW would cost in the vicinity of $90,000 to $120,000.[141] If money is tied up in the property itself, the older party is in a 'catch-22' situation, in that they are unable to access funds to seek legal advice. Community based legal services such as Justice Connect,[142] Seniors Rights Services[143] and the Older Persons' Legal and Education Program[144] (a specialist service of Legal Aid NSW), can provide legal advice and representation for those

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[135] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [8.16]

[136] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of the Commonwealth of Australia, *Older People and the Law* (September 2007) para 5.21.

[137] The Productivity Commission, *Access to Justice Arrangements* (72, Australian Government Productivity Commission, 2014) http://www.pc.gov.au/inquiries/completed/access-justice/report, 6.

[138] Civil Procedure Regulation (2017), Schedule 1.

[139] *Civil Procedure Regulation* (2017) Clause 9(1), 10(1). Although a party may apply to have these fees waived: see *Civil Procedure Regulation* (2017) Part 4.

[140] The Productivity Commission, *Access to Justice Arrangements* (72, Australian Government Productivity Commission, 2014) http://www.pc.gov.au/inquiries/completed/access-justice/report, 115-116.

[141] Email correspondence with Patricia Lane, Barrister, Level 22 Chambers, Sydney (6 March 2019).

[142] https://www.justiceconnect.org.au

[143] http://seniorsrightsservice.org.au

[144] https://www.legalaid.nsw.gov.au/what-we-do/civil-law/a-service-for-older-people

either eligible for legal aid, or through pro-bono schemes. These services are means tested and, therefore, only available to those who satisfy the eligibility criteria. A submission to the Productivity Commission report from National Legal Aid remarked that continued funding restraints has meant that many people who are unable to afford a private legal practitioner will be unable to receive a grant of legal aid, or the level of assistance they need.[145] Therefore, costs are a particular barrier to obtaining legal assistance for people in the middle-income range, who are neither eligible for legal aid nor able to afford costly legal fees.[146]

In their 2017 Report on Elder Abuse, the Australian Law Reform Commission responded to the problem of prohibitive costs by recommending family accommodation matters be heard by Tribunals, based on the current Victorian practice.[147] Tribunals are certainly a lower cost alternative, and many litigants are self-represented, thus eliminating the costs associated with legal representation. However if the present law is to continue to be applied without reform, it is difficult to see how matters could be argued in the absence of legal representation, and the Productivity Commission has acknowledged that the more complex the matter, the greater the costs.[148] In any case, the absence of legal representation can prove to be a disadvantage to the parent, owing to potential inherent and situational vulnerabilities, and, thus, prevent from effectively participating in proceedings.[149]

3 *Nature of Proceedings (Formality)*

The adversarial nature of the Supreme and District Courts together with the formality of proceedings can be a disincentive to commencing litigation.[150] The basis of the adversarial process is for opposing parties to present their cases in order to achieve the best possible

[145] The Productivity Commission, 'Access to Justice Arrangements' (72, Australian Government Productivity Commission, 2014) http://www.pc.gov.au/inquiries/completed/access-justice/report, 716.
[146] Christine Coumarelos et al, 'Access to Justice and Legal Needs' (Law and Justice Foundation of New South Wales, 2012).
[147] Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) recommendation 6.4.
[148] The Productivity Commission, *Access to Justice Arrangements* (72, Australian Government Productivity Commission, 2014) http://www.pc.gov.au/inquiries/completed/access-justice/report, 117. Additionally, there are jurisdictional problems with equitable principles being applied in Tribunals.
[149] Sarah Ellisonet al, Law and Justice Foundation of NSW 'The Legal Needs of Older People; Access to Justice and Legal Needs, Vol 1, (2004) 365; see also Elizabeth Richardson, Genevieve Grant, and Janina Boughey, 'The impacts of self-represented litigants on civil and administrative justice: Environmental scan of research, policy and practice.' (Australasian Institute of Judicial Administration, 2018). This also explains why some cases are brought post -mortem as a part of succession litigation.
[150] Sara Ellison et al, 'The legal needs of older people in NSW', (Law and Justice Foundation of NSW, 2004) 365.

outcome, with the decision maker taking a passive rather than an inquisitorial role.[151] This characteristic, and the associated formal procedures of the courts are perceived to be intimidating, and 'anchored in the past'.[152] Along with costs, the formality associated with the current forum was an important motivation behind the ALRC's recommendation that disputes involving asset for care arrangements be heard in tribunals. Tribunals, in contrast to courts, operate under a statutory mandate to deal with matters informally and quickly, proportionate to the complexity of the matter. They are given a broad discretion in conducting proceedings, which is often seen as moving tribunal processes from an adversarial approach to a more inquisitorial model. For instance, the New South Wales Civil and Administrative Tribunal has a duty to 'resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible.'[153] Therefore, they are not required to adhere to strict rules of evidence, or comply with the same procedural rules as a court. They are required, however, to achieve procedural fairness between parties.[154]

4 *Time for Matters to be Resolved*

In a recent decision of the Australian Capital Territory Court of Appeal, Justice Burns referred to delay and expense as the 'twin evils besetting our system of civil justice.' He went on to say that, '[t]hey are not entirely unconnected: delay begets expense.'[155] The Productivity Commission Report on Access to Justice also noted that '[c]oncerns about delays can contribute to unmet legal needs', and it was estimated that one third of individuals who chose not to take legal action, cited delays as the reason for their decision. [156] Having matters drawn out over a long period of time not only contributes to the expense, but prolongs the emotional distress that people suffer when involved in disputes, in particular, interfamilial disputes. Although parties can apply for expedited hearings,[157] the decision is discretionary and dependent on other matters before the court. Even if granted, an expedited matter in the

[151] Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37 (1) *Monash University Law Review* 135, 138.
[152] Bertus de Villiers, 'Accessibility to Law: Adjusting Court Proceedings to the Modern Era – Novel Practices and Procedures from Down Under' (2016) 14 *New Zealand Journal of Public and International Law* 229.
[153] Civil and Administrative Tribunal Act 2013 s 3(d). See also ss 36 (1), 38 (4).
[154] *Amad El Ahmad v Imelda Reyes* [2015] NSWCATAP 50 at [32].
[155] Davis Samuel Pty Ltd v Commonwealth of Australia [2016] ACTCA 22, [141] (Burns J).
[156] The Productivity Commission, *Access to Justice Arrangements* (72, Australian Government Productivity Commission, 2014) http://www.pc.gov.au/inquiries/completed/access-justice/report, 127.
[157] Practice Note SC Eq 8 – Urgent Matters in the Equity Division (19/10/2009). Reasons for an expedited hearing include a party or essential witness being of advancing years, or a party or essential witness is frail or in declining health.

Supreme Court can take up to 8 months (in New South Wales alone) to be heard.[158] The parent/donor in a family accommodation dispute is, simply by virtue of the nature of the arrangement, likely to be an older party, and therefore less inclined to engage in lengthy litigation.[159]

V CONCLUSION

As more Australian's are reaching a greater age, housing for the older generation is becoming a serious social and political issue. For many older Australians, living with family and providing children with financial support in exchange for accommodation and care has significant advantages over living alone, or entering an aged care facility. The perceived advantages may become even more acute, as at the time of writing, the Royal Commission into Aged Care Quality and Safety is hearing disturbing evidence concerning poor standards of care in aged care facilities in Australia.[160] In contrast, the benefits of multi-generational living arrangements are many and include the provision of companionship, mutual support, and financial and housing security. Furthermore, budgetary constraints in the aged care and health sectors mean that the provision of accommodation and care for older people in a family environment is an attractive option for both society and government. The problem is that, when such arrangements break down, there is a lack of legal recourse for the parent/donor that will often see a person left without funds, accommodation and care. These costs would then fall on the public purse.

On entering the agreement, the parent/donor does so pursuant to legal principles that assume equality before the law and autonomy of the parties to an agreement. Within well-defined doctrines, equity does recognise some of the issues raised by personal situational vulnerability, such as emotional dependence, undue influence and reliance on non-contractual promises. Nonetheless, in responding to the vulnerability of the parent/donor by allowing challenges to

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[158] See further Rachel Callinan, 'Court Delays in NSW: Issues and Developments', (2002) NSW Parliamentary Library Research Service. https://www.parliament.nsw.gov.au/researchpapers/Documents/court-delays-in-nsw-issues-and-developments/01-02.pdf

[159] Susannah Sage – Jacobson, 'Access to Justice for Older People in Australia' (2015) 33 *Law in Context* 142; Australian Law Reform Commission, *Elder Abuse - A National Legal Response* Report No 131 (2017) [8.17].

[160] Royal Commission into Aged Care Quality and Safety (established 8 October 2018). See also Meagan Dillon, 'What have we heard at the Royal Commission into Aged Care Quality and Safety so far?' *Australian Broadcasting Commission* (online, 22 February 2019) https://www.abc.net.au/news/2019-02-22/first-fortnight-of-hearings-for-royal-commission-wrap-up/10837116

the title through *in personam* exceptions, the processes involved in bringing these actions counterintuitively create further vulnerability for the parent/donor in the form of systemic vulnerability. In some cases, as with the presumption of advancement, equitable principles add to the legal vulnerability experienced by the parent/donor by embedding normative assumptions concerning the nature of the relationship between parents and children. The combination of these vulnerabilities makes achieving the resolution of any dispute under the framework of the present law, often an insurmountable task.

Fineman's vulnerability theory as theorised by Rogers et al, provides a powerful argument for increased state intervention through law reform to ameliorate this pathogenic vulnerability. A donor/parent may be subject to factors that indicate both inherent and situational vulnerability, these factors are not the focus of law reform. Applying these theories to the position of the parent/donor in a failed asset for care situation enables the identification of the barriers to accessing justice in the form of appropriate dispute resolution. While this article has demonstrated why intervention is needed, more work is needed to examine how that should occur.[161] These reforms should aim to provide a statutory cause of action to avoid the complexities associated with the current law, greater emphasis on alternative dispute resolution, and a move to a tribunal forum rather that the Supreme or District Court. Law reform is therefore seen as a state response to the recognition of the particular vulnerability of a specific group and should be undertaken as a form of social responsibility.[162]

[161] The scope of proposed law reform will be the subject of a further article. This article explores introducing a statutory cause of action, with tribunals exercising jurisdiction.

[162] Robert E Goodin, 'Vulnerabilities and responsibilities: an ethical defense of the welfare state' (1985) 79 *The American Political Science Review'* 775.