# Response to Discussion Paper 83(DP83): *Elder Abuse*

# Submission from

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# Submission

This submission is based on a 15 year program of research on financial abuse, the management of the assets of older people, substitute and assisted decision making and intergenerational transfers including wills. We have made comment on areas where we have relevant research evidence.

 We agree that a strong rights framework needs to inform law, policy and practice in this area when core concerns of autonomy and protection, dignity and risk are being addressed. In our opinion the paper identifies many of the core issues that require attention.

* There is little advantage in creating a specific offence of ‘elder abuse’. As noted in the paper, existing criminal law covers most conduct labelled as ‘elder abuse’. The current issue in this regard is that there are very few prosecutions where abuse is alleged. We would suggest that calling ‘elder abuse’ such terms as assault, fraud or theft raises the profile seriousness of the issue and underlines the rights of people to equal treatment before the law, regardless of age or capacity.
* A rights framework speaks against compulsory notification. All adult citizens have the right not to proceed with prosecution. Of course older people should receive appropriate support if they wish to prosecute, but equally older people are entitled to support (which is generally not currently available) if they seek to stop or contain the abuse while maintaining the relationship. Impairment in capacity adds to the complexity of implementing a rights framework using substitute decision makers.
* Substitute decision making provisions raise a number of issues. They are undoubtedly helpful to those who provide care and support when the donor loses capacity and provide a means by which trusted family and friends may ‘take care’ when care is needed. Increasing numbers of attorneys are relinquishing their responsibilities because they find their duties are too onerous because the document is difficult to use or the reporting requirements are stressful, or the time needed to negotiate with older people about their wishes on a day to day basis is too demanding. Many suggestions around tightening provision to protect donors may make their job more difficult. For a minority of attorneys enduring powers provide a mechanism for abuse and many of these suggestions are potentially effective in preventing such abuse. We would suggest that some of the effective responses here may be legal, but others relate to the service sector which is not funded to provide the support needed to make substitute decision making safe and sustainable in a wide range of contexts.
* We agree that our understanding of why some older people are abused is incomplete. Different forms of abuse are highly likely to have different causes and suggest different responses to stop the abuse. We have focused particularly on financial abuse. In this area it is clear that older people’s perceptions of what constitutes abuse, the level of control they wish to have and their tolerance for outside intervention in their affairs varies. This level of variance suggests that responses should, as far as possible, be directed by older people themselves.

## Brief overview of the research program

The Assets, Ageing and Intergenerational Research Program is a 15 year interdisciplinary program of research that has focused on financial abuse, the management of assets of older people, substitute decision making and intergenerational financial transfers including wills. Funders include the ARC Linkage grants, an NHMRC grant, Queensland government, 7 Public Trustees across Australia, non government and professional bodies and Cadenza in Hong Kong. Projects have included multiple methods (national prevalence studies, semi- structured interviews , case file reviews) with diverse participants (the general community, older people, service providers, legal practitioners, allied health and aged care staff). A strong focus of relevance to this submission has been on EPA’s a project looking at access and useablility of EPA and AHD forms for the Qld government and knowledge understanding and use of EPA in residential age care. The program was triggered in 1999 by the practice issues emerging around financial abuse and decision making about entry to residential care, the introduction of EPAs in Qld and policy shifts that focused on self provision and paying for care that were linked to changes in perceptions of older people’s assets.

## Key findings of relevance to this submission

Readings in the reference list support the following findings

### Financial abuse

Is embedded in

* The social, policy and cultural context around attitudes to older people and to their assets and changing expectations and competing interests in assets
* The everyday activities of managing money in families, expectations about intergenerational asset transfers
* Knowledge and use of substitute and assisted decision making.
* The absence of someone who monitors decision making
* Access to assets through EPAs, informal arrangements, co-residence, undue influence.

### Asset management practices are an early task of informal care

* High level of interest in older people assets at policy, service provider and family levels.
* Managing money with or for older people is an early task of providing care, most commonly adult children are involved as asset managers
* Asset management on behalf of older people was a result of physical fraility and cognitive incapacity.
* Asset management tasks vary from informal (using the ATM on behalf of someone) to semis formal arrangements with banks to formal arrangements through EPAs and Administration. Although 1 in 4 Australians had assisted an older person with their assets in 2002, the most common method used were informal. This means that much of management and abuse can be invisible.

###  Risky assets management practices can foster or indicate abuse

* Risky asset management practices identified in interviews included poor accountability, poor understanding of EPAs and asset management, ageist attitudes and attitudes of entitlement to family money.
* For carers, managing money can be time consuming and onerous. Some take the most convenient route of mingling money or not involving the older person in decision making.
* In Aged Care facilities, many staff prioritised managing risk over the autonomy of the older person and defaulted to attorneys and family members as decision makers even when the resident had capacity for that decision. Involving older people in decisions was reported to be resource intensive.

### Older people’s views on what they wanted in terms of help with minding the money varied

* Older people expressed interest in a mix of decision making arrangements ranging from maintaining control with others implementing, consultation and ceding management to others. Few were happy with having management taken over by family members. Of primary importance is the fit between the older person’s expectations and wishes around involvement and their degree of involvement.

Limited understanding and misuse of principles of substitute decision making and EPAs

* Limited understanding of the principles results in default to substitute decision making.
* Limited understanding also a result of processes and practices surrounding the forms in Qld which did not sufficiently engage attorneys in understanding responsibilities at point of drafting the document. Look at LPITAF

### Something here about resourcing of support systems for substitute and assisted and supported decision makers.

##  References

1. Wilson, J., Tilse, C., Chui, W., Setterlund, D., Chan, H. & Woo, J. (2013) Elder financial management. Chapter in J. Woo (Ed.), *Aging in Hong Kong: a comparative perspective,* Springer, New York.
2. Tilse, C., Wilson, J. & Setterlund, D. (2009) Personhood, financial decision-making and dementia: An Australian perspective. Chapter in D. O’Connor & B. Purves (Eds.), *Dementia, personhood and decision making: examining the interface,* Jessica Kingsley Press, London
3. [Wilson, J.](https://espace.library.uq.edu.au/list/author_id/1168/) & [Tilse, C.](https://espace.library.uq.edu.au/list/author_id/287/) (2015) [Opening up Options: Decision Making around Older People's Assets](https://espace.library.uq.edu.au/view/UQ%3A365699). *Australian Social Work*, 68*(*2), 153-155. Doi:10.1080/0312407X.2015.1010555.
4. [White, B.](https://espace.library.uq.edu.au/list/author/White%2C%2BBen/), [Tilse, C.](https://espace.library.uq.edu.au/list/author_id/287/), [Wilson, J.,](https://espace.library.uq.edu.au/list/author_id/1168/) [Rosenman, L.](https://espace.library.uq.edu.au/list/author_id/612/), [Purser, K.](https://espace.library.uq.edu.au/list/author/Purser%2C%2BKelly/) & [Coe, S.](https://espace.library.uq.edu.au/list/author/Coe%2C%2BSandra/) (2015) [Estate Contestation in Australia: An empirical Study of a Year of Cases](https://espace.library.uq.edu.au/view/UQ%3A367330). *University of New South Wales Law Journal*, 38(3), 880-910.
5. [Tilse, C.,](https://espace.library.uq.edu.au/list/author_id/287/) [Wilson, J.](https://espace.library.uq.edu.au/list/author/Wilson%2C%2BJill/), [White, B.](https://espace.library.uq.edu.au/list/author/White%2C%2BBen/), [Rosenman, L.](https://espace.library.uq.edu.au/list/author/Rosenman%2C%2BLinda/) & [Feeney, R.](https://espace.library.uq.edu.au/list/author_id/74049/) (2015) [Will-making prevalence and patterns in Australia: keeping it in the family](https://espace.library.uq.edu.au/view/UQ%3A372586). *Australian Journal of Social Issues*, 50(3), 319-338.
6. Wilson, J., Rosenman, R., White, B., Tilse, C. & Feeney, R. (accepted – 5/12/2015) Cultural consideration in will making in Australia*. The Alternative Law Journal*.
7. [White, B.](http://espace.library.uq.edu.au/list/author/White%2C%2BB./), [Tilse, C.](http://espace.library.uq.edu.au/list/author_id/287/), [Wilson, J.](http://espace.library.uq.edu.au/list/author_id/1168/), [Rosenman, L.](http://espace.library.uq.edu.au/list/author/Rosenman%2C%2BL./), [Strub, T.](http://espace.library.uq.edu.au/list/author/Strub%2C%2BT./), [Feeney, R.](http://espace.library.uq.edu.au/list/author_id/74049/) & [Silvester, W.](http://espace.library.uq.edu.au/list/author/Silvester%2C%2BW./) (2014) [Prevalence and predictors of advance directives in Australia](http://espace.library.uq.edu.au/view/UQ%3A346166). *Internal Medicine Journal*, 44(10), 975-980. Doi:10.1111/imj.12549.
8. [Pachana, N.](http://espace.library.uq.edu.au/list/author_id/1725/), [Byrne, G.](http://espace.library.uq.edu.au/list/author_id/14/), [Wilson, J.](http://espace.library.uq.edu.au/list/author_id/1168/), [Tilse, C.](http://espace.library.uq.edu.au/list/author_id/287/), [Pinsker, D.](http://espace.library.uq.edu.au/list/author_id/7718/), Massavelli, B., Vearncombe K, [Katharine, J.](http://espace.library.uq.edu.au/list/author_id/15381/) & [Mitchell, L.](http://espace.library.uq.edu.au/list/author_id/82802/) (2014) [Predictors of ﬁnancial capacity performance in older adults using the Financial Competence Assessment Inventory](http://espace.library.uq.edu.au/view/UQ%3A331055). *International Psychogeriatrics*, 26 (6), 921-927. Doi:10.1017/S1041610214000209.
9. Willmott, L., White, B., Tilse, C., Wilson, J. & Purser, K. (2013) Advance health directives: competing perceptions, intentions and use by patients and doctors in Queensland. *QUT Law Review*, 13(1), 30-51
10. Tilse, C., Wilson, J., White, B., Willmott, L. & McCawley, A. (2013) Enduring powers of attorney: promoting attorneys' accountability as substitute decision makers. *Australasian Journal on Ageing*, 33(3), 193-197. Doi:10.1111/ajag.12052. IF = .678
11. Tilse, C. & Wilson, J. (2013) Recognising and responding to financial abuse in residential aged care. *Journal of Adult Protection*, 15(3), 141–152
12. Mitchell, L., Pachana, N., Wilson, J., Vearncombe, K., Massavelli, B., Byrne, G. & Tilse, C. (2013) Promoting the use of enduring powers of attorney in older adults: a literature review. *Australasian Journal on Aging,* 33(1), 2-7. Doi:10.1111/ajag.12043. IF = .678
13. Tilse, C., Wilson, J., Rosenman, L., Morrison, D. & McCawley, A. (2011) Managing older people’s money: assisted and substitute decision making in residential aged care. *Ageing and Society,* 31(1), 93-109. IF = 1.230
14. Pinsker, D., Pachana, N., Wilson, J., Tilse, C. & Byrne, G. (2010) Financial capacity in older adults: a review of clinical assessment approaches and considerations. *Clinical Gerontologist*, 3(4), 332-346. IF = .940
15. Wilson, J., Tilse, C., Setterlund, D. & Rosenman, L. (2009) Older people and their assets: a range of roles and issues for social workers. *Australian Social Work,* 62(2), 155-67. IF = .580
16. Tilse, C., Wilson, J., Setterlund, D. & Rosenman, L. (2007) The new caring: financial asset management and older people. *Annals of the New York Academy of Science* (ANYAS), 1114, 355-72. IF = 4.383
17. Tilse, C., Wilson, J., Setterlund, D. & Rosenman, L. (2007) Managing the financial assets of older people: balancing independence and protection. *British Journal of Social Work,* Special Issue on Caring for People: Social Work with Adults in the Next decade and beyond, 37(3), 565-572. IF = 1.335
18. Setterlund, D., Tilse, C., Wilson, J., Rosenman, L. & McCawley, A. (2007) Understanding financial elder abuse within families: exploring the potential of routine activities theory. *Ageing and Society,* 27(4), 599-614. IF = 1.230
19. Tilse, C., Rosenman, L., Wilson, J., Peut, J., Setterlund, D. & Ryan, L. (2006) Managing assets for older people: does rurality make a difference? *Rural Society*, 16(2), 127-226.
20. McCawley, A., Tilse, C., Wilson, J., Setterlund, D. & Rosenman, L. (2006) Access to assets, older people with impaired capacity and financial abuse. *Journal of Adult Protection*, 8(1), 20-32
21. Tilse, C., Setterlund, D., Wilson, J. & Rosenman, L. (2005) Minding the money: a growing responsibility for informal carers. *Ageing & Society*, 25(2), 215-227. IF = 1.230
22. Tilse, C., Wilson, J., Setterlund, D. & Rosenman, L. (2005) Older people’s assets: a contested site. *Australasian Journal on Ageing* Special, 24, 51-56. IF = .678
23. Wilson, J., Tilse, C., Setterlund, D., Rosenman, L., Morrison, D., Harrison, G. & Peut, J. (2005) Population ageing and the implications for financial markets: how will financial institutions respond to the transactions and asset management needs of both the ageing population and their carers? *Journal of Banking & Financial Services,* 115(1), 14-16

**Reports**
25. Tilse, C., Wilson, J., White, B., Willmott, L. and McCawley, A. (2011) Enduring documents: improving the forms, improving the outcomes. St Lucia QLD, Australia: University of Queensland. <http://eprints.qut.edu.au/46893/1/Enduring_documents_-_improving_the_forms%2C_improving_the_outcomes.pdf> LPITAF STUDY

26. Tilse, C., Wilson, J., White, B., Rosenman, L. and Strub, T. (2013) Families and generational asset transfers: making and challenging wills in contemporary Australia: outcomes from a national prevalence survey of will making. http://nmsw.uq.edu.au/wills

27.Wilson, J. and Tilse, C. (2012) Will making in Queensland in (eds.) School of Social Work and Human Services: Brisbane Australia: The University of Queensland, School of Social Work and Human Services. [http://www.uq.edu.au/swahs/Will%20making%20in%20Queensland.pdf\](http://www.uq.edu.au/swahs/Will%20making%20in%20Queensland.pdf%5C)

*This reports contains sections on Indigenous people, EPAs an will making.*

28. C Tilse, J Wilson, B White, LS Rosenman, [R Feeney](https://scholar.google.com.au/citations?user=onYvHQQAAAAJ&hl=en&oi=sra) - 2015 - .[Having the last word? Will making and contestation in Australia](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808919)papers.ssrn.com

 http://eprints.qut.edu.au/82785/1/\_\_staffhome.qut.edu.au\_staffgroupw$\_whiteb\_Documents\_Having%20the%20last%20word%20-%20Will%20making%20and%20contestation%20in%20Australia%20(FINAL%20Report%20for%20ARC%20Linkage%20March%202015).pdf