

JUSTICE COMMITTEE

PROSECUTION OF ELDER ABUSE

SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Criminal Law Committee welcomes the invitation to attend the Justice Committee to take part in an evidence session on the nature, extent and prosecution of elder abuse and whether there is merit in the potential introduction of an aggravated offence of elder abuse in Scotland.

The Scottish Government is committed to "shaping our legislation so that it is fit for 21st century Scotland and most importantly sufficient protection for those who need it."¹ Elder abuse must be seen in that context.

However, it arises, elder abuse is unacceptable. It should be dealt with through prosecution for criminal conduct and the promotion of campaigns to raise awareness of the issue. Simply debating the issue raises awareness of the problem, addresses societal concerns, identifies the apparent extent of the problem and highlights the need to deal with this issue effectively.

Scotland does not have a definition for elder abuse though the World Health Organisation² has described it 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'

¹ Ministerial Foreword by Aileen Campbell MSP and the cabinet Humza Yousaf MSP

² https://www.who.int/ageing/projects/elder_abuse/en/

It takes various forms, such as physical abuse, psychological or emotional abuse, financial abuse, sexual abuse, and neglect. In our evidence, we emphasise that there is a need:

- To define what elder abuse comprises both with regard to the abusive conduct to be considered criminal and the category meant by elder
- To consider whether existing legislation covers the abuse in all its forms.
- To consider how best any proposed hate crime legislation should target elder abuse
- To promote the need for non-legislative measures to run alongside the hate crime consultation and legislation.

Background

The Justice Committee considered the issue of elder abuse in 2017 during Stage 1 of what has now become the Domestic Abuse (Scotland) Act 2018 (2018 Act)³. The Scottish Government has announced that various provisions of that Act designed to enable the effective prosecution of behaviour that is controlling, coercive and emotionally or psychologically abusive amongst partners/ex-partners will come into force on 1 April 2019.

Partners (and ex-partners) in this context include spouses, civil partners and cohabitants as well as people in intimate personal relationships who do not live together. As well as physical abuse, behaviour under the 2018 Act will now cover other forms of psychological abuse and coercive and controlling behaviour that cannot currently be easily prosecuted. A wider range of abusive behaviour that occurs between partners (and ex-partners) who are elderly will now be able to be prosecuted where sufficient admissible evidence exists to justify prosecution.

We would suggest that it would be best as a first step to evaluate and monitor how the 2018 Act affects the criminal landscape once it is in force. It will take time to understand how effective that legislation proves to be in obtaining successful convictions and the imposition of relevant sanctions for abusive behaviour between partners (and ex-partners). Thereafter, that should allow for the identification of what proportion of those prosecuted for an offence under the 2018 Act fall into the category of elder. That will help identify the extent of the problem as well as any gaps in provision.

The 2018 Act sends out an important message about societal disapproval of abusive conduct that arises between partners (and ex-partners). Seeing how it is received is important.

The 2018 Act's implementation will be running alongside a public-facing strategic campaign highlighting the new offences.

³ <http://www.legislation.gov.uk/asp/2018/5/contents/enacted>

When considering elder abuse, we emphasise that it is about more than just legal reforms. It includes the need:

- to identify the relevant offences when they arise
- to introduce elder abuse helplines or systems to assist in reporting
- for education both in the schools and community based to inform about the issue
- to support those involved in caring for the elderly with guidance, so they know what and when to report
- for joined up criminal statistics (see Question 7) to identify the extent of the problem.

What the 2018 Act will not cover is abusive behaviour which falls within the offending category but arises between those that are not partners (and ex-partners).

Question 1 asks where behaviour is abusive in terms of the 2018 Act and is directed at the elderly if there should be a new stand-alone offence. The background to this question is linked to inextricably with Question 2 which concerns the creation of a statutory aggravator applying in situations where a more general offence involves elder abuse. We deal with both questions together.

Question 1: Merits of having a specific statutory offence of elder abuse (possibly based on the new domestic abuse offence provided for in the Domestic Abuse (S) Act 2018)

Question 2: Merits of introducing a new statutory aggravator applying to situations where a more general offence involves elder abuse

We have outlined what comprises offending conduct under section 1 of the 2018 Act. Presumably, any stand-alone offence would intend to replicate the wording of the relevant sections of the 2018 Act. As well as suggesting that we await evaluation of how the 2018 Act works in practice, we believe that the issue of elder abuse cannot be considered in isolation.

It is part of the Scottish Government's current consultation on *One Scotland: Hate Has No Home Here* which follows Lord Bracadale's Independent Review of Hate Crime Legislation in Scotland.⁴ Part Three of Lord Bracadale's Report specifically concerns 'age'. Age as a category is wider than just including elder as this would cover all ages from youth to elderly.

We support the suggestion at Question 11 of the hate crime consultation⁵ that a new statutory aggravation on age hostility should be added as part of the proposed hate crime legislation. (This follows Lord Bracadale's Report's Recommendation 10.⁶)

⁴ <https://www2.gov.scot/Resource/0053/00535892.pdf>

⁵ <https://www2.gov.scot/Resource/0053/00535892.pdf>

⁶ <https://www2.gov.scot/Resource/0053/00535892.pdf>

There is merit in all the 'protected characteristics' in the Equality Act 2010 being included as statutory aggravations. Looking at the importance of the message being sent by the proposed hate crime legislation will demonstrate the seriousness of such offences when they are motivated by age.

Exactly where abusive behaviour and hostility overlap would need to wait until the terms of the draft statutory aggravator are seen. Exactly what additional behaviour would be included within the term 'elder abuse' as a statutory aggravation is not known at this point.

There are merits in not treating the elder as a specific category but having a non-specific age category. Equality expects everyone to be treated equally, which is what an age aggravator as an offence would achieve. Hostility shown to be motivated by age should see no difference whether referring to a youth or an older person.

Where we understand that there may be issues is in proving the motivation for the offence as being hostility based on age. It may be difficult to distinguish that it was the age rather than the perceived vulnerability of the person which motivated the hostility. Those who are elder are more likely to be vulnerable or fail.

Before any new offence or statutory aggravator could be created, the definition of 'elder' needs to be considered.

One option would be to refer to a specific age. This could link to retirement, or over 50 or over 60, for example.? In Florida, an aggravation of advanced age refers to those over 65.⁷

Other vulnerable individuals could have the same problems as older persons, for example where they have early onset Alzheimer's. Such individuals would be excluded by a specific age restriction. Equally, those over a certain age will not all be vulnerable in the same way. 'Elderly' is non-specific. It is also likely that the perpetrator will not know the victim's specific age when they commit an offence. We do not necessarily know each other's age nor predict it correctly.

There would also be a need to consider future proofing legislation. Retirement now has no restriction. As we are living longer, more people will fall into an elder category if this is specified by age. That ageing demographic is likely to continue for some time. We have also seen an increase of elder accused appearing in the court. A similar increase can also be anticipated in the numbers of elderly people who may be required to appear as a witness.

There are similarly categories of crime where those that are elderly seem more likely to be targeted such as theft, bogus workman fraud, or embezzlement (which are not forms of abusive behaviour under the 2018 Act). There may be circumstances where

elder abuse offences are more likely to occur, such as in a nursing home/hospital or carer situation. There are a range of statutory offences where potentially abusive conduct involving elderly can be prosecuted; examples of which include:

- Section 315(3) of the Mental Health (Care and Treatment) (Scotland) Act 2003⁸ for ill-treatment and wilful neglect of mentally disordered persons
- Section 83 of the Adults with Incapacity (Scotland) Act 2000⁹
- Part 3 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016¹⁰

Separately, there might be useful consideration of Section 12 of the Children and Young Persons (Scotland) Act 1937¹¹ which is a widely drafted offence where there may be parallels with the type of conduct towards elderly person which should be subject to criminal sanctions. That offence which is widely used in our experience concerns cruelty to children under 16 where it involves a person “who has parental responsibilities or has charge or care of that person and they wilfully ill-treats, neglects, abandons, or exposes them or causes or procures them to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause them unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)”.

Additionally, what we might consider would be useful is to identify scenarios where the conduct might amount to abusive behaviour but cannot be currently prosecuted. The terms of section 12 above may assist here. If there are any gaps, there should be a means to deal with the offending behaviour so the elder, who are some of the most vulnerable in society, benefit from the protection of the criminal law.

Howsoever elder abuse is dealt with, the proposed hate crime legislation provides a great opportunity for Scotland to consolidate the existing legislation as well as bringing forward any new offences and new aggravators. That could include an elder aggravator if required. We prefer the use of statutory aggravators to deal with offending behaviour as the law around the use of aggravations is clear to those operating within the criminal justice system, including judges.

We already consider that the judges have ample opportunity in sentencing cases involving elder persons to reflect the facts and circumstances found proved in the commission of the relevant offence. That includes emphasising where the crime includes the elderly.

“.....you have been convicted this morning on your own plea of a particularly despicable offence. Your victim was a vulnerable 76-year-old lady, whom you attacked with a hammer, inflicting repeated blows upon her head and body, occasioning severe injury and, according to the agreed narrative in this case,

⁸ <http://www.legislation.gov.uk/asp/2003/13/section/315>

⁹ <http://www.legislation.gov.uk/asp/2000/4/section/83>

¹⁰ <http://www.legislation.gov.uk/asp/2016/14/contents/enacted>

¹¹ <http://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/37/section/12>

permanent scarring, all having forced your way into her home of 56 years with intent to rob her¹²".

Legislation on sentencing would only be required if it were to be thought that current maximum permissible sentences for any crimes aggravated by being perpetrated on the elderly should be increased in the event of finding an aggravation proved. If maximum sentencing powers are adequate, training and guidance to the judiciary may be the most appropriate approach. This would lie with the Judicial Institute for Scotland¹³.

We support Lord Bracadale's Report¹⁴ where he invited the Scottish Government to consider the introduction of a general aggravation covering exploitation and vulnerability. If there are gaps in the ability to prosecute for elder abuse then this may be a route to take forward in considering how to protect the vulnerable or deal with exploitation.

Question 3: The ability and willingness of victims to be able to report elder abuse

This question is best answered by Crown Office and Procurator Service (COPFS), Police Scotland and those third sector organisations representing the elder groups. There are support networks available through the COPFS with Victim Information and Advice.¹⁵

It is vital to ensure the dignity and autonomy of the person affected and provide effective support. Victims may face embarrassment but knowing they are not on their own can help.

Third sector organisations could play an important role in signposting and providing information for their members (and carers) as well as providing support where necessary in reporting elder abuse. We have identified the category of the elderly as one where there may have been less engagement with the criminal justice system until such time as they are the victim of a crime or accused of an offence such as driving. Their involvement with lawyers may well tend to have been in relation to heritage, executries and capacity issues; they are not necessarily equipped with the basic and necessary working knowledge of criminal justice system, courts or other procedures.

The role of Adult Support and Protection¹⁶ services are likely to be even more significant in identifying cases of elder abuse and indeed, on occasion, assisting or

¹² <http://www.scotland-judiciary.org.uk/8/2130/HMA-v-James-Burke-Hume>

¹³ <http://www.scotland-judiciary.org.uk/59/0/Judicial-Training>

¹⁴ Independent Review of Hate Crime Legislation in Scotland (paragraphs 4.51 - 4.70),

¹⁵ <http://www.copfs.gov.uk/involved-in-a-case/victims>

¹⁶ <https://www2.gov.scot/Topics/Health/Support-Social-Care/Adult-Support-Protection>

reporting them. Elder abuse will not necessarily be restricted to adults with dementia or Alzheimer's who may have specific needs in reporting any crime. Elder abuse is not about vulnerability because of their age though some factors commonly associated with age may make older persons more vulnerable to abuse. Disability is more common among older people. Cognitive impairment also increases with age as does dementia and the increased requirement for care and support. Vulnerability does not arise only from health issues but societal issues such as isolation and community attitudes such as ageism. All of these factors contribute to elder abuse.

The role of the Appropriate Adult, which the Scottish Government is working on, is relevant here as they may well be present and involved in the police station in supporting someone with communication issues.

Question 4: Any specialist skills which may be required within the police and prosecution system to adequately address elder abuse offences?

We refer to our answer to Question 3. Police Scotland and COPFS are the best placed to answer.

Special measures exist for those who require to give evidence in court available through existing legislation. This provides support for them as a vulnerable witness (and is elderly) where required. These include the use of screens, CCTV, evidence on commission and the use of section 259 of the Criminal Procedure (Scotland) Act 1995¹⁷ where the elder witness is deemed to be vulnerable.

These measures are going to be enhanced once the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill¹⁸ comes into force. It will take some time given the proposed phased approach before the elder vulnerable witness would be included. At present, it will only involve evidence on commission in High Court cases.

Following the Stage 1 debate of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill,¹⁹ the Scottish Government is considering if the Bill should be amended to include domestic abuse in the list of offences to be covered as a category within section 1(2) of that Bill. That would expand the scope of the crimes involved which would be of benefit in due course to the elderly and vulnerable where the relevant conduct has arisen.

Question 5: Any parallels in the criminal protections extended to persons based on certain equality protected characteristics, (i.e. race, disability, those under a certain age etc.) and the lack a specific aggravating factor in relation to offences targeted at those over a certain age?

¹⁷ Hearsay evidence introduced by statement

¹⁸

[https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20\(Criminal%20Evidence\)%20\(Scotland\)%20Bill/SPBill34S052018.pdf](https://www.parliament.scot/S5_Bills/Vulnerable%20Witnesses%20(Criminal%20Evidence)%20(Scotland)%20Bill/SPBill34S052018.pdf)

¹⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11930>

We refer to our answers to Questions 1 and 2. We reiterate that all protected characteristics warrant being covered by a statutory aggravation, including age (whether old or young).

Question 6: Whether Scotland is fully meeting its international human rights commitments to older people in terms of not having a statutory offence on elder abuse?

Relevant concepts in civil law in relation to the elderly include incapacity, the exercise of undue influence and facility and circumvention. These all have a relationship with the criminal law. However, as we have expressed above, in relation to criminal law, human rights compliance does not principally mean prosecuting offences once they have occurred. It means that as far as possible that they should not occur.

Civil law has a role to play. It is significant that, internationally, the term 'measures of protection' is used to describe measures that can be taken in civil law, rather than criminal law and these include, in Scotland, guardianship, or remedies under adult support and protection legislation. To ensure human rights compliance, there may be the opportunity to evaluate the effectiveness both in theory and in practice of existing 'measures of protection' in addressing and reducing elder abuse.

Question 7: Any other issues you consider relevant to the topic.

Training and education

We would refer to the need for training and education in relation to elder abuse. Human rights compliance is outlined under Article 13.2 of the UN Convention on the Rights of Persons with Disabilities where Article 13.2²⁰ states:

“In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.”

Where the elder can be classified as having disabilities, compliance with this Article is relevant.

Extent of elder abuse

It would be useful to be aware of the statistics which refer to offences involving the elderly and those involving abuse of the elderly.
Charter of rights for older persons²¹

²⁰ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-13-access-to-justice.html>

²¹ <https://social.un.org/ageing-working-group/>

The United Nation on Aging Working Group has suggested that there should be a charter to set out the rights of older people to ensure that they enjoy their human rights in older age, and on an equal basis with others. That suggests that there should be a convention to:

- provide a comprehensive and systematic framework for the protection and promotion of all our human rights in older age
- prohibit all forms of discrimination in older age in every aspect of our lives
- articulate how each human right specifically applies to us in older age
- provide for a strong implementation, monitoring and accountability system.

Elder abuse would fit into that context.

Gillian Mawdsley

Policy Executive