

JUSTICE COMMITTEE

PROSECUTION OF ELDER ABUSE

SUBMISSION FROM ACTION ON ELDER ABUSE SCOTLAND

Action on Elder Abuse (AEA) Scotland works to protect older people from harm and abuse. We support those experiencing (or at risk of) harm and abuse, including financial harm, physical, sexual and psychological abuse, and intentional neglect. We're part of the UK-wide charity, Action on Elder Abuse, which has over 20 years' experience in working exclusively in this area as a single focus to our work. We therefore have extensive experience that is not available from any other agency.

Elder abuse is a complex, yet rarely discussed issue, in modern society. We estimate that it affects around 9%¹ of the older population in Scotland, however we believe that the true extent of the problem is much higher as so few victims speak up. In a rapidly ageing society, the problem of elder abuse will only exacerbate in future years.

Although Scotland is leading the way across the UK in our response to adult safeguarding², it is too often the case that instances of elder abuse are primarily 'social worked' instead of prosecuted. Unlike the empowering way in which practitioners support survivors of domestic abuse, the response to cases of elder abuse is often very paternalistic. Older people are referred to as 'victims' rather than 'survivors', and the focus is primarily on safeguarding rather than seeking justice.

We therefore welcome the Scottish Parliament's commitment to reforming the law in this area, and believe that this presents a real opportunity to create an effective deterrent to this horrendous crime.

Problems with the current system

One of the most significant problems with the current criminal justice framework is the dearth of data collected by both the police and the prosecution. Action on Elder Abuse Scotland submitted Freedom of Information requests to Police Scotland the Crown Office and Procurator Fiscal Service (COPFS) in 2016, and our response from both highlighted that neither agency records the age of the victim, making it very difficult to gather data on criminal case involving older people. This inevitably makes it very difficult to analyse the true extent of criminal prosecutions regarding older people in Scotland.

¹ In July 2017, we asked a weighted, representative survey of 1,000 people aged 65+ if they had experienced some form of harm or abuse, to give us a prevalence rate of almost 9%. Our research supplements existing UK-wide academic research into elder abuse regarding the scale of elder abuse, which estimated that the likely prevalence of elder abuse was 8.6% of the UK population (NatCen, Kings College London, 2013: <http://natcen.ac.uk/media/20824/abuse-neglect-older-people.pdf>)

² Scotland is the only country in the UK to have dedicate adult safeguarding legislation: the Adult Support and Protection Act (Scotland) 2007

We can, however, look to research which Action on Elder Abuse carried out in England and Wales in 2017, which found that in relation to crimes involving older people:

- of those that are reported, the majority are either not acted upon, or result in cautions, suspended sentences. For example, using Freedom of Information requests, we found that one police force investigated 76 cases of elder abuse, and all 76 resulted in police cautions. Another police force did not record a single case of elder abuse.
- of those that do reach court, very few result in prosecution. We found that the number of successful criminal convictions in 2015/16 (3,012) represents just 0.7% of total prevalence of elder abuse.
- out of 28,187 adult protection cases involving older people (substantiated by local authorities as genuine safeguarding concerns), only 12% (3,317) were referred by the police to the prosecution service.

We have heard anecdotal evidence which suggests that the picture in Scotland is very similar, as well as numerous media reports, including:

October 2017

An Alloa couple who stole £60,000 from a relative's bank accounts have avoided prison sentences.

Former police officers Andrew and Jean Rough took the money from Mr Rough's mother Gladys over the course of almost five years.

They claimed she told them to spend her money freely, but Mrs Rough said it was only to use "if they were stuck".

The couple, both 58, were each ordered to carry out 300 hours of unpaid work.

February 2016

An assistant at a Glasgow nursing home has been ordered to carry out 180 hours of unpaid work within 12 months after she was convicted of assaulting two residents.

Paisley Sheriff Court heard that Rhythmia Anupam slapped one 88 year old lady after she became 'irritated' with her while helping her into bed on 22 October 2013. On the morning of Christmas Day 2013 she assaulted another 93 year old resident by striking her and pinching and twisting her cheek her while getting her out of bed and dressing her.

She assaulted the same woman again on the morning of 8 February 2014 by punching her.

July 2015

An assistant at an East Kilbride nursing home has been ordered to carry out 200 of hours of unpaid work under a Community Payback Order after being convicted of assaulting an 86-year-old resident.

Hamilton Sheriff Court heard that Cecilia Brady, with another carer, had been assisting the man in his room on the early evening of 24 May 2014. Due to the limited mobility of the elderly man they were using a metal frame and harness known as a Stand Aid.

Brady lost her temper and initially slapped the man, then slapped him again, she then pulled the Stand Aid back, then pushed it forward striking the man on the head.

November 2014

Lisa Curry was jailed in September for six months after being found guilty of slapping an 82-year-old resident, placing her arm up her back and spraying water from a shower head into her face at Buckreddan Care Centre on Irvine Road, Kilwinning on November 14 last year.

But an appeal hearing at the High Court in Edinburgh the 24-year-old's jail sentence was scrapped and she was sentenced to 300 hours community service and given two years probation instead.

While these cases highlight failings in the prosecution framework, there are also a number of barriers to criminal cases involving older people reaching the courts in the first place. These include:

- **older people's reluctance to report criminal offences.** This is often because they are dependent on the abuser (who may be the primary caregiver), may be fearful of the consequences (e.g, being unable to cope, being moved into a care home, etc), are embarrassed to report their own children, they fear they will not be believed (there is often an assumption that older people have memory/cognitive difficulties), or fear of loneliness. We unfortunately regularly hear of older people who would rather put up with abuse than endure loneliness.
- **a perception that older people do not make credible witnesses.** There are often unfounded perceptions around memory, frailty or confusion, or a perception that older witnesses won't be able to stand up to questioning. This is obviously a massive generalization (and even discrimination) of older people, and does nothing to address the fact that many older people are not given enough support and encouragement to take legal action.
- **lack of appropriate special measures for older people giving evidence in court.** While there are some special measures available for 'vulnerable' witnesses, these are fairly limited, and there is little evidence to show how often they are used in practice.
- **perceptions from both victims and perpetrators of elder abuse that the behaviour is not criminal.** This is particularly true in cases of financial

abuse, where there is often a perception that it's not theft or exploitation if it happens within a family.

- ***A belief from older people that their allegations will not be taken seriously.*** We have been supporting Lynn Harrision, whose elderly aunt was defrauded of almost £44k at the hands of her carer, who told us that her allegations were regularly dismissed by the police:

“Despite two victims, the Police were slow on following this up. I had to continually “badger” them for updates on progress. Every other crime appeared to be receiving priority over what had happened to my Aunt and the other elderly victim. It took from February to November 2014 for a report to be presented to the Procurator Fiscal and then until October 2016 before Margo faced a trial for her crimes. During this time, I had to formally complain about the Police, seek support from my MP and fight with the Justice system to get this matter to trial. We had to endure 22 court appearances, due to First Diets, continuations to First Diets, an appeal, postponed trials and ultimately a 10-day trial before justice prevailed.”

It is therefore little wonder that so few older people speak up and that so few cases actually reach the courts.

Merits of having a specific statutory offence of elder abuse

Many criminal conduct involving older people may be incorporated into ‘standard’ criminal charges, e.g. theft, rape, assault, etc. However, ‘standard’ inevitably means that criminal law is applied in the same way to an older person as it does to anyone else. If the law includes special measures for victims of domestic abuse and crimes motivated by race, disability or sexual orientation, we would question why the same measures cannot be extended to older people.

The current approach fails to adequately recognise the seriousness and unique dynamics of elder abuse. Victims of elder abuse are often more vulnerable than others, and therefore often in position to take action to defend themselves. The current approach also fails to recognise the impact on the older person, which can be devastating in relation to their physical and mental health, and their ability to live independently. Compared with younger adults, older people are physically weaker, and even a minor injury could therefore have grave consequences and result in longer convalescence.

Existing criminal charges also fail to recognise the motivations for elder abuse, namely the fact that many older people are specifically targeted as they are seen as more vulnerable or ‘easy targets’. Although prosecutors can consider guidance (the COPFS ‘Older People’s Policy’) in cases involving older people, this is not statutory and sentencing decisions will therefore be at the discretion of the judge, and/or applied inconsistently.

Similarly, while we welcome the new offence of ‘domestic abuse’, this is not applicable in many cases of elder abuse. This is because domestic abuse charges

only apply in situations where the perpetrator is the partner / ex-partner. A comprehensive UK-wide study into elder abuse found that 33% of perpetrators are family members other than partners/spouses³, primarily their own children. Even in cases where the abuser is living with the older person, this will still not be considered 'domestic abuse'.

We are therefore concerned that the current criminal justice system does not provide the flexibility to take appropriate account of the unique nature and dynamics of elder abuse, and the impact on the victim.

We strongly advocate the introduction of a new specific offence of 'elder abuse' as a means of addressing the flaws in the current criminal justice system. We envisage this as a more proactive approach to prosecution, whereby it should be the responsibility of the accused to prove that such actions were not intentional or wilful. Potential benefits are likely to include:

- ***Additional statutory protections to older people.*** A new specific offence of elder abuse recognises that the law should mark crimes against older people and their unique impact on an older victim, and recognises increased legal protections and punishments are appropriate in these circumstances. We believe this approach will provide much more clarity (to both older people and criminal justice professionals) than a new statutory aggravator, and sends a stronger message to the public that elder abuse will not be tolerated.
- ***Provides similar protections to victims of elder abuse as that of victims of domestic abuse.*** During the evidence gathering for the creation of a new offence of 'domestic abuse', it was recognised that a specific offence was needed to capture behaviours that cannot be easily prosecuted. We would argue that the case for a similar offence for elder abuse presents exactly the same argument. For example, if it is accepted that psychological abuse is difficult to prosecute using standard offences, how do the courts prosecute cases of psychological abuse when the abuser is the victim's son for example? Similarly, if an offence of domestic abuse recognises the unique gendered dynamics of such abuse, how do the courts recognise the unique dynamics of elder abuse?
- ***Improved recording and monitoring of elder abuse by the police and prosecution service.*** As there is currently no breakdown of age in recording mechanisms, it is impossible to gather an accurate picture of the effectiveness of the criminal justice system. A new offence would inevitably and clearly provide an accurate analysis of the extent of elder abuse and the success of prosecutions.
- ***Increased clarity for both the older person and professionals involved in the criminal justice system.*** This can assist in investigating, prosecuting and convicting instances of elder abuse. Elder abuse is not a unitary concept – it

³ UK Study of Abuse of Neglect of Older People, Department of Health (2007)

is incredibly complex, and involves domestic abuse, psychological abuse, financial abuse and much more. It occurs in care homes, the older person's own home and in hospitals. It involves family members, caregivers and strangers. A specific offence is therefore likely to provide a more meaningful and effective response to elder abuse than a 'one size fits all' approach. It is also likely to encourage older people to report cases of elder abuse, as behaviour which they may not deem criminal would have a more obvious criminal aspect when using such terminology.

- ***Encourage adult protection professionals to consider the criminal aspects of elder abuse.*** The current response to elder abuse is very much rooted in adult support and protection processes, focusing on safeguarding rather than prosecution. While safeguarding is important, safeguarding and justice must be considered *alongside* each other where a criminal offence has occurred. By failing to consider the criminal aspects of harm, abuse and exploitation of older people (or only imposing lenient sentences), we are in danger of sending a message to perpetrators that vulnerable older people continue to be an 'easy target', and that crimes against older people will not be harshly prosecuted. As financial abuse is the most common type of abuse experienced by older people, we are concerned that some perpetrators might believe that stealing thousands of pounds from a vulnerable older person is a risk worth taking.
- ***Makes abusers accountable to the courts for their actions, not just to their partners or families.*** Many instances of abuse in family situations are not regarded as criminal, especially in relation to financial abuse. If the consequence is prosecution, the abuser is more likely to perceive the act as a crime against the community than as a 'family matter.'
- ***Elder abuse is rarely discussed – criminalisation would increase public awareness, likelihood of reporting, and change perceptions of justice.*** Making elder abuse a specific offence would result in heightened public recognition of the issue, which in turn would contribute to changing public perceptions of what is acceptable behaviour and actions. A specific offence, with sentencing which takes account of the seriousness of the crime and its impact on the victim, would reflect the public distaste for elder abuse. In turn, victims are more likely to speak up if they believed elder abuse cases are being treated more seriously.

Possible models for a new offence of elder abuse

We would urge the Committee to look at the successful San Diego model of prosecuting elder abuse. San Diego County has a specific offence of elder abuse, and handles around 9,000 cases of elder and dependent adult abuse cases each year. See pages 22-24 of Action on Elder Abuse's report: 'Elder abuse is a crime –

now let's make it one': <https://www.elderabuse.org.uk/make-elder-abuse-a-crime-in-scotland>

Any new offence in Scotland would need to have a broad enough definition to capture the wide range of different behaviours and complexities of elder abuse. We would recommend that the following should be included: physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.

From a comparative perspective, various jurisdictions have managed to create workable and clear offences and definitions relating to elder abuse. See for example, chapter 13 of the California Penal Code 368 or New York Penal Law 260.32. See pages 16-21 of our report (above) for a comprehensive overview of models used on other countries/states.

Merits of introducing a new statutory aggravator

In relation to crimes such as theft, fraud or assault (any many more), we know that older people are often specifically targeted due to their actual or perceived vulnerability. This may be based on physical frailty, mental capacity, memory difficulties, loneliness and isolation, or dependency on others for basic care needs.

While we know that in some cases, older people may experience hostility or ill-will on the basis of their age, the vast majority of crimes against older people are driven by the perpetrator's perception of the victim's vulnerability. While our preference would be for a specific offence of elder abuse (as we believe this sends a stronger message to perpetrators around the seriousness of such crimes, and the concept of a separate offence would be an easier concept for the public to grasp), if this proposal does not gain support, we would welcome a new statutory aggravator as a much more effective option than the current criminal justice process.

It may also be an option to introduce both a new specific offence of elder abuse, **and** a statutory aggravator (as is the case in human trafficking legislation). If this is the case, consideration would need to be given to which factors would be taken into consideration as aggravations, and the thresholds at which criminal conduct becomes 'elder abuse' rather than an aggravating factor in existing criminal charges.

We believe the potential benefits of a new statutory aggravator on the basis of vulnerability and exploitation would include:

- ***Additional statutory protections to older people.*** As with a new specific offence of elder abuse, a statutory aggravator recognises that the law should mark crimes against older people and their unique impact on an older victim, and recognises increased legal protections and punishments are appropriate in these circumstances. For example, robbing an older man who is frail and has cognitive difficulties is likely to have a greater impact on the victim than robbing a younger man with no health issues. A new statutory aggravator would compel judges to take these factors into account during sentencing decisions, rather than on a discretionary basis. This would also lead to more

consistency; as current common law aggravations can be applied or interpreted in different ways.

- ***Recognition that older people are often specifically targeted, with appropriate reflection during sentencing.*** The aggravators of 'exploitation' and 'vulnerability' (if clearly defined) could potentially capture crimes in which older people are specifically targeted because of their perceived or actual vulnerability. The power of a specific offence lies in the requirement that the judge declares in open court that the offender's sentence has been increased because the elder abuse element has made the offence more serious. As noted above, we supported Lynn Harrison, whose aunt was defrauded of almost £44k at the hands of her carer. Lynn believed that her aunt was deliberately targeted because she was frail, lonely and housebound due to a terminal illness. A statutory aggravator would therefore provide a much more effective prosecution process for cases such as these, and would be likely to lead to a tougher prosecution.
- ***A more effective prosecution route for professional scammers.*** While Action on Elder Abuse works primarily to support those who have been victims of abuse by those in a position of trust (e.g family, friends, carers, health professionals, etc), there is also the prolific crime of professional scammers who deliberately target vulnerable older people via 'doorstep crime', online, postal and telephone scams. Many scammers often use so-called 'suckers lists' to persistently target those who have been identified as either vulnerable or easily duped. We've heard of numerous cases of older people being so lonely that they are knowingly engaging with scammers, including some older people handing back free call-blocking devices as they'd rather speak to scammers than have no one to talk to. We strongly believe that this type of crime, which deliberately and specifically targets those perceived to be vulnerable, must be effectively prosecuted to take account of the effect it has on vulnerable older people as a wider group. A statutory aggravator is likely to capture such crimes much more effectively than the current criminal justice process.

If a new statutory aggravator is adopted, careful consideration will need to be given to how the law defines both 'exploitation' and 'vulnerability'. If not clearly defined, there is a risk of creating unnecessary confusion around what these terms mean and who they apply to. We would suggest that it would be useful to consider the definition of vulnerability in the Adult Support and Protection (Scotland) Act 2007. Although the term 'vulnerability' is not specifically used, the definition is clearly intended to cover people who may be vulnerable. This Act refers to 'adults at risk of harm', and the threshold (the 3-point test) is as follows:

People aged 16 years or over who:

- are unable to safeguard their own well-being, property, rights or other interests; and
- are at risk of harm; and

- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

We would, however, suggest that other factors should be added to this definition to take account of some of the factors that make some adults particular targets for crime or exploitation, including loneliness, bereavement, dependence on others for care needs, advanced age (as is the case in some states in America, for example), etc. We appreciate that these can be difficult concepts/scenarios to define, however evidence can be sought by police and prosecutors to determine whether any of these issues are present.

We also believe it will be important for judges to consider situations in which victims are targeted even if they do not believe themselves to be vulnerable. The important factor is that the perpetrator ***believed them to be vulnerable and this is why the victim was targeted***, and this needs to be reflected in prosecutions. For example, an older lady with slight memory problems living on her own may be targeted for financial abuse by her nephew as he believes that these factors make her vulnerable to financial abuse. For example, he may assume she will not pick up on financial irregularities due to memory problems, or the fact that she lives on her own means that she is lonely and less likely to report the abuse.

The police and prosecution system

We recognise that sentencing is not the only factor to consider when attempting to tackle and deter the problem of elder abuse. Many cases never reach court due to a variety of factors (see pages 3-4), and it is therefore vital to address the barriers to accessing justice before any changes are made to the way in which cases are prosecuted.

Significant problems with the way both the police and prosecution service respond to cases of elder abuse are inevitably barriers, and we would suggest that a lot can be learned from other countries in this regard.

In the San Diego model, the District Attorney's Elder Abuse Unit not only focuses on prosecuting crimes against older people, but also addresses the special needs of older victims who often require hands-on care and support. This includes:

- providing education to older people, whereby they provide information on how to protect themselves from various types of abuse
- training bank and credit union employees on how to protect the financial assets of their older customers
- training police, public safety and fire personnel to be aware of the special issues involving older people.

In a number of other states in America, special units within the police and prosecutor offices have been established to focus specifically on elder abuse, with specially trained personnel, including victim advocates. Other states give precedence to criminal trials involving victims over the age of 70, including in special elder courts.

Evidence suggests that such measures have led to increased arrests and prosecutions.

In 1982, amendments to the Older Americans Act established definitions of elder abuse, and provided funding for training, awareness raising, and preventative strategies. In 2006, this was further expanded to include the detection, assessment, investigation, intervention and response to elder abuse. With the Scottish Government's recent commitment to producing a new 'Older People's Framework', we see no reason why Scotland use this as the basis of following in the footsteps of America, and becoming the first country in the UK to introduced dedicated legislation for older people. As well as provisions relating to elder abuse, such legislation could also include provisions for special provisions for older people who are witnesses in courts. Although the Scottish Parliament are currently considering provisions for vulnerable adults in the Vulnerable Witnesses Bill, this inevitably only applies to 'vulnerable' adults, not older people in general.

Crossover with the Adult Support and Protection Act

Any measures to provide the police and prosecution service with specialist skills and training around elder abuse must be considered in conjunction with ongoing developments around the Adult Support and Protection Act. There has been a tremendous amount of work in Scotland in recent years raise awareness of adults at risk of harm, and the support available to such adults. While this inevitably focuses on all vulnerable adults, not older people specifically, there is a great deal of expertise in this area readily available. However, it should be noted that such expertise focus on safeguarding, rather than criminal aspects of harm or abuse.

Jury direction

We also believe there could be merits in introducing jury direction in cases of elder abuse as a means of making juries aware of the unique dynamics of elder abuse. Such an approach appears to be working in well in sexual assault cases, and we see no reason why the same approach cannot be applied to elder abuse.

Parallels with other aspects of criminal law

"We have dedicated laws for animal abuse, child abuse, and domestic violence and for certain hate crimes. Such crimes seek to protect certain groups – whether they be animals, children, domestic partners, or an ethnic group. Elders should also be entitled to similar protections".

British-born Paul Greenwood, Deputy District Attorney, San Diego County (discussing the UK context)

Elder abuse is often seen as the 'poor cousin' of child abuse, in terms of the protections and redress offered to children, as well as generally being regarded as being years behind in terms of legislation and policy developments. This needs to change.

Whereas much of the legislation and guidance relating to child abuse considers both child protection and criminal proceedings simultaneously, in relation to older people,

adult support and protection proceedings often fail to recognise the criminal aspects of the harm and abuse of older people. It could be argued that terminology plays a part in this (adult support and protection uses the term 'harm', not 'abuse'), as well as assumptions that older people's primary concern is support and protection, not access to justice.

Similarly, there are various pieces of legislation specially relating to children, as well as various statutory aggravations in other areas of the law. However, there is no dedicated legislation specifically relating to older people, and any aggravations are common law rather than statutory.

Similarly, hate crimes law relating to race, religion, disability, etc take account of ill-will or hostility on the basis of these characteristics as aggravating factors. No such provisions exist on the basis of age or vulnerability.

Human rights considerations

Protection from abuse and neglect is a basic, fundamental right which should be afforded to all older people.

Elder abuse is a human rights violation and infringement of Article 25 of the EU Charter of Fundamental Rights, which recognises and respects the rights of older people to lead lives of dignity and independence, and to participate in social and cultural life. The UN Plan of Action on Ageing, adopted in 2002, put the issue of elder abuse firmly within the framework of universal human rights, and on 19 December 2011, the General Assembly of the United Nations adopted a Resolution on Ageing, which addressed neglect, abuse and violence against older persons.

Older people also have rights under the Human Rights Act relevant to elder abuse, including:

- the right to life
- the right not to be treated in an inhuman and degrading way
- the right to respect for private and family life (including the right to physical and psychological integrity)
- the right to liberty and security
- the right to an effective remedy
- the right not to be discriminated against on the grounds of age.

We are therefore concerned that failure to reform Scotland's criminal justice system to take account of elder abuse will be a breach of our human rights obligations towards older people.

We would also recommend that the Scottish Parliament also considers the introduction of a dedicated declaration of rights for older people. This could be a standalone declaration (as is the case in Wales), or incorporated into new legislation specifically for older people. Wales was the first country in the world to take these measures, both of which reflect the UN Principles for Older Persons. The Welsh Declaration aims to:

- help older people understand how their rights apply to them, and how to access them more effectively
- help older people understand how their rights relate to current equality and human right law
- help statutory bodies and service providers who work for, or on behalf of older people, know what is expected of them when providing services for older people.

Other issues

We believe that the public generally supports proposals for tougher prosecutions for those who commit crimes against older people. In an Action on Elder Abuses poll of 3,000 people across Scotland in 2017, we found that:

- 28% assumed crimes targeting older people must already be classed as aggravated offences and another 67% thought they ought to be
- only 5% of people thought crimes against older people should NOT be reclassified as aggravated crimes
- 96% think there should be tougher sentences for those who commit crimes against older people
- 94% think older people are specifically targeted for abuse due to their perceived physical frailty or mental vulnerability.
- just 7% thinks the government does enough to support older victims of crime
- Almost 93% of respondents in Scotland said they would like to see elder abuse made an 'aggravated offence'

Lesley Carcary
Director of Action on Elder Abuse Scotland