Is more law the answer? A review of proposed reforms to address victimisation of older adults

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Summary
An increase in research addressing violence and abuse of older people has been met with calls to formally recognise and respond to ‘elder abuse’, either through the introduction of specific criminal offences or by widening the hate crime framework to include older age. Similarly, growing concerns that older people are being targeted as victims of crime, particularly for fraud, have driven a recent surge in requests to respond through hate crime offences. Both proposals are currently under consideration in Scotland (as well as other parts of the UK). This report offers a critical review of these proposals, drawing on the available evidence locally, nationally and internationally to assess the merits and challenges in responding to victimisation of older adults through legal reform. This report concludes that neither proposal will achieve the primary objectives of reducing violence and abuse, and targeted victimisation, of older people or improving prosecution and conviction rates. In fact, such laws may exacerbate inequalities and potentially facilitate further cultural devaluation of older people. There is insufficient evidence that the introduction of similar laws in other jurisdictions have been successful and in most cases the evidence indicates these laws are infrequently used. Moreover, there are significant issues with extending legislation to older people based on the ‘vulnerable older adult’ arguments.

This report makes four recommendations to address these objectives, namely: establish a working group to collate and assess evidence on the extent of older victimisation and issues with current policies and procedures, including a critical review of criminal justice and safeguarding policies; the introduction of sentencing guidelines which direct that victim vulnerability should be taken into consideration when sentencing for general criminal offences; training for criminal justice practitioners, including judges, based on the findings
from the working group; and awareness raising, campaigns and education, and increased support provisions for older victims of crime.
1. Introduction
The (western) world population is rapidly ageing. By 2030 over a billion people worldwide – one in every eight of the Earth’s inhabitants and almost double the current number – are forecast to be over 65; in the UK, 12 million people are aged 65 or over and this number is projected to increase to over 16 million in the next 20 years. Over the next two decades, it is anticipated that the number of people of pensionable age will increase by 25 per cent in Scotland. Moreover, it is predicted that the number of people aged 75 and over will increase by 27% in the next decade. As Herring points out, these demographic changes will impact on society in profound ways: despite a growing number of healthy older people, their place in society is marginalised.

This increase in the older population has wide ranging impacts for society. To date, most of the concerns that have been subject to research and policy relate to the negative implications of an ageing society in terms of the health and social care needs, and resulting pressures that these place on state welfare policies and services. More recently, there have been growing concerns about the vulnerabilities that can emerge as a result of age, in particular the risks of violence and abuse in later life by family, friends and carers. Most of this work has been located within the field of ‘elder abuse’, although research from other fields such as domestic violence, feminist studies and criminology are also materialising.

Although the issue of ‘elder abuse’ is not in itself a new topic, until recently there was relatively little attention (across research, policy and practice) given to it in the UK. Nationally (across the UK) there is limited data on the prevalence of violence and abuse against older people; until recently, the Crime Survey for England and Wales had an age-cap of 59 on the self-completion module which collects data on domestic violence, sexual violence and stalking and the Northern Ireland Crime Survey has a cap of 64 on the domestic abuse module. In Scotland, data on police recorded incidents of domestic abuse reveal there were 1,159 incidents involving a victim aged 61 and over in 2017-2018, of which 66% of victims were female. However, it is estimated that less than half of domestic abuse incidents are

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1 S.E. Minocha, K. Hartnett, S. Dunn, T. Evans, C.P. Heap, B. Middup and D. Roberts. “Conducting empirical research with older people” (Newcastle: Newcastle University, 2013).
2 Currently this describes men and women aged 66 and over. At the time of the National Records of Scotland report (n2, below), it was defined as 65 for women and 66 for men. See National Records of Scotland, Projected Population of Scotland (2016-based) National population projections by sex and age, with UK comparisons (Edinburgh: Scotland, 2017).
3 National Records of Scotland (ibid).
4 J. Herring, Older People in Law and Society, 1st edn (Oxford: Oxford University Press, 2009).
5 Quotation marks are used to indicate that this term is contested. This is considered in more detail later in the report (see section 3.1).
reported to the police, with some estimates placing the figure at less than 1 in 4\(^8\). Consequently, police data cannot be interpreted as a true reflection of prevalence.

There has only been one ‘elder abuse’ survey in the UK\(^9\). The survey, conducted by O’Keeffe and colleagues in 2007, included 2100 people aged 66 and over living in private households and reported a prevalence rate of 2.6% for neglect, psychological, physical and sexual abuse by a family member, close friend or care worker. Outside of the UK, and in particular in the USA, there has been significantly more research, policy and practice attention on ‘elder abuse’ and, in the last two decades there has been a deepening and widening of the evidence on the prevalence, nature and impacts of violence and abuse in later life. A recent global meta-analysis of research estimates that, on average, at least 1 in 6 people aged 60 and over who are living in private residences experience some form of physical, psychological, financial or sexual abuse each year\(^10\). To put that into context, this would equate to approximately 204,000 older people experiencing some form of abuse each year in Scotland\(^11\). These figures do not include abuse occurring in non-private settings, such as care homes or hospitals, or abuse perpetrated by friends, acquaintances or strangers. Similarly, the national surveys (CSEW and O’Keeffe study) are limited to community samples and exclude abuse in care homes or other institutional spaces.

In terms of other types of crime, adults aged 60 and over are the lowest risk age group for victimisation. In Scotland, approximately 13.4% of adults were a victim of at least one crime in 2016/17, but for adults aged 60 and over the figure is just over 7%. This compares to other age groups with much higher rates, for example those aged 16-24 had a rate of 19.5\(^%\)\(^12\). However, research from elsewhere in the UK indicates that there may be increasing levels of victimisation among older people in terms of violent assaults, homicides doorstep crime and distraction burglary\(^13\). As hate crime against older people is not formally recognised or


\(^{11}\) As of 2018 there were approximately 1,362,420 people aged 60 and over living in Scotland.


\(^{13}\) Recent academic research has revealed an increase in physical assaults of older people see V. Sivarajasingam, D.J.J. Farnell, S. Moore, N. and J.P. Shepherd, Violence in England and Wales in 2016: An Accident and Emergency Perspective (Cardiff: Cardiff University, 2016), https://www.cardiff.ac.uk/__data/assets/pdf_file/0009/734904/Violence-in-England-and-Wales-in-2016.pdf [Accessed 20 March 2020].

Recent research has also found that one in four domestic homicides in the UK involves a victim aged over 60 - see H. Bows, “Domestic Homicide of Older People (2010–15): A Comparative Analysis of Intimate-Partner Homicide and Parricide Cases in the UK” (2019) 49 British Journal of Social Work, 1234-1253. Similarly, recent studies have highlighted the rise in scams involving older people (see J. Lonsdale, J. D. Schweppenstedde, L. Strang, M. Stepanek and K. Stewart “National Trading Standards — Scams Team Review” (Cambridge: RAND Europe 2016), https://www.rand.org/pubs/research_reports/RR1510.html [Accessed 20 March 2020]) and
counted in the UK there are no evidence on prevalence. In Ireland, although there is no hate crime legislation, the Garda has, since 2002, recorded crimes that they consider have a ‘discriminatory motive’, which was expanded in 2014 to include all strands of the Diversity Strategy, which covers age\textsuperscript{14}. In 2016, there were 38 crimes recorded as having an ageist discriminatory motive. Unfortunately, further data on the nature of these crimes is no available; consequently, it is not clear whether these were crimes of opportunity where it appeared an older person was deliberately targeted (e.g. scams) or crimes based on hostility, hatred or prejudice towards older people based on their age. It is therefore not possible to rely on this data as an indication of age-based hate crimes in Ireland.

The international data on ‘elder abuse’ coupled with the recent increase in empirical evidence regarding violent assaults and homicides of older people in the UK has been met with a growing demand to respond to the phenomenon through legislation and policy. An increasing number of cases reported in the media\textsuperscript{15} have bolstered the calls for Parliament to respond through new legislation. Elsewhere, most notably the USA, ‘elder abuse’ has been placed on a statutory footing and there have been calls to adopt a similar approach throughout the UK\textsuperscript{16}. In particular, there are two major types of legislative reform currently under consideration across the UK: the introduction of new substantive offences of ‘elder abuse’; and the widening of the hate-crime legislation to include older age as a protected characteristic\textsuperscript{17}. This report provides an assessment of the current proposals, drawing on the available international evidence to inform the Scottish Parliament/Justice Committee review into prosecuting ‘elder abuse’ and the concurrent review into hate crime legislation.

\textbf{2. Scottish Context}

The issue of improving justice responses to ‘elder abuse’ was first considered by the Justice Committee of the Scottish Parliament in 2017 as part of the scrutiny of the then proposed Domestic Abuse (Scotland) Bill. Evidence was taken at the first stage of scrutiny of that Bill on doorstep fraud (see C. Phillips, “From ‘rogue traders’ to organized crime groups: Doorstep fraud of older adults” (2016) 57(3) British Journal of Criminology, 608-626).

\textsuperscript{14} J. Schewpepe and A. Haynes, “You can't have one without the other one: "gender" in hate crime legislation” (2020) 2 Crim. L.R., 148-166.
\textsuperscript{16} For example, the Daily Express launched their ‘crusade’ to make ‘elder abuse’ a recognised offence in 2018, see G. Sheldrick, ‘We lead fight to protect this generation’, (Daily Express, 7 June 2018) https://www.dailymail.co.uk/news/article-705766/elderly-abuse-campaign-minister-for-elder-people.html [Accessed 20 March 2020] and Action on Elder Abuse (UK wide) have been campaigning to make ‘elder abuse’ a standalone offence or part of the hate crime framework of offences, see Action on Elder Abuse, ‘Criminalisation’, Action on Elder Abuse, https://www.elderabuse.org.uk/pages/category/criminalisation [Accessed 20 March 2020].
issues concerning ‘elder abuse’ and whether there was scope for the Bill to be extended to provide a mechanism to address the prosecution of ‘elder abuse’. As a result of these discussions it was agreed that the issue of ‘elder abuse’ would be specifically looked at by the Committee at a later date.

In 2019, the Justice Committee opened a new inquiry into the issues surrounding the prosecution of ‘elder abuse’ in Scotland. In addition to the discussions held in 2017, this inquiry was prompted by the independent review of hate crime legislation in Scotland led by Lord Bracadale in 2017-18. The purpose of that review was to consider whether the existing laws represent the most effective approach for the criminal justice system to deal with conduct and behaviour motivated by hatred, malice, ill-will or prejudice. As part of that review, Lord Bracadale highlighted the issue of ‘elder abuse’. In the final report, Lord Bracadale indicates reluctance to make ‘elder abuse’ a specific offence because:

any new standalone offence would have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data (section 4.65).

However, he did recommend that a new statutory aggravation based on age hostility should be introduced to the hate crime framework. In line with existing hate crime provisions, Lord Bracadale stated in the report that:

Where an offence is committed, and it is proved that the offence was motivated by hostility based on age, or the offender demonstrates hostility towards the victim based on age during, or immediately before or after, the commission of the offence, it would be recorded as aggravated by age hostility. The court would be required to state that fact on conviction and take it into account when sentencing.¹⁸

The proposal to add age as a protected characteristic received mixed reviews during the Government ‘Consultation on amending Scottish hate crime legislation’¹⁹. The majority of respondents (54%) disagreed with the proposal to create a new statutory aggravation relating to age. Those in favour were mainly organisations; individuals were more likely to disagree with the proposal. However, in a poll of over 3,000 older people in Scotland conducted by Action on Elder Abuse, almost 100% were in favour of making ‘elder abuse’ an ‘aggravated offence’.²⁰ As a result, the Committee are currently considering two proposals: the introduction of a new statutory offence of ‘elder abuse’ aimed at supporting effective prosecution of abuse against older people; and a new statutory aggravator based on ‘age added to the hate crime legislation, applying to situations where a more general offence (e.g.


assault) involves ‘elder abuse’ and/or to capture the targeted victimisation of older people, for example in relation to scams and other forms of fraud.

In response to the widespread concerns that elder abuse is increasing yet prosecutions and political responses remain limited, there has been a growing appetite among age-related charities, campaign groups, public officials and sections of the general public and media to respond to ‘elder abuse’ and/or crimes against older people more broadly through either standalone legislation or extending hate crime laws. This mirrors increasing pressure by organisations and MPs in other parts of the UK. The law is often seen as the best, indeed the only, appropriate response to allay public concerns on social issues and legislation is frequently introduced to respond to social concerns about particular behaviours. However, such an approach is frequently cautioned by scholars and practitioners. We should be very cautious about introducing new laws based on the belief that more law will necessarily prevent offending and/or improve prosecutions and convictions. Scholars in the UK and beyond have repeatedly warned against the use of legislation to create quick fixes to social issues, which are not only futile but infringe the principles of criminalisation. As scholars in Australia have argued, such approaches are typically void of research evidence or consultation and are designed to allay public concern about crime rather than reduce it.

The need for new laws should be evidence based and should be rooted in the principles of criminalisation which underpin the doctrine of criminal law. A full discussion of the philosophical foundations of criminalisation and the various attempts to identify fundamental principles is beyond the scope of this report, but it is worth briefly mentioning the core principles to criminalisation set out by Lord Williams of Mostyn and cited by Ashworth which underpin the doctrine of criminal law. A full discussion of the philosophical foundations of criminalisation and the various attempts to identify fundamental principles is beyond the scope of this report, but it is worth briefly mentioning the core principles to criminalisation set out by Lord Williams of Mostyn and cited by Ashworth.

The starting point is that offences should be created only when necessary and when the following principles are satisfied:

1. the behaviour in question is sufficiently serious to warrant intervention by the criminal law;

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21 In addition to Action on Elder Abuse and Age Scotland, Scottish Care has also expressed support for making crimes against older people a hate crime – see Scottish Legal News, ‘Care expert joins calls for hate crime laws to protect elderly’ (Scottish Legal News, 11 July 2019), https://scottishlegal.com/article/care-expert-joins-calls-for-hate-crime-laws-to-protect-elderly [Accessed 20 March 2020].


2. the mischief cannot be dealt with under existing legislation or by using other remedies;
3. the proposed offence is enforceable in practice;
4. the proposed offence is tightly drawn and legally sound; and
5. the proposed penalty is commensurate with the seriousness of the offence.

These principles will be returned to throughout the report where evidence supports or contradicts the need for new offences to address ‘elder abuse’ and/or crimes against older people more broadly.

2a. Current legal position – abuse of older adults
At the time of writing this report, there are currently no specific offences of violence or abuse against older adults in Scotland or the rest of the UK. Instead, similar to most global jurisdictions, violence and abuse of older people may be captured by more general criminal offences in Scotland, for example the recently introduced Domestic Abuse (Scotland) Act 2018, which covers physical, sexual, financial and emotional abuse as well as coercive control perpetrated by intimate partners or former partners. This does not include abuse by other family members, friends, neighbours or carers which would instead come under more general offences such as the common law offence of Assault, Assault to injury; Assault to severe injury, Indecent Assault, Rape, Theft, Housebreaking and Robbery. In relation to neglect of older people, this may come under the recently introduced Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016. Thus, similar to most jurisdictions in the world, behaviours which may be defined as abusive or violence are covered by well-established laws which apply to adults regardless of age.

2b. Current legal position – hate crime
There are two principle legislative models of hate crime in Scotland: aggravated sentences for specific criminal offences where there is an element of hatred towards a protected characteristic; and standalone offences27.

The first model, aggravated sentences, is contained within section 96 of the Crime and Disorder Act 1998 and applies to offences that are racially aggravated. Specifically, section 96 provides that a case is racially aggravated if, at the time of committing the offence or immediately before or after doing so, the offender demonstrates malice and ill-will based on the victim’s actual or presumed membership of a racial group or where the offence is wholly or partly motivated by such malice or ill-will. Evidence from a single source is sufficient to establish racial aggravation. The consequences of this provision are that any offences deemed to be racially aggravated must be recognised as such by the court through explicit acknowledgment at the point of conviction; the conviction must also be recorded in a way that shows it was aggravated and the aggravation should be a feature taken into consideration when sentencing. Similar provisions have been created in various amended legislation over the last two decades to cover religious aggravation (section 74 of the Criminal Justice (Scotland) Act 2003); disability (section 1(7) and 1(8) Offences (Aggravation by

Prejudice) (Scotland) Act 2009; sexual orientation (section 2(7) Offences (Aggravation by Prejudice) (Scotland) Act 2009); and transgender identity.

The second model is based on a set of substantive hate crime offences contained in the Public Order Act 1986 (sections 18, 19 and 23\(^{28}\)), the Crime and Disorder Act 1998 (section 96), the Criminal Law (Consolidation) (Scotland) Act 1995 (section 50A\(^{29}\)), and, finally, the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 (section 6\(^{30}\)). This patchwork of provisions protect against racial and religious harassment and stirring up of hatred. There are no equivalent substantive offences for disability, sexual orientation or transgender based hate offences\(^{31}\). Age is not currently included in either of the existing hate crime legislative models in Scotland.

### 3. Proposals for reform

As described earlier in this report, there are currently two proposals for legal/justice reform under consideration by the Scottish Parliament, resulting from the scrutiny of the Domestic Abuse (Scotland) Bill in 2017 and the recommendations relating to age which were made by Lord Bracadale on conclusion of the Hate Crime Review in 2018. The two proposals are:

1. To provide new substantive criminal offences of ‘elder abuse’; and
2. To extend hate-crime legislation to include age as a protected characteristic.

Both proposals involve the creation of new offences, either through the introduction of new substantive offences or by widening the hate crime framework to include age, thereby extending the scope of the existing legislative offences. There has been increasing public concern about the prevalence of ‘elder abuse’ and the perceived lack of provisions to protect older people and, where they are victimised, to ensure adequate legal responses.

Several arguments underpin these calls, falling broadly into five categories. The first three apply to both proposals: inadequate criminal law and justice processes and responses; symbolic benefits; and protecting the vulnerable older victim. The final two are specific to the hate crime proposals: addressing age-related hostility; and ensuring equality in hate crime protections. However, there are both conceptual and operational challenges associated with these arguments and the resulting proposals for reform. This report will evaluate each of these arguments drawing on evidence from Scotland, the rest of the UK and elsewhere and conclude on the viability of the two proposals under review.

#### 3.1. Terminology and definitions

Before considering each of the proposals in turn, it is important to address the terminology which underpins the current discussions: old, elderly and, importantly, ‘elder abuse’. Despite the ubiquitous use of the terms older, elderly and ‘elder abuse’, there is no shared agreement about the definitions of these terms. Across academic research, law and policy, the terms

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\(^{28}\) Sections 18 and 19 are concerned with the stirring up of racial hatred and section 23 criminalises possession of racially inflammatory material.

\(^{29}\) Section 50A relates to racially aggravated harassment.

\(^{30}\) Section 6 creates the offence of threatening communications which can be committed in two principle ways (A and B). Condition B is concerned with religious hatred.

\(^{31}\) For a detailed overview of the law in Scotland see Chalmers and Leverick (n27).
older, elder and elderly are used variably to describe those aged 50 and over, 55 and over, 60 and over and 65 and over\textsuperscript{32}. In Scotland, for example, the Scottish Public Health Network define older people as those aged 65 and over\textsuperscript{33}, whereas Age Scotland offer their services to people aged 50 and over.

Similarly, ‘elder abuse’ is used to describe a range of abuses, contexts and dynamics. There is currently no single agreed definition of ‘elder abuse’. The World Health Organisations defines ‘elder abuse’ as:

“an act of commission or of omission … either intentional or unintentional …. Of a physical, psychological, financial nature or other material maltreatment … that will certainly result in unnecessary suffering, injury or pain, the loss or violation of human rights, and decreased quality of life for the older person.”\textsuperscript{34}

However, other definitions adopted by organisations and policies in the UK will often refer to a relationship or expectation of trust as a key element, and some definitions although include crimes by neighbours, friends, strangers and acquaintances\textsuperscript{35}. For example, in Scotland, Action on Elder Abuse have suggested the following definition:

“physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.”

This suggested definition is broad and not limited to particular relationships or contexts, meaning in theory it captures every crime committed against an older person, from physical abuse by a partner (already captured by domestic abuse definitions and the new legislation) to opportunistic theft of personal items (e.g. a handbag) by a stranger on the street, as long as it results in physical harm or mental suffering. Such a broad definition raises concerns about the value of using this term and separating every incident that an older person might experience from that which younger people also experience, based solely on the victim’s age. Why label opportunistic street theft against an older person ‘elder abuse’ while simply labelling it ‘theft’ if the victim is younger?

The concerns about broadening the definition of ‘elder abuse’ have been raised elsewhere, in particular by some of the founders of the ‘elder abuse’ field. It has been argued that the continuous expansion of the concept has led to the term being used as a catch-all for all

\textsuperscript{32} See H. Bows, \textit{Sexual violence against older people}, 1\textsuperscript{st} edn (Oxon: Routledge, 2019) for a review of how the different terms have been used and the varying starting points for older age in academic research.


\textsuperscript{35} See for example Action on Elder Abuse, ‘New Definition of Abuse’ (London: Action on Elder Abuse, 1995).
crimes against the elderly, ultimately undermining any potential value of term. As Brandl and Raymond point out, grouping together these varying contexts and dynamics of abuse as a single collective issue is problematic whilst Desmarais and Reeves argue the grouping together has led to an “overemphasis on types of abuse and perpetrators unique to elders” disregarding abuse occurring by partners. This is more troubling given the evidence, which indicates that the majority of violence and abuse experienced by older people is perpetrated by partners or other family members; the former clearly falls within the definition of domestic abuse in Scotland but there is a conceptual gap with how to define abuse by other family members, including (adult) children towards their parents. As research indicates around half of all domestic homicides of a person aged 60 and over in the UK are committed by an adult son (or occasionally, daughter) or grandson, this is a significant gap that needs addressing. However, as younger people (under the age of 60) can also be killed by family members, the term ‘elder abuse’ would fail to adequately capture abuse and violence that occurs across the life course by family members.

In England and Wales, abuse by adult sons/daughters or other family members is captured by the current definitions of domestic abuse and, although there is no specific criminal offence of domestic abuse at the time of writing this report, violence and abuse may be captured either under existing general criminal offences (for example assault, stalking or harassment) or the recently introduced coercive control offence. In England, a recent conviction of an adult son for coercive and controlling behaviour towards his older parents highlights the utility of this law for prosecuting such abuse.

Given the findings that almost half of all domestic homicides of older people in the UK are committed by an adult son/grandson (or, in a handful of cases, adult daughter/granddaughter), and some research identifying a history of coercive control in such cases, it is critical that a review of policy and law is conducted to establish whether there are gaps in relation to violence or abuse by adult sons/other family members not currently captured by existing Scottish laws and policies. This should not be limited to older adults, however, as emerging evidence indicates the existence of coercive control between siblings

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41 See H Bows (n13).
42 Serious Crime Act 2015, s76.
43 K. Weston, ‘Priest’s rugby-playing step-son, 27, is jailed for three years after viciously bullying his parents and smashing up their house as they vow to stand by him after he is released’ (Daily Mail Online, 8th January 2020), https://www.dailymail.co.uk/news/article-7864747/Son-27-viciously-bullied-parents-jailed-three-years.html [Accessed 20 March 2020].
and against parents under the age of 60\textsuperscript{45} and between other family members (including but not limited to coercive behaviours that could be captured under the broader umbrella term of honour-based violence, which are also not currently criminalised in Scotland). It may be that different laws and/or policies are required to capture these different contexts and dynamics\textsuperscript{46}.

The term ‘elder abuse’ has been further criticised for distinguishing abuse experienced in younger life with that experienced after the age of 60. This ‘bracketing off\textsuperscript{47}’ suggests these offences have unique characteristics that warrant an emphasis on age. However, this is not supported by the majority of research. Furthermore, the term has been argued to victim blame – it positions the issue as one to do with age (rather than gender, class and/or other social demographics and identities) and in doing so may indirectly blame the victim\textsuperscript{48} for the abuse. The latter point is particularly poignant when one considers the way age and ageing are viewed in society; as a process of decay and decline, and older people are devalued and perceived as a burden on society, particularly in the UK within the welfare state. This has enabled a dominant theoretical bias which links ‘elder abuse’ to caregiver stress/caregiver burden, which despite being debunked by empirical evidence, continues to frame some of the narrative within the field of ‘elder abuse’.

Legal scholars in the USA\textsuperscript{49} have criticised some of the efforts by ‘elder abuse’ advocates which have

“tended to try to transform ‘elder abuse’ into a societal concern by emphasizing difference, not sameness. That is, advocates have tried to portray ‘elder abuse’ as a societal ill by treating ‘elder abuse’ as something different in character from parallel behavior directed at non-elderly or non-vulnerable adults”.

It has therefore been argued that we should move on from using the term “‘elder abuse’” because it suggests that the abuse of older people is somehow different to the abuse of others when in fact this is not supported by most research\textsuperscript{50}.

In summary, the lack of agreed and clear definitions and conceptual boundaries for ‘old’, ‘older’, ‘elderly’ and ‘elder abuse’, and the significant issues associated with the latter term, provide unstable foundations for the development of legislation. Even if these could be

\textsuperscript{46} For example, Bettinson and Quinlan (ibid) argue that the concepts and criminal offence of coercive control would capture many incidents of adolescent-to-parent violence (APV) but that these should be conceptualised and approached differently.
\textsuperscript{49} Kohn (n39), 17.
\textsuperscript{50} Bows (n32).
addressed, the value of the term ‘elder abuse’ is increasingly disputed and there should be very careful consideration before the term is adopted in policies or legislation.

### 3.2. Inadequate law and process arguments

Several supporters of a criminal offence of ‘elder abuse’ cite inadequacies in the justice system as a key reason for introducing new offences. For example, Action on Elder Abuse describe two key issues which they feel justify the need for reform: (1) existing laws to protect older people from abuse and prosecute perpetrators are not strong enough; (2) the current Criminal Justice System is not fit for purpose. In their submission to the Justice Committee, Action on Elder Abuse Scotland identify several specific issues: cases of ‘elder abuse’ are often diverted away from the CIS towards a social work/safeguarding pathway resulting in a paternalistic rather than empowering; police investigations result in cautions rather than prosecution, referrals between adult safeguarding and the police are poor. Consequently, AEA and others have called for specific offences of ‘elder abuse’ to be introduced, mirroring approaches taken in San Diego or, alternatively, adding age to the list of protected characteristics under the hate crime legislation.

Several of these arguments have also underpinned discussions by policy makers and MPs. For example, in a discussion in the House of Commons, Giles Watling MP argued for a statutory definition of a crime against an older person and specific elder-protecting legislation to be introduced, because:

"[‘elder abuse’] is not just an appalling failure of justice; the lax approach to punishment fails to deter would-be abusers, who see older people as a soft target, as my hon. Friend pointed out. We must do more to protect older people. We would not fail the victims of child, domestic or sexual abuse in this way, so why are we seemingly happy to fail the victims of ‘elder abuse’? Why are we happy for there to be a lower conviction rate for the abuse of older people than for racially motivated crimes, homophobic or transphobic crimes, domestic abuse and disability hate crime? It is simply unacceptable, and I propose that we put ‘elder abuse’ in its own category in line with these other appalling crimes to improve the justice outcome for victims".

One of the central concerns argued by advocates of the introduction of specific ‘elder abuse’ laws are the low prosecution and conviction rates. In Scotland, there is limited reliable data on the extent of reported (and unreported) ‘elder abuse’, as data on cases of violence, abuse and other interpersonal crime recorded by Police Scotland cannot be disaggregated by the age of the victim. This is largely due to old legacy police systems and databases, however it does mean that currently it is not possible to examine criminal justice responses to reported cases of violence/abuse involving older adults. However, some data is available from other parts of the UK. Although in its infancy, and with several limitations, the emerging research

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52 Action on Elder Abuse (n20).


54 See Daily Express and Action on Elder Abuse (n16) and House of Commons Hansard (ibid).
on crimes against older people suggests prosecution and convictions may be lower than younger groups. Although using data which cannot be directly compared, Action on Elder Abuse examined estimated prevalence rates of abuse cases for victims aged 65 years or over with the conviction data from the Crown Prosecution Service (CPS) and estimate that only 0.7% of elder abuse resulted in a conviction. A recent study in Northern Ireland examined outcomes (criminal sanctions) in police recorded criminal cases involving victims aged 55 or over compared with victims aged 20 to 54 years and found a strong negative correlation between age and outcome rate over the period 2007/08 to 2017/18.

However, rather than pointing towards problems with the existing law, the developing research instead indicates a combination of evidential and procedural issues inhibiting access to justice. For example, in the Northern Ireland study, interviews with police staff, victim commissioners and older people showed that older victims seem reluctant to engage with the criminal justice system due to fears about the process, including giving evidence in court, and the longer-term implications of pursuing a case (particularly where the offender was a family member). Action on Elder Abuse Scotland highlight the tendency for cases of ‘elder abuse’ to be dealt with as safeguarding issues; for example in 2017, out of 28,187 adult protection cases involving an older person in England and Wales, only 12% were referred by the police to the CPS. These concerns have been raised elsewhere in the UK. For example, in a review of domestic abuse vs. ‘elder abuse’ responses in Wales, Wydall and colleagues argue that

“there is a risk of diverting older people out of the domestic abuse support framework and into a welfare-centric approach, thereby reducing the ability to use civil and criminal justice options.”

They further point out that such a welfare-centric approach can “lead to missed opportunities to explore civil and criminal options more accessible to younger victim-survivors.” This has been identified as an issue in relation to domestic abuse risk assessments; emerging evidence in Wales indicates the standard domestic abuse risk assessment tool, Domestic Abuse, Stalking and Honour Based Violence (DASH), often results in lower scoring than might be expected in approximately 1 in 5 cases involving older victims, and research has found there is sometimes an unwillingness to use the DASH tool to assess older victims based on ageist assumptions and belief and conceptual confusion between ‘domestic abuse’ and ‘elder abuse’. Thus, it is not clear that the substantive law is an issue but rather the surrounding policies and procedures.

55 However, it is widely accepted that interpersonal crimes are severely underreported and that this may be magnified for older people – see Bows (n31).
57 Action on Elder Abuse (n19).
59 Ibid, 970.
60 Older People’s Commissioner for Wales, ‘Information and guidance on domestic abuse: Safeguarding older people in wales’ (Cardiff: Older People’s Commissioner for Wales 2019).
Other research indicates that in some cases involving older complainants, physical or cognitive health issues may make it difficult for them to give evidence, which can be detrimental to violence/abuse cases where complainant testimony is often the primary source of evidence\textsuperscript{62}. They may, for example, have difficulty recalling the details of the incident and/or offender. However, Brown and Gordon\textsuperscript{63} point out that there are numerous measures available to criminal justice agencies, such as police body worn camera evidence, video testimony and intermediaries which can support victims to give their evidence and alleviate some of these problems. Brown and Gordon’s research has found that these are not well used and the perceived, or actual, evidential difficulties may result in practitioner reluctance to continue a case. Similarly, a recent joint inspection of police and prosecution practice in England and Wales in relation to older victims of crime found that policies to support victims and enable the collection of importance evidence were often not applied\textsuperscript{64}. The report also highlights issues with multi-agency working, particularly agencies with a responsibility for safeguarding adults, and identified that the police are infrequently assessing victim needs and that support provisions for victims giving evidence were not being utilised.

Many of these concerns are not unique to older victims and influence engagement with the Criminal Justice System for many (younger) victims of crime, particularly in cases involving interpersonal abuse and violence\textsuperscript{65} and hence do not, in themselves, explain the lower prosecution and conviction outcomes for reported cases involving older victims. Nevertheless, this emerging research appears to indicate that it is evidential and procedural difficulties rooted in criminal justice policy and practice that seem to be hindering prosecutions and convictions for crimes against older people, rather than problems with only the substantive law. Although the law is commonly perceived as a “socially acceptable means of dealing with phenomena such as violence and abuse” and, outside of the UK, “is one of the methods policy makers use to try and solve the problem of ‘elder abuse’ and neglect”\textsuperscript{66} it is not currently clear that more law would address the evidential and procedural issues that have been identified as inhibiting prosecutions and convictions in reported cases of violence and abuse of older people.

\textit{3.2a International comparisons – dedicated ‘elder abuse’ laws}

Very few jurisdictions have implemented specific ‘elder abuse’ criminal offences; however, parts of the USA has introduced specific laws criminalising ‘elder abuse’\textsuperscript{67}. In the USA, the

\textsuperscript{62} Brown and Gordon (n56).

\textsuperscript{63} Ibid.


\textsuperscript{67} For a review of legislative approaches in different countries see Department of Justice Canada, \textit{Legal Definitions of ‘elder abuse’ and Neglect}, (Department of Justice Canada, 2009),
overall benefit of specific ‘elder abuse’ laws has been questioned by scholars, who have pointed out that many of these laws have duplicated existing criminal provisions that do not distinguish among victims based on age and, as a result, effectively “create new penalties for behaviour that was already criminal and could have been prosecuted under existing criminal laws.”

For Kohn, the value of new legislation is in addressing gaps in the law, in particular behaviours by carers towards clients that is considered abusive but which was not previously a criminal offence. One example Kohn gives is the failure of a carer to meet the needs of an elderly or vulnerable person, whether deliberately or negligently, which in some states in the USA remains immune from criminal prosecution due a lack of applicable legislation. In Scotland, recent legislation has been introduced to capture these behaviours against vulnerable people, regardless of age, under ss26-27 of The Health (Tobacco, Nicotine, etc. and Care) (Scotland) Act 2016. Thus, in Scotland, as with the rest of the UK, the conduct proposers of new laws are seeking to criminalise are, in fact, already criminal offences. Introducing new ‘elder abuse’ laws which duplicate those that already exist is at odds with the first two principles of criminalisation described in section 2 of this report: whether the behaviour is sufficiently serious to warrant criminal laws; and whether the mischief can be dealt with by existing criminal offences. Creating new laws to capture behaviour already criminalised through a new label is vanity legislating. Described by Loughnan as ‘particularism’ or specificity, this approach involves drafting new offences which target a particular group or social issue by specifically including them in the title of the legislation or offence. According to Horder, this provides definitional detail which serves to “exemplify rather than delimit” wrongdoing and should be avoided through the drafting of offences that are sufficiently general enough that the definition of the offence itself ‘gives an accurate moral grasp of what the defendant has done’.

As Loughnan argues this reduces the coherency of criminal law; the existence of other offences that already cover the proscribed behaviour means the ‘seriousness of the conduct does not of itself warrant the creation of a new offence’, since the seriousness of the behaviour is already addressed by existing legislation.

Even where specific ‘elder abuse’ legislation is well established, there is evidence that it is often not applied well and that it is ineffective in addressing the roots of ‘elder abuse’ and thus will not meet the third principle described above – enforceability. For example, San Diego has specific ‘elder abuse’ offences and is often relied on by campaigners and supporters of reform as an example model for Scotland (and the rest of the UK) to adopt. However, the evidence on how useful the legislation has been is contested. A recent NBC 7 investigation into ‘elder abuse’ reports that around 4,470 cases of ‘elder abuse’ were reported to the San

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68 Kohn (n38).
71 Ibid 338-339.
72 Loughnan (n68)
73 California Penal Code Section 368.
Diego Police Department since 2010 and the majority of these remain ‘open’ (rather than solved/prosecuted) cases. A specialist attorney is quoted as stating:

“Generally speaking, elderly people don’t make the best witnesses. They perhaps have some level of dementia or memory impairment. And frequently it’s a ‘he said, she said’ situation. So it becomes very difficult to present those cases when you don’t have any hard and fast evidence.”

Ulrey identifies a combination of evidential and procedural problems inhibiting prosecution and convictions for ‘elder abuse’, despite the introduction of dedicated ‘elder abuse’ legislation. These include a lack of awareness among criminal justice agencies and wider society and a lack of police and prosecutor confidence using the statutes. Additionally, a lack of resources to investigate cases and, in some cases, victim capacity and cognitive impairment, also hinder the utility of specific offences. Davidson similarly agrees that despite the introduction of specific offences and positive prosecution policies, the rates of prosecutions for ‘elder abuse’ in the USA remain low. Davidson also cites limited resources as an explanation for this as well as the nature of ‘elder abuse’ which is, in most cases, domestic abuse occurring in the victim’s home and perpetrated by a spouse or family member, resulting in low levels of reporting and detection. More law has not, therefore, resolved the problems in responding to ‘elder abuse’ and in many cases criminal justice agencies revert back to more general offences (e.g. theft, assault) instead.

It would appear, therefore, that it is not a lack of relevant substantive law (which in fact already exists) which is causing the low prosecutions and conviction rates for violence and abuse against older people, but rather the broader criminal justice procedures and policies. In other jurisdictions, lawyers have questioned why existing legal provisions are not being used in cases involving older adults and have suggested that the issues lie in the attitudes of professionals and structural barriers of the criminal justice institutions, rather than in the law itself.

3.2b International comparisons – including age as a hate crime
The USA is one of the few countries where age-based hate crimes have been introduced, although only a few states specifically include age as a protected category. Among them are the District of Columbia, Florida, Iowa, Louisiana, Minnesota, Nebraska, Texas, Oregon, Vermont and New York. Several scholars and campaigners strongly advocated for the introduction of laws in these states. For example, Hull, writing some 11 years ago, supports

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77 Brown and Gordon (n56).
78 Harbison (n39).
the widespread introduction of age-based hate crimes in the USA based on the increasing ageing population and the belief that many older people are vulnerable to abuse and/or targeted victimisation, and therefore need specific laws that address offending against them and ensure prosecutions and convictions. The merits of such arguments are considered throughout this report, however it is useful at this stage to examine how the States in the USA which have enacted such laws are using these in practice.

Data on State level reporting of hate crime to law enforcement is published annually by the Federal Bureau of Investigation (FBI) but only for the characteristics recognised at a federal level, namely race/ethnicity, religion, sexual orientation, disability, gender and gender identity. Consequently, several states that have age-based hate crime categories do not routinely publish data on these offences (e.g. Louisiana, Texas, California). However, some States do publish data at a local level. New York City and Florida, for example, publishes data annually on police recorded hate crimes against different categories including age. Significantly, the latest data from NYC based on the 2018 hate crime incident reports and arrests reveal there were no age-based hate crime reports or arrests that year. Similarly, in Florida, the latest data (from 2016) shows no reports or arrests for hate crime based on advanced age. Thus, the laws may exist in these States, but they are not being used.

3.3. Symbolic value arguments
Several supporters of a new ‘elder abuse’ law and/or age-based hate crime aggravator have argued that criminalisation would increase political and public awareness of ‘elder abuse’ and change perceptions of justice and therefore has an expressive function which justifies the introduction of new offences. These beliefs are supported by some legal scholars in the USA, who have noted the potential expressive benefits of criminalising and prosecuting ‘elder abuse’, or adding age as a hate-crime aggravator, including sending powerful messages about society’s attitudes towards abuse and raising the social value of victims, countering harmful stereotypes about old age and older adults (ageism).

The expressive function of the law is widely debated, and a comprehensive review of these debates is not possible in this report. The law is generally viewed as one driver of social change, although the relationship between legislation and social attitudes in reciprocal rather than unilateral, and thus the law can sometimes reflect social attitudes rather than shaping them. It is broadly accepted that the law alone does not result in cultural change, but rather

82 For example, Action on Elder Abuse (n51).
83 For example, Kohn (n39) has pointed out that the expressive function of making ‘elder abuse’ a crime and subsequent prosecutions may help to combat societal acceptance of abuse of older people, sending a powerful message about not only the attitude towards this abuse but also the social value of victims, but she cautions that the existing legal approaches across the USA have failed to do this.
it is people that change culture\textsuperscript{85}. Although the law may send messages that certain behaviours are not accepted within a particular society, there is little agreement about whether criminal law is an effective or suitable mechanism for transforming an “unjust society into a just one”\textsuperscript{86}. Arguably, the law is most useful when it captures behaviours where there was no previous criminal offence that captured those abuses; as well as providing new protections, it also sends a clear message about what conduct will be accepted in society and denounces particular behaviours which may help cultural change\textsuperscript{87}. However, a change in the law must be supported with public campaigns, training for professionals and dedicated resources for investigating the new offences in order to be effective. In the context of ‘elder abuse’, this is to some extent evidenced in the USA context where, as described previously, legal scholars\textsuperscript{88} have raised concerns that the successive ‘elder abuse’ laws have failed to bring about the kind of change reformers had hoped for, largely due to a lack of accompanying training, campaigns and targeted awareness raising.

In the Scottish Government consultation into prosecuting ‘elder abuse’ (2018-2019) one of the arguments raised in favour of criminalisation was the potential deterrent effect of creating specific substantive laws or new hate crime provisions. The belief that more law will necessarily lead to more order is widely held yet empirically unsupported. Ashworth argues that it is “important to develop new forms of response to lawbreaking and to avoid the fallacy that crime will go down if penalties go up”\textsuperscript{89}. This is particularly the case with the behaviours against older people which campaigners are seeking to address: these behaviours are already criminal offences, thus if the existing law has not acted as a deterrent it is unclear why new laws are expected to achieve this. Presumably, the underlying belief is that enhanced sentencing penalties, either included in new standalone ‘elder abuse’ offences or via the aggravated sentencing enhancements for hate crime, would act as a deterrent because these would go beyond existing sentencing provisions.

Nadler\textsuperscript{90} considers the expressive function of law and the extent to which legal coercion – the threat of being punished by law for prohibited behaviour and/or the broader regulation of behaviours by the law – acts as a deterrent. Research has consistently found that criminalising behaviour does not, in and of itself, act as a deterrent. This is for a variety of reasons, including risk of detection, poor knowledge of relevant legal rules\textsuperscript{91} assumptions about what the law is

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\textsuperscript{88} Ulrey (n75).

\textsuperscript{89} Ashworth (n26) 237.


\end{small}
based on what people believe it ought to be\textsuperscript{92}. Similarly, Ashworth cautions that there is a tendency to over-estimate the deterrent efficacy of criminal sentencing.\textsuperscript{93}

Lots of contemporary examples of legal reform/the introduction of new laws to criminalise conduct not previously subject to criminal prosecution can be provided which illustrate that more law does not necessarily deter individuals from committing crimes. Writing recently about rape law, Wykes and Artz (2019)\textsuperscript{94} point out that, since the vigorous reform of sexual offences law in England and Wales in 2003, which widened the legal definition of rape allowing a broader range of contexts to be captured by the law, there has been a stark increase in the number of reported rapes but this has not been met by an increase in convictions. In fact, the latest figures reveal a 32\% decrease in rape prosecutions and 26\% decline in convictions, representing the lowest level in a decade\textsuperscript{95}.

Another example is Forced Marriage, which was made a criminal offence in Scotland by the Anti-social Behaviour, Crime and Policing Act 2014. Nationally in the UK, the latest statistics indicate a 47\% increase in cases dealt with by the Forced Marriage Unit\textsuperscript{96}, yet there have only been two convictions in England and Wales and none in Scotland. In the context of hate crime, Chalmers and Leverick point out that “a direct link between the size of the penalty for hate crime and the frequency of its incidence is rarely argued for outside of behavioural economics circles” and “there is no empirical evidence that offenders (in any context) are deterred by the magnitude of punishment”\textsuperscript{97}. This is further supported by data on elder abuse and age-based hate crime laws introduced in other jurisdictions (see sections 3.2a and 3.2b) which show these laws are often not used. Thus, there is limited evidence that simply criminalising behaviour leads to deterrence and more law does not necessarily mean more convictions.

In addition to the doubts about whether legislation alone can create the sort of social and cultural changes that advocates of reform are hoping for, legal commentators have cautioned that the introduction of new laws can actually be counterproductive in achieving the underlying socio-cultural objectives. Bils and Nadler acknowledge that legal regulation can increase or decrease activities directly, for example as a deterrent through fear of sanctions, or indirectly through changing attitudes about regulated behaviours. However, they argue that although the indirect path may be the most efficient one, it is not guaranteed and can often had unintended and perverse effects, including backlashes\textsuperscript{98}. In the context of ‘elder abuse’, it has been argued that “when age or age-related characteristics trigger new statutory


\textsuperscript{93} Ashworth (n26).


\textsuperscript{97} Chalmers and Leverick (n27) 37.

crimes” these are typically paternalistic in nature and have undermined the autonomy of abuse victims. Consequently, such laws have effectively promoted stereotypes about older adults (i.e. they are assumed to be senile, incapable of making their own decisions or looking after themselves and are thus automatically in need of specific legal protections once they reach a certain age). Many of these laws therefore serve to restrict the rights of older people, rather than protect them, and reinforce damaging stereotypes and attitudes that contribute to the problem of abuse against older people. Writing some 25 years ago, Macolini\textsuperscript{100} questioned the logic of creating a “distinct form of intrafamilial violence based predominantly upon the age of the victim” and argued that statutes which created special protections for older adults were themselves ageist, as the “alleged need for heightened societal attention is based on age rather than on physical or cognitive limitations. In fact, advanced age appears to have been equated with dependency and disability within some statutes”\textsuperscript{101} which is inherently ageist. The symbolic effects are therefore overwhelmingly negative and harmful.

Advocates of reform have drawn comparisons between the high levels of political and public attention child abuse receives compared with the low levels of attention afforded to ‘elder abuse’\textsuperscript{102} and called for legislative changes in order to establish ‘elder abuse’ as a political and social priority. There are several important distinctions between child abuse and ‘elder abuse’ which make comparisons between these fields difficult, and scholars have warned against basing legal or policy decisions based on child abuse models, which risk radical disempowerment of older people and removal, rather than protection of, their rights\textsuperscript{103}. Aside from these concerns, it is important to acknowledge the cultural shifts in relation to child abuse in England and Wales have not been achieved solely through the introduction of legislation. Instead, similar to abuse of adults, there are both generic and specific offences across statute and common law which offer a range of protections. Many of the existing child abuse offences apply equally to vulnerable adults\textsuperscript{104}, or there are similar offences for adults. Thus, the (absence of) specific ‘elder abuse’ substantive law or age-based hate crime legislation cannot be argued to be the primary reason that abuse of older adults has been given less political and societal attention than child abuse. Researchers have emphasised the importance of other social institutions, for example the media, in placing child abuse on the public and political agenda and driving important social change\textsuperscript{105} and academic research, which has been widely disseminated and has informed specific public information programmes promoted by government and voluntary agencies, as well as the media\textsuperscript{106}. Furthermore, the introduction of new laws to respond to public concerns and promote

\begin{footnotesize}
\begin{enumerate}
\item Kohn (n39).
\item Ibid, 350.
\item See for example Action on Elder Abuse (n16 and n51).
\item N. A. Kohn, “Outliving Civil Rights” (2009) 86 WASH. U. L. REv. 1053, 1057 points out that children are viewed as needing state protection as they are not able to make decisions for themselves, whereas adults are deemed capable of making their own decisions, even if those decisions are harmful to themselves.
\item See Section 2 of this report.
\end{enumerate}
\end{footnotesize}
political profiles is often a quick fix with little long-term social benefit. Ashworth\textsuperscript{107} has cautioned that government often take the view that the “creation of new crime sends out a symbolic message that gets them off the hook” but, in reality, achieves very little else and contravenes the basic principles of criminalisation. It is also important not to overstate the impact the law can have. For example, drawing on the comparisons being made with child abuse by campaigners, we have had child protection legislation for more than a century and significant legal developments relating to child safeguarding have been introduced in the last two decades, yet we will have child abuse. Thus, as Williams argues, the laws do not solve social problems like these but rather the law may contribute to much broader, interdisciplinary approaches to preventing abuse\textsuperscript{108}.

3.4. Protecting the vulnerable older victim
The third category of arguments put forward by supporters of legal reform relate to the vulnerability (perceived or actual) of older people. A full discussion of vulnerability is beyond the scope of this report, but it is worth highlighting that the concept of vulnerability and how this is measured and assessed is highly contested. The multiple approaches to defining vulnerability and who is vulnerable (as inherent, as structural, as experiential)\textsuperscript{109} are at odds. Most frequently, the inherent model is used, categorising groups of people as inherently vulnerable to victimisation based on a particular characteristic (e.g. age). This inherent model is contrary to the principles of Fineman’s vulnerability theory, which argues against approaches to legal reform which focus on the needs of specific groups and in doing so “constructs relationships of difference between individuals and groups within societies”\textsuperscript{110}. Focusing on particular groups or identities as markers for vulnerability not only oversimplifies vulnerability and the risk of victimisation, it also ignores the importance of harm and ignores the structural processes of becoming a victim\textsuperscript{111}. As Das\textsuperscript{112} argues, “to be vulnerable is not the same as to be a victim”.

It is of course true that older people can be vulnerable (as can younger people) and that older age may create particular vulnerabilities. However, it is also true that young(er) age can create vulnerabilities, and that other demographics, environments and lifestyles can independently and collectively render individuals and groups more vulnerable to violence and abuse (as well as other crime). For example, in the context of ‘elder abuse’, scholars\textsuperscript{113} have concluded that vulnerability is as much a product of a situation or relationship as it is a characteristic of an

\textsuperscript{107} Ashworth (n26) 238.
\textsuperscript{108} J. Williams, “State Responsibility and the Abuse of Vulnerable Older People: Is there a Case for a Public Law to Protect Vulnerable Older People from Abuse?” In Jo Bridgeman, Heather Keating and Craig Lind Responsibility, Law and the Family (Oxon: Routledge 2008) 81-104.
\textsuperscript{111} Kohn ibid.
\textsuperscript{112} V. Das, Life and Words: Violence and the Descent into the Ordinary (Berkeley, CA: University of California Press, 2007) 63.
individual per se. This is consistent with wider socio-legal research on victimisation which has highlighted the complexities of ‘vulnerability’ and demonstrated that vulnerability does not have a single cause, but is actually the result of multiple intersecting personal, social and environmental conditions. Thus, rather than creating categories of vulnerability based on particular characteristics (in this case, age) which is then used as the basis for criminalisation and/or regulation, we should instead recognise vulnerability ‘as a product of social and institutional interactions which can be experienced in a variety of ways by all’.

Many of the supporters of introducing new criminal laws on ‘elder abuse’ and/or extending hate crime laws to include older age have argued that age creates particular vulnerabilities such as dementia, disease or chronic conditions resulting in poor mobility, dependency and care needs and social isolation. Although some older people are affected by these issues, they are not universally experienced. Moreover, many younger people also experience some of these conditions but are not afforded age-specific protections. Furthermore, both the crime data and academic research indicate that most ‘older’ people who experience interpersonal violence and abuse, and crime more generally, are aged 60-69; as the average retirement age for men and women is currently 65.1 and 63.9 respectively, and the average age of dementia onset is over 80, categorising the majority of older victims (aged 60-69) as vulnerable due to isolation, dependency and dementia and thus in need of special legal protection is not supported by evidence on the typical profile of older victims. Thus, as scholars from other jurisdictions have argued, a better approach to protect those with specific (and mostly age-related) vulnerabilities such as dementia would be to create policy protections for people with those particular conditions, rather than applying broad-brush paternalistic policies based on age.

The application of age-based policies and legal reform based on vulnerability theory has been sharply criticised for being paternalistic and disempowering. Roulstone and colleagues state that “as a term, ‘vulnerable’ has connotations of weakness and is generally applied by members of a powerful majority to oppressed groups. There is arguably something inherently paternalistic in the act of designating another as ‘vulnerable’”. In addition to oversimplifying vulnerability and victimisation by categorising older people as inherently vulnerable,

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114 See Walklate (n109).
116 For example, see Sheldrick (n15) Action on Elder Abuse (n15) and House of Commons Hansard (n52).
118 ONS (ibid)
120 See Kohn (n110).
perceiving all older people to be vulnerable based on chronological age demonstrates prejudicial conceptualisations of older age, the very thing (prejudice) that hate crime legislation has been introduced to address. It homogenises older people into a single group characterised by their inherent vulnerability. As Pain has argued, presumptions of physical vulnerability fuel stereotypical views of the elderly and their experience of crime, even though not all older people are frail and not all elderly people experience crime in the same ways. The damaging consequences of stereotyping groups as inherently vulnerable has been acknowledged in relation to other groups, including disabled people. In the context of older people, Pritchard-Jones points out “the association between ‘traditional’ vulnerability and old age, also mutually reinforces the stereotypical view of old age itself, as well as the need for care and support in old age, as something to be feared, something ‘bad’, or as a negative state of being”. Legal scholars have drawn comparisons between using chronological age as a proxy for vulnerability (and the subsequent paternalistic legislation) and the “type of protectionist rhetoric that has historically been used as an excuse for limiting the freedoms of women” and other oppressed groups. Thus, legal reforms which seek to protect the ‘vulnerable older person’ may on the face of it appear progressive but in actual fact, as Hillyard et al argue ‘can and are often turned on their head, and may ultimately serve to exacerbate structures of inequality vulnerability; the intentions behind proposals clearly do not determine their actual uses.

Rather than introducing new substantive laws which protect particular groups (i.e. older people) who are deemed vulnerable by virtue of their membership of that group, Scotland may instead consider adopting a similar approach to England and Wales which recognises vulnerability in the sentencing of almost all criminal offences. Walters and Tumath persuasively argue in favour of this approach, stating that ‘sentencing guidelines have the clearest scope to ensure that other identity-based hostilities (beyond the five protected characteristics) are recognised during the sentencing stage of the criminal process’. In England and Wales, victims (in general) who are deemed vulnerable are already recognised in existing sentencing guidance for the crimes older people most commonly experience. Many of the guidelines specifically refer to older victims as forming one category of ‘vulnerable’ victims. For example, the sentencing guidance for a common assault specifically outlines two aggravating features which would capture older victims of crime: first it creates an aggravating feature where the offence is motivated by, or demonstrating, hostility based on victim’s age and, second, where the perpetrator has deliberately targeted

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125 Kohn (n110) 20.
a vulnerable victim. Several recent cases provide examples of these sentencing provisions being applied\textsuperscript{130}. For theft offences\textsuperscript{131}, deliberately targeting a victim on the basis of vulnerability is listed as one of the factors that would determine the offence category as high culpability and the (older) age of the victim giving rise to vulnerability features in the sentencing decisions of several recent cases\textsuperscript{132}. This is also listed in the sentencing guidelines for fraud\textsuperscript{133}, which current evidence suggests is the crime older people are most likely to experience\textsuperscript{134} and again this is specifically referred to in the sentencing decisions of recent cases\textsuperscript{135}. Older people who are assessed as vulnerable are, therefore, already captured by the sentencing criteria for the offences that older people most commonly experience (violence and property offences) in England and Wales and this approach could be usefully adopted in Scotland. This approach is supported by criminal justice agencies in Scotland. For example, in their submission to the inquiry, Police Scotland state that they support initiatives which would:

allows the courts to consider if a crime has been committed against a person based on the frailty and vulnerability of a victim will ensure a greater percentage of our vulnerable communities would be protected as opposed to simply being based on a person’s age\textsuperscript{136}.

This would also mirror approaches adopted outside of the UK. For example, Canada have embedded enhanced sentencing for offences motivated by bias, prejudice or hate within their criminal code. This currently includes race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, and sexual orientation. They also have a ‘any other similar factor’ mop-up, allowing some flexibility for the law to develop to new forms or categories of discrimination as they emerge\textsuperscript{137}.

3.5. Addressing age-related hostility
Supporters of an extension to hate crime law to include older age as a protected characteristic have argued there is a need to protect older people from age-based hostility which underpins some victimisation. As it currently stands, age is not specifically included in any of the existing hate crime laws, although older people may be captured under hate-crime legislation if they have one or more of the protected characteristics, for example ethnicity or a disability.

\begin{itemize}
  \item Theft Act 1968 section 1 sentencing guidelines.
  \item Fraud Act 2006 s.1 sentencing guidelines.
  \item Police Scotland Submission to the Justice Committee Prosecution of Elder Abuse Consultation (Police Scotland 2019) page 2, \url{https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-PS.pdf} [Accessed 20 March 2020].
\end{itemize}
Many examples of conduct which the supporters of a hate crime extension seek to criminalise are arguably covered by the existing disability hate crime which academics, lawyers and policy makers suggest is the reason the victim has been targeted, rather than their age. In a recent study on crimes and abuse of older people in Wales, a Crown Prosecution Officer commented that:

“There’s a huge crossover between ‘elder abuse’ and disability hate crime. Quite often when we look at issues that are flagged up as ‘elder abuse’ the reason that person has been targeted is not necessarily because what it says on birth certificate but because they have a condition physical mental that runs as vulnerable. It maybe that that is a age-related condition but the reason they are being targeted is because they have that disability or perceived disability and not necessarily because of their age”.

However, research has found that for disability hate crimes the nature of offending is typically different to that of other hate crimes; theft and mistreatment or neglect are more common in disability hate crimes whereas violence against the person is more common for racial or religious hate crime. This makes the task of proving the all-important hostility element challenging; simply taking advantage of someone who has a disability is insufficient in most cases. Similarly, taking advantage of someone simply because they are old does not fit within the conceptual or operational scope of current hate crime legislation, nor its intended scope.

Some of the core conceptual (and operational) features of hate crime seem at odds with the arguments to extend hate crimes to include older people. First, despite the debates among scholars and professionals about definitions and conceptual understandings of hate crime, one of the key features which is consistent across legal and social scholarship, policy and practice is that hate crime is fundamentally about a targeting of individuals who belong to a marginalised or stigmatised group, based on prejudice towards or hatred of that particular group. Hate crime is thus characterised by a targeting of difference – the individual victim is not targeted just because of who they are, but because of who and what they represent, and in this sense the offence can be considered not only against the victim, but the broader community the victim represents. Hate crime thus differ from other, more general crimes because they involve the targeting of a victim because of their actual or perceived membership of a particular group. Consequently, it is the feature that is targeted rather

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138 The available evidence indicates that physical and/or psychological disabilities are major risk factors for ‘elder abuse’ alongside gender, and it is these vulnerabilities rather than age which explain interpersonal violence in later life. See M. Lachs and K. Pillemer, “Elder Abuse” (2015) 373 New England Journal of Medicine, 1947-1956 for a useful review.


141 ibid.

142 Schweppe (n137).
than the individual and the victim is thus ‘thought to be interchangeable with any other member of the same group’\textsuperscript{143}.

These features do not apply to older people for a number of reasons. Older age is a ‘group’ that the vast majority will become members of, regardless of our other identities. In fact, globally, there are now more people aged 65 and over than there are aged 5 and under\textsuperscript{144}. Older age is thus not a feature of difference, but similarity. Furthermore, there is no available evidence that older people are targeted as victims of crime, including violence and abuse by partners or family member, because they represent the older community.

Relatedly, there is limited reliable evidence that older people are specifically targeted because of hatred and hostility, which are key elements of both hate crime conceptualisations and existing hate crime offences. One study which suggested older people are specifically targeted in hate crimes was conducted by Iparraguirre\textsuperscript{145}, who used British Crime Survey data\textsuperscript{146} to argue that age-based hate crime is more prevalent than gender-motivated hate crime. However, this is a misrepresentation of the data. The Home Office report is based on the British Crime Surveys 2009/10 and 2010/11 which included a specific section on hate crime. The section of the survey relied on by Iparraguirre involved two primary questions (following a screening question) about whether the victim perceived the offender to be racially motivated (question 1) and/or whether they felt the offender had been motivated by the offender’s attitude towards the victim’s religion, sexuality, age, gender or disability (question 2). For respondents answering ‘don’t know’ to either question, a further follow-up question asks whether there was anything about the incident that made the victim think it might have been motivated by any of these factors.

The results showed that, overall, about 0.3% of people aged 16 and over perceived they were victims of age-related hate crime compared to 0.2% of victims who though they were victims of gender-related hate crime. However, the Home Office cautions that “estimates of age-motivated hate crime in particular should be treated with caution, as it is possible, for example, that older victims who may be targeted for their age-related vulnerability, are answering that the incident was motivated by the offender’s attitude towards their age rather than this vulnerability”. They further state that

“the youngest and oldest age groups were more likely to say they thought they had been a victim of age-motivated hate crime than other age groups (0.7% of those aged 16–24 and 0.6% of those aged 75 and over were victims of age-motivated hate crimes compared with 0.3% of those aged 65–74). This suggests that some people may have

\textsuperscript{143} M. Al-Hakim, ”Making a home for the homeless in hate crime legislation” (2015) 30(10) Journal of Interpersonal Violence, 1755-81, 1759.

\textsuperscript{144} National Geographic, ‘There are now more people over age 65 than under five—what that means’ (National Geographic, 14 July 2019), https://www.nationalgeographic.co.uk/history-and-civilisation201907there-are-now-more-people-over-age-65-under-five-what-means [Accessed 20 March 2020].

\textsuperscript{145} J. Iparraguirre, ”Hate crime against older people in England and Wales—an econometric enquiry” (2014) 16(3) The Journal of Adult Protection, 152-165.

misunderstood or misheard the question and mistakenly be reporting an incident as age-motivated”.

Given these concerns about misinterpretations of the questions and the methodological limitations of the British Crime Survey, the analysis and findings by Iparraguirre are unreliable. Consequently, making claims about the prevalence of age-based hate crime is questionable. Furthermore, although there is limited research exploring older people’s attitudes and beliefs around their actual or perceived victimisation, some small exploratory projects have indicated that older victims do not believe their victimisation was because of hostility or hatred of older people. Similarly, professionals working in the criminal justice system have warned that the introduction of age-based hate crimes would be futile on the basis that few cases involve hatred or hostility and prosecutions would therefore be infrequent. A further problem can be identified here: proving the motivator for the offence. This was noted by the Law Society in Scotland, who have pointed out the difficulty with incorporating age into the hate crime framework centres on proving the motivation for the offence was “hostility based on age”, rather than vulnerability. As others have noted, hate crime cases create specific evidential hurdles as they require the prosecution to establish not only that the basic offence was committed, but that the offender was motivated by hostility towards the specific characteristic covered by the legislation.

### 3.5a Hostility or vulnerability?

It has been argued both in Scotland and elsewhere in the UK and beyond that while hostility towards older people based on their age may not be common, the deliberate targeting of older people because they are (actually or perceived to be) vulnerable provides justification for the inclusion of older age as a protected characteristic. For example, Action on Elder Abuse concede that few older people are targeted because of hatred/hostility but argue that perpetrators deliberately choose victims because of their perceived vulnerability and that this deliberate targeting is akin to the targeting of the groups currently protected by hate crime laws, where it will be taken into consideration as an aggravating factor during sentencing. They go on to pose the question:

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147 Ibid 25.
151 Walters and Tumath (n123) 577.
“Is there any reason why we shouldn’t be doing the same for those who deliberately target older people because of their actual or perceived vulnerability? I can’t think of any.”153

There are several assumptions underpinning the arguments to include older age based on vulnerability: that older people are routinely targeted because of perceived/actual vulnerability related to their age (conflating vulnerability with high risk); that hate crime as a concept can, and should, be widened in scope to include vulnerability (demonstrated or motivated by); and that older victims would benefit from this widening. These will be dealt with in turn.

There is limited evidence that older people are, in general, routinely targeted as victims of crime and are therefore vulnerable. National data shows older people experience less personal crime (violence and property) than younger groups154. This is also true of economic crime: national data indicates older people experience fraud less frequently than younger groups and that those aged 75 and over experience the least fraud of all age groups155. For example, mass marketing fraud (emails, texts, letters or phone calls from individuals or companies requesting money) is experienced most frequently by those aged 25-44 – those aged 75 and over are the least likely to experience such communications. Several studies outside of the UK have also found that younger people are more at risk of fraud overall than older people156. Consequently, there is currently insufficient evidence that older people are, in general, being targeted because of actual or perceived vulnerability based specifically on age. There is some limited data that indicates older people may be more likely to be victims of particular types of scams, for example doorstep scams157, although the lifestyles of older individuals (at home more and therefore more likely to answer the door) may contribute to this. Doorsteps scams form a small proportion (17%) of all scams, and for people aged 65 and over only 3% of the scams they experience are doorstep crimes, compared with 5% of those aged 18-24, thus the relative risk for older people remains low158. There is compelling evidence that the impacts of fraud, and other offences, may be more severe for (some) older

153 Ibid.
people, including increasing the risk of the victim going into a care home\textsuperscript{159}. However, impacts vary by individuals and it is not universally the case that older people will experience more adverse effects than younger victims. For example, a study commissioned by Citizens Advice Scotland found younger people were twice as likely to feel embarrassed or ashamed about scams as older people\textsuperscript{160}. Thus, if age were to be included, it would need to incorporate both young and old in order to accurately capture the groups who are ‘vulnerable’ to experiencing crime and being specifically targeted. In doing that, however, we essentially include everyone as a potential victim of hate crime and thus there is nothing to distinguish crimes from hate crimes\textsuperscript{161}.

Moreover, as most fraud is experienced by younger people, the (potential) higher rates of victimisation for one particular type of fraud (e.g. scams) does not justify an overall widening of substantive laws based on older age, particularly when the existing fraud legislation already captures these offences. It may be, however, that the vulnerability of the victim (where age among other factors can be considered) and the impact of them can be taken into consideration during sentencing if Scotland adopts a similar approach to (general) sentencing principles as is the case in England and Wales. Further support for victims or those at risk of fraud which is tailored towards specific groups should also be considered; for example, education and awareness raising campaigns aimed at older groups, advice through trusted organisations (such as the Citizens Advice Bureau) and support for victims that become victims of fraud are all important policy and practice initiatives for reducing victimisation and providing support to those who experience fraud.

Conceptually and operationally, even if older people as a group may be more vulnerable to particular crimes compared with other groups, vulnerability must be distinguished from hostility. Recent research has highlighted that evidence of a person being targeted because of perceived vulnerability or because they are an easy target is not evidence of hostility, and thus such offences are not within the scope of existing hate crime frameworks. However, this is sometimes viewed as a conceptual limitation of hate crime legislation and policy. Several scholars have highlighted the focus on prejudice, hostility or hatred as a limitation of existing hate crime frameworks and legislation, although the comments made on the opening day of an ongoing High Court case have confirmed the importance of the hate element\textsuperscript{162}. Chakraborti and Garland\textsuperscript{163} point out that the current approach is identity-based and uses membership of

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\item \textsuperscript{159} Neighbourhood Watch, ‘Scams and older people’ https://www.ourwatch.org.uk/crimes-archive/scams-older-people/ [Accessed 20 March 2020].
\item \textsuperscript{161} Similar concerns have been raised by Schwepp (n136, 185) who has argued that focusing on identifying characteristics or traits widens the net too far. Using the example of the traditional target of playground bullies, which includes rich, poor, geeky, stupid, fat, thin etc. children, it becomes impossible to draw a line between crime and crime motivated by hate.
\item \textsuperscript{162} See I. Lyons, “‘Right to be offended’ does not exist, judge says as court hears police record hate incidents even if there is no evidence” (The Telegraph, 20 November 2019) https://www.telegraph.co.uk/news/2019/11/20/right-offended-does-not-exist-judge-says-court-hears-police/ [Accessed 20 March 2020].
\item \textsuperscript{163} N. Chakraborti and J. Garland, “Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’” (2012) 16(4) Theoretical Criminology, 499-514.
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particular groups to establish the parameters of hate crime. Under this existing framework, it is a select set of groups who are protected by hate crime, excluding those who may be different or vulnerable but whom do not fit within the narrow conceptualisation of a hate crime victim. Chakraborti and Garland therefore propose a vulnerability-based approach, which acknowledges the heightened level of risk posed to certain groups or individuals that can arise through a complex interplay of different factors, including hate, prejudice, hostility, unfamiliarity, discomfort or simply opportunism or convenience. Under this revised framework, a more flexible approach to identify victims of hate crime and hate-based incidents is possible, and those from majority groups may be included if, for example, they were targeted due to their perceived or actual vulnerability. This approach shares similarities with Fineman’s vulnerability theory, which positions vulnerability as inherent to the human condition and is therefore universal.

However, several other scholars have cautioned against the widening of hate crime to include vulnerability. As well as the issues with defining and conceptualising vulnerability discussed earlier in this report, there are broader concerns that widening the scope of hate and hostility to include vulnerability will essentially dilute the purpose and meaning which underpinned the core objectives for introducing hate crimes. By widening hate crimes to include those deemed vulnerable, the range of victims that could be included could potentially be so wide that almost everyone can be a victim of hate crime, rendering the legislation meaningless and removing the special status that currently attaches to these crimes and in essence making hate crimes indistinguishable from the more general versions of the offences (for example assault). The widening of hate crime also has implications for offenders. As Schweppe has argued, in singling out specific groups in hate crime legislation, a clear message is being sent: these groups are deserving of more protection than others, essentially classifying distinct victim types as more worth of legal protection. This has an important impact on the offender at the sentencing stage, as in creating distinct groups of victims it also creates distinct groups of offenders. Schweppe therefore argues that whenever the legislature does this and effectively discriminates between offenders, ‘any offence against which automatically requires an enhanced sentence, it must do so carefully, and with the principle of equality for offenders and victims in mind.

Finally, even if the vulnerability model was to be accepted, it does not follow that older people should be inherently perceived as vulnerable (which a specific hate crime characteristic would infer) for a number of reasons described in section 3.4 of this report, namely the risk of exacerbating ageist attitudes by positioning older people as inherently vulnerable, obscuring the nature of violence/abuse/crimes against older people by bracketing it off from abuse and crime younger people experience, ignoring the role of other social characteristics which

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164 Ibid, 506.
166 For a useful overview of arguments in this area see Chalmers and Leverick (n27), page 61 onwards.
169 Schweppe (n137).
170 Schweppe (n137) 178.
Evidence indicates raises the risk of violence, abuse and crime and finally, encouraging paternalistic legal responses to older people which limit, rather than enhance, their rights.

3.6. **Equality of protection**

The final main argument put forward by some supporters of hate crime legislation reform is that, even if there is no specific need for an age-based characteristic, other groups are protected and therefore we should include older age. This argument is therefore not based on any of the principles of criminalisation (see section 2), nor the core features of hate crime (see section 3.5). Instead, this particular argument is essentially based on a ‘why not, might as well’ perspective and is the weakest of all the arguments put forward for legal reform. The argument is not based on evidence of victimisation of older people nor any evidence that victimisation is likely to grow. Instead, there is a loose speculation that such a provision may be useful in the future and/or for the sake of completeness older age should be added to the hate crime characteristics. This argument infringes several of the principles of criminalisation – it is not based on evidence or need, is speculative in nature, and is not based on tightly drawn and logical legal reasoning.

Indeed, there is an argument that introducing older age as a protected characteristic would actually *create inequality*. By giving older people, who are the least likely to experience almost all crimes, special treatment because of their age, this may inadvertently be creating inequalities, since younger people who constitute the majority of victims are not afforded any additional protection. Essentially, this would mean that if you experience theft aged 24 (when you are statistically most likely to) there is no hate crime, but at 60 (when you’re statistically least likely to experience it) it is treated as an aggravated offence. To address this, ‘age’ could be added which incorporates all age groups, but this then essentially makes all crimes potential hate crimes, undermining the very principles of hate crime (see section 3.5 and 3.5a).

Moreover, the law should not speculative in design. As Walters and colleagues have argued

> “any new characteristic that is added to hate crime law should reflect specific harms and wrongs that have been evidenced as requiring criminalisation. An implicit feature of the criminal law is that it must not be forward-looking in preventing harms that we think might occur sometime in the future.”

They further argue that taking such approach would “add an element of guesswork into the criminal law” which arguably transgresses the principles of criminal law but also contravenes human rights.

4. **Conclusions and recommendations**

Historically, older people have been invisible as victims of crime. They have been viewed as no-risk, or low-risk, for crime, and age has widely been considered a protective factor for both offending and victimisation. Consequently, academic research and criminal law, policy and practice has focused on younger victims. However, there has been a steady increase in

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172 Walters (n127) 210.
research documenting the existence of crimes against older people over the last decade, and a separate growth in research examining ‘elder abuse’ and domestic abuse of older people. Collectively, this work has drawn attention to the prevalence and nature of crimes against older people, and this has led to increasing calls for the expansion of law, policy and practice to adequately recognise and respond to older victims.

The law has a long history of being seen as the obvious, natural response to social issues, particularly when those issues are, or can be, politicised. Ashworth notes that ‘politicians, pressure groups, journalists and others often express themselves as if the creation of a new criminal offence is the natural, or the only appropriate, response to a particular event or series of events giving rise to social concern’\(^{173}\) and the law is thus used as ‘a multi-purpose tool, often creating the favourable impression that certain misconduct has been taken seriously and dealt with appropriately’\(^{174}\). However, this type of reactive law should be avoided, as it is usually drafted quickly to appease particular groups in society in order to be seen to be taking concerns seriously and ‘doing something’. This approach has serious consequences for the doctrine of criminal law and wider criminal justice policy, including the ‘reduction of the social status and communicative power of criminal law’\(^{175}\).

Scholars and practitioners have extensively criticised this haphazard approach to law making, arguing that the law should be a last resort and that criminalisation of behaviour should be evidenced-based and adhere to particular criteria and principles. This includes establishing the behaviour is serious enough to warrant criminal intervention, that there is a clear need for new legislation as the behaviour can’t be dealt with by existing laws or other remedies, that the proposed offence(s) would be enforceable in practice, are tightly drawn and legally sound and that the proposed penalty is commensurate with the seriousness of the offence. If the proposed legal reforms cannot satisfy these principles, there is the risk of introducing bad law – that is, law that is enacted without a sufficient evidence base that it is needed and that the proposed format of the law would address the issues underpinning proposals, and which infringes one or more of the principles of criminalisation. These risks include ineffective law, undermining communicative power, misallocation of resources and flawed legislation which is subject to challenge and/or simply lays dormant. A further cost of bad law is an ‘opportunity cost’. As Ayling points out, ‘a more effective better designed solution, one that may or may not require legislation, may be overlooked in the rush to do something’\(^{176}\). This has been echoed by scholars examining the introduction of ‘elder abuse’ laws in other jurisdictions, who have cautioned that “in an eagerness to help older adults, there is a tendency to want to do something without adequately analysing how to do the right thing”\(^{177}\). It will be argued in the remainder of this section that there is insufficient evidence to support the introduction of new laws to address ‘elder abuse’/crimes against older people and that alternative, extra-legal solutions should instead be pursued.

The two proposals of legal reform to address ‘elder abuse’/crimes against older people currently under consideration in Scotland are: the introduction of substantive ‘elder abuse’

\(^{173}\) Ashworth (n26) 225.
\(^{174}\) Ashworth (n26) 225.
\(^{175}\) Loughnan (n69).
\(^{176}\) Ayling (n24) 14.
\(^{177}\) Kohn (n39) 12.
offences and/or the widening of hate crime legislation to include older age as a (new) protected characteristic. Several arguments in favour of these proposals have been put forward by campaign groups, charities and politicians including inadequate criminal justice responses in cases involving older victims, the symbolic benefits of introducing laws which criminalise violence or abuse of older people, the need to protect the ‘vulnerable’ older victim, the need to address age-based hostility and/or the deliberate targeting of older people and, finally, equality of protection for older people. There are a significant number of issues and risks inherent in both of the proposals for legal reform. First, the conceptual ambiguities concerning ‘elder abuse’, the lack of agreed definitions of older/elderly, and the inconsistent use of these terms to refer to different forms and contexts of violence and abuse against older people render any attempts at legal reform impossible.

Even if these definitional and conceptual problems could be addressed, there is limited evidence that legal reform through specific criminal offences of ‘elder abuse’ is required to achieve the intended objectives of increasing prosecutions, improving awareness and driving political attention. Laws already exist which capture the various forms and contexts captured by the broadest ‘elder abuse’ definitions, and any introduction of new offences would duplicate the existing criminal provisions. Doing so infringes the principles of purpose of criminal law – it re-criminalises conduct which is already criminal, undermining the status and communicative function of the criminal law. Furthermore, relabelling some of these offences as hate crimes is difficult to justify. As Walters and colleagues\textsuperscript{178} point out, re-labelling a basic offence into a hate crime should be based on evidence that shows hate crimes cause different types of individual, community and societal harm. If these three elements cannot be demonstrated, it is difficult to justify the creation of hate crimes.

The available research indicates that the problems with prosecutions and convictions for abuse of older people centre on procedural and evidential issues rather than deficiencies in substantive law. Most of the existing literature points towards a combination of ageist attitudes and policies, insufficient resources and poor policies which serve to obscure the extent and nature of ‘elder abuse’ and result in poor prevention and intervention responses within and outside of the criminal justice system. This is further supported by scholars and practitioners in jurisdictions where dedicated statutory provisions have been introduced such as the USA, where prosecution and convictions remain low, professionals lack confidence in responding to ‘elder abuse’ and provisions for victims are widely viewed as inadequate\textsuperscript{179}. Although there may be some symbolic advantages to specifically criminalising ‘elder abuse’, there are considerable risks associated with introducing laws which separate older people from other groups and contribute to ageist attitudes and stereotypes about older people and result in paternalistic approaches that limit, rather than enhance, older people’s rights.

Extending hate crime frameworks to include older age is similarly fraught with difficulties. The core tenets of hate crime – the targeting of an individual based on their perceived or actual membership of a marginalised group based on prejudice or hatred/hostility towards that group – is not observed in crimes against older people. Not only are older people not a minority group, there is also insufficient evidence that they are specifically targeted based on

\textsuperscript{178} Walters and Tumath (n123) 577.

\textsuperscript{179} Ulrey (n75).
hostility or hatred. In fact, both national data and academic research indicates older people experience all types of crimes at lower rates than younger people, and research with older people and professionals in the criminal justice system has highlighted that hatred or hostility is rarely a feature of these crimes. Moreover, although it has been argued that the (potential) vulnerability of older people to victimisation justifies an extension of hate crime frameworks to include older age as a protected characteristic, the evidence of older people’s vulnerability to crime is contested and there are concerns associated with casting older people as inherently vulnerable. Finally, as others have argued, ‘just because an offence may fit within our comprehension of what ‘hate’ might entail does not necessarily mean it is advantageous to include it within hate crime law’\(^\text{180}\). In other jurisdictions where older age has been added to the hate crime legislation, recent data indicates the legislation is not being used. In NYC, for example, there was not a single recorded offence of hate crime against an older person in the latest data published by the City. Thus, even if the current hate crime framework could be extended to include older people (perhaps based on vulnerability, notwithstanding the potential problems and risk associated with this approach) it does not necessarily follow that it should be.

In conclusion, there are a number of valid concerns about the current state of policy and practice in relation to violence, abuse and crimes more generally against older people. This group of victims continues to be invisible in much of the socio-legal research on crime and victimisation, the majority of policies either exclude older people or are unfit for purpose, responses to criminal victimisation of older people are often inadequate and general awareness and focus on older victims at both a political and public level is lacking. Urgent action is needed to address each of these areas, but the current proposals to criminalise ‘elder abuse’ through a new offence or extend hate crime legislation to include older age as a protected characteristic do not appear to be capable of achieving these goals. Rather, improved use and application of the existing law may be achieved through training, awareness raising and improvements in prevention and victim support policy to address embedded ageism. As Kohn has argued “ultimately, we may discover that the most effective criminal justice interventions for protecting older adults are not those that maximize ‘elder abuse’ conviction rates”\(^\text{181}\).

4.1. Recommendations

Although this report has concluded that more law is not the answer, many of the concerns raised by campaigners, charities and those in favour or legal reform are valid and supported by evidence. Thus, while more law may not address these concerns, there are a number of potential remedies or solutions that could be pursued to address the issues with identifying and responding to crimes against older people. This report makes four recommendations to address the concerns that have driven the current proposals for reform.

Recommendation 1: Establish working group to assess law and policy at national and local level

A working group should be established, made up of key academics, campaign groups, MPs and policy makers (and other relevant stakeholders including safeguarding/social services and

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\(^{180}\) Walters and Tumath (n123).

\(^{181}\) Kohn (n39) 29.
criminal justice agencies) to assess current legislation and policy in relation to age and crime, including victimisation and offending. One of the core focus areas of this group should be ‘elder abuse’ and crimes against older people more generally. There are two functions that this group should have: to gather evidence on the nature, extent and responses to crimes against older people by commissioning research and requesting data from key criminal justice, health and safeguarding organisations (recommendation 1a); and a critical policy review of existing provisions nationally and locally (recommendation 1b).

**Recommendation 1a: Research and data collection to provide evidence on the extent of crimes against older people in Scotland**

To address the concerns raised about inadequate criminal justice responses and outcomes in cases involving older adults, particularly that these cases are not taken seriously or are diverted away from the criminal justice system, data from Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS) should be collected and analysed to examine police and prosecution outcomes, with a focus on attrition, prosecution and convictions. Additionally, data on cases of suspected abuse/violence dealt with by other agencies (e.g. safeguarding/social work, NHS) should be examined to give a more comprehensive view. There is some evidence from academic research in Northern Ireland and data collected by charities and campaign groups that older victims of crime, particularly violence/abuse related offences, may experience lower prosecution and convictions than younger victims of the same types of offences. However, this evidence is piecemeal and more robust research is needed. This is compounded by a lack of data in Scotland, due to a lack of available data from Police Scotland and the absence of academic research in this area. In order to assess whether older people experience particular issues in the criminal justice system (CJS), how the CJS responds to older victims, how the age of victims (and offenders) affects decision making and the experiences of older victims, data from Police Scotland should be collated and presented to the Justice Committee. Additionally, academic research which specifically looks at decision making at all stages of the CJS as well as victim experiences should be commissioned. This will provide evidence needed to inform future law and policy decisions in this area.

**Recommendation 1b: Critical law and policy review**

To address the concerns about equality of protections, and in particular poor protections for vulnerable adults and deficiencies in current policies and processes, a critical policy review of existing criminal justice and victim policies (for example, risk assessments, referral pathways, victim code) should be carried out with victim groups, age-related groups and older people involved in the review to ensure that these apply equally to all adults including those who may be deemed ‘vulnerable’ and/or older. One example where older people are disadvantaged by current practice is domestic abuse risk assessments. The most commonly use tool, DASH, has been criticised because the main part of the tool, the risk assessment checklist, has been designed to include several questions that automatically exclude older people. This is particularly concerning because the risk assessment is one of the main ways high risk cases are identified and managed through multi-agency planning and older people may be less likely to meet the high-risk threshold due to the design of these questions. It is

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182 Similar academic research conducted by the author of this report (Bows) is about to commence (March 2020) and will collect data from two police forces and the Crown Prosecution Service to assess outcomes, processes, decision making and experience in 1,000 cases of crime involving a victim aged 60 and over using real-time tracking.
notable, but perhaps not surprising, that there is no mention of older adults in the recently published Government consultation report ‘Risk assessment and interventions for victims of domestic abuse: consultation response analysis’\(^{183}\).

Furthermore, much of the crime prevention awareness material currently distributed to the public uses modes of communication which may inadvertently exclude older people. For example, poster campaigns about crimes which only feature images of young people and/or are displayed in community settings where the audience is likely to be young(ger) such as universities, pubs and bars both directly and indirectly contributes to the stereotype that older people are not victims of crime and means that messages about crime prevention are not received by older people. Similarly, older people may be less likely to see social media messages about crime – e.g. warnings about particular offences or advice on how to get support if you are a victim of crime.

Finally, this group should consider gaps in law/policy in relation to older adults who are abused by family members other than spouse/partners. Given the emerging research that adult sons and other family members are responsible for a significant proportion of violence/abuse of older people, including homicide, it is critical that Scotland assesses the extent to which this is captured not only in policies and procedures, such as risk assessments, but whether existing legal provisions adequately capture these behaviours given the new domestic abuse laws are limited to those in intimate relationships.

**Recommendation 2: Sentencing Guidelines**

To address the concerns that the vulnerability of the victim (actual or perceived) is not taken sufficiently seriously by existing criminal justice policies, particularly in relation to sentencing, the Committee should consider working with the newly formed Scottish Sentencing Council to develop guidelines, similar to those used in other parts of the UK (i.e. England and Wales) and other jurisdictions such as Canada which make ‘vulnerability’ an aggravating feature in sentencing. Given the concerns with attaching the label of vulnerability to a finite list of victim groups based on personal characteristics, a broad indicative but non-exhaustive list of factors which may indicate vulnerability could be provided. This may include age and would allow for prosecutors to refer to the particular features in individual cases which indicate vulnerability and for Judges to consider when sentencing whether there are particular vulnerabilities which should aggravate the sentence given. This approach has been suggested by scholars writing about the potential of hate crime laws more broadly in England and Wales\(^ {184}\), and Scotland\(^ {185}\).

**Recommendation 3: Training for criminal justice practitioners**

To address concerns about poor awareness and understanding of crimes against older people by professionals, particularly those in the CJS, training for CJS practitioners (police, prosecutors and judges) should be provided. This should be developed following the research recommended to identify key issues in the CJS (recommendation 1) and the policy review


\(^{184}\) Walters et al (n127).

\(^{185}\) Chalmers and Leverick (n27).
(recommendation 2) to ensure the training is evidence based and specifically deals with known issues within the CJS. As it currently stands, there is insufficient evidence to develop meaningful training so this should be after the requisite research has been done.

**Recommendation 4: Awareness raising and support for older victims**
To address concerns that abuse/violence and crimes against older people are hidden and/or not taken seriously by society resulting in poor awareness and understanding and a lack of support services for victims, support services should be established to respond to older victims of abuse/violence/crime. This has been advocated by Law Society of Scotland\(^{186}\) - who suggested helplines, education, systems to assist with disclosure/reporting and guidance for those working with or supporting older people should be considered instead of new legislation.

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