



# Abuse of, and crimes against, older people

## Introduction

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**“Older persons should have access to social and legal services to enhance their autonomy, protection and care.”**

UN Principles for Older Persons, Principle 11

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A study carried out in 2007<sup>1</sup> by the Department of Health and Comic Relief estimated that the prevalence of abuse suffered by older people in their own homes in Wales was 6% of the older population aged 66 and older.<sup>2</sup> Based on today's population figures, that equates to around 40,000 older people. There are no accurate statistics that would identify the prevalence of abuse in care homes in Wales, however, the Care and Social Services Inspectorate for Wales Annual Report 2012-13 reports that 888 concerns were raised with them about care in 405 care settings.<sup>3</sup> The most common concerns raised were about the neglect of service users, protection and physical abuse of service users and concerns about the behaviour and attitude of management.<sup>4</sup>

There is not yet sufficient understanding within public services and society generally, of the nature of abuse faced by older people and the circumstances that lead to older people becoming particularly vulnerable or at risk. The number of successful prosecutions of crimes against older people seem to be disproportionate to the prevalence identified in research and the number of concerns raised. Crown Prosecution Services (CPS) figures show that prosecutions for rape stand at around 18%<sup>5</sup>, which is regarded as a very low prosecution rate, but still more than 26 times

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<sup>1</sup> [UK Study of Abuse and Neglect of Older People Prevalence Survey Report, Department of Health and Comic Relief, 2007](#)

<sup>2</sup> [UK Study of Abuse and Neglect of Older People Prevalence Survey Report, Department of Health and Comic Relief, 2007, p.72](#)

<sup>3</sup> [Care and Social Services Inspectorate for Wales, Annual Report 2012-13, p.27](#)

<sup>4</sup> [Care and Social Services Inspectorate for Wales, Annual Report 2012-13, p.26](#)

<sup>5</sup> <http://www.leftfootforward.org/2013/02/rape-low-conviction-rate-in-the-uk/>

higher than the reported 0.68% prosecution rate for neglect of older people.<sup>6</sup>

I am working – and I need others to work with and alongside me – to see these different forms of abuse recognised and addressed. There needs to be a systematic approach to identifying those who are at risk and all older people who are at risk must have access to effective safeguarding support. Those who are abused must be swiftly and appropriately supported to regain their safety and, where they fit the legal definition, older people need to be recognised as victims of domestic abuse and have access to the widest possible support available under domestic abuse legislation and domestic abuse support services. Those who are the victims of crime must have access to justice.

This paper sets out the areas on which I am focusing my attention in the next two years. I have chosen these priority areas as a result of conversations with older people and older people's organisations, as well as themes emerging from my casework.

Good work has begun in Wales to improve the support and protection that we give those at risk of harm, but we must continue to build and improve on this so that Wales is a safe place to grow older – not just for some, but for everyone.



Sarah Rochira

March 2014

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<sup>6</sup> <http://www.bbc.co.uk/news/uk-politics-22761717>

# Summary

## 'Elder Abuse'

- 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. It has been a very helpful term in raising the profile of abuse faced by older people, but we must move to a more nuanced understanding of the abuse older people face and name it for what it is – e.g. assault, theft, fraud, sexual assault, coercive control and domestic abuse. Sometimes the abuse faced by older people is also a criminal offence but is identified as 'elder abuse' and referred to adult protection services instead of the police. By the time it is referred to the police – if at all – vital evidence has often been destroyed.
- By applying a special label to the type of abuse faced by older people they may, and often do, receive different treatment and are unable to access the same support, services and justice available to other adults. Older people must have equal access to support and justice.
- We should, instead, talk about the abuse of, and crimes against, older people.

## Raising Concerns

- In Wales we need a new culture of openness that encourages people to raise concerns at an early stage and which does not penalise or ostracise people who do so.

## Safeguarding & Adult Protection

- The proposed definition of 'adult at risk' in the forthcoming Social Services and Well-being (Wales) Bill is too narrow and risks paternalism.
- Adult Support and Protection Orders should apply not just to private homes but also to care homes and hospitals where a person is suspected of being an adult at risk.
- Older people who are at risk of, or experiencing, harm should be entitled to independent advocacy and should never have to pay for that service.

## Domestic abuse

- Older people are not routinely identified as victims of domestic abuse and the Welsh Government must act on the findings of the evaluation of its Access to Justice Pilot Scheme, undertaken in 2012 by Aberystwyth University.
- The Welsh Government must ensure that legislation, Codes of Practice and guidance on domestic abuse and adult protection are better integrated so as to ensure understanding of the differences and overlaps between the two, and how they should work together.

- The Welsh Government must also ensure that its publicity campaigns and publications represent older victims as well as younger victims.
- The Welsh Government should fund work to identify support services that work for older victims of domestic abuse.

## Criminal Law

- The law on wilful neglect, even if extended to those who have capacity, will not overcome the hurdles of a 'guilty mind' and intent or the problems of proving an 'omission'. It has value for the older person seeking access to justice, but limited value.
- A new offence of corporate neglect must be included in the Care Bill (UK Government) because this will address some of the barriers faced by the families of the victims of Operation Jasmine – and by numerous other families – and will send a clear message that those at the top of organisations are responsible for the delivery of safe care to older people.
- The criminal justice system must recognise more openly the direct and indirect discrimination that older people face at a societal level, as a result of stereotyping and attaching little value to them as human beings.
- Criminal offences carried out against older people because of their age, or perceived age, should be classed in law as a hate crime so that judges can impose tougher sentences under the Criminal Justice Act 2003.

## Civil and Public Law

- Independent providers of care who enter into contracts with self-funders and families who pay 'top-up' fees must make certain that the contract terms are very clear before the contract is entered into. People often enter into these contracts during a time of great difficulty or distress.
- Local Authorities and Local Health Boards who commission social care should make families and carers who pay 'top-up' fees aware that they have contractual rights.
- Protection under the Human Rights Act 1998 should be extended to self-funders because the human rights of anyone receiving some kind of social care must be upheld and this is a matter of importance to society and not just the individual.
- Independent providers of care in Wales, as regulated bodies, should be accountable for the extent to which they uphold the human rights of older people.
- Older people and their families must be informed of, and have access to, civil remedies when things go wrong.
- Care providers owe a duty of care to those they offer a service to. If that duty of care is breached, and this results in injury to the body, mind or emotions, an

older person or their family may bring a personal injury claim. Older people and their families have as much right as anyone else to bring a personal injury claim.

## Moving on from the term ‘elder abuse’

Since taking on the role of Older People’s Commissioner in June 2012, I have been very clear that addressing the abuse of, and crimes against, older people is a priority for me and must also be a priority for Wales. Much progress has been made in the past five years, but there is more progress to be made. Wales must be a safe place to grow older – not just for some, but for everyone.

The term ‘elder abuse’ has been very helpful in focusing minds on the fact that older people, who are often ignored by society in general, can experience abuse - physically, psychologically, financially, sexually or through neglect. However, in another sense, the term is unhelpful because it somehow distinguishes abuse of older people from the abuse of other adults and sets older people apart; this can affect the response of social services, the police and others. For example, through my casework I have found that many acts of abuse that, if a younger adult were involved, would be referred to the police are, in the first instance, referred to adult protection. This can have serious consequences for the gathering of evidence, which can be crucial in securing a conviction.

Older people should not be treated – or spoken about - differently because of their age or a disability or any other protected characteristic; this can result in discrimination. Offences against them should be named for what they are – for example, theft, fraud, assault, coercive control and rape – and we must be careful that through our terminology we do not inadvertently soften the seriousness of the abuse they might face or lead people to think that the abuse they face is somehow ‘different’.

## The issues and what must change

### Raising Concerns

In December 2012, I published the report ‘Raising Concerns in the Workplace’<sup>7</sup> which made recommendations for a way forward for raising concerns about poor or abusive practice in Wales. Since then the National Raising Concerns Programme Board has been established, which I chair.

The experience of those who speak out about poor or abusive practice can be difficult and raising concerns can sometimes have a devastating effect on their career and even their personal life. Those who raise concerns may have to choose between resigning or being dismissed from their employment.<sup>8</sup> There is also the prospect of those who remain in their jobs being blacklisted or ostracised by work colleagues, leading to personal suffering, marital breakdown or long-lasting health, financial or

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<sup>7</sup> <http://www.olderpeoplewales.com/Libraries/Uploads/RaisingConcerns.sflb.ashx>

<sup>8</sup> Gallagher A (2010) Whistle-blowing: what influences nurses’ decisions on whether to report poor practice. Nursing Times 2 February 106 (4):22-25

personal problems.<sup>9</sup> Those who choose to remain silent in the face of apparent wrongdoing may also experience great moral distress.<sup>10</sup>

In Wales we need to see a change in the culture that surrounds policies designed to assist workers in raising concerns at an early stage. We need a new culture of openness and learning that supports both those who raise concerns and those who investigate them. This requires a change in working practices and the removal of stigma around ‘whistle-blowing’ and raising concerns. This can only be achieved through strong leadership by those at the top of organisations, whether those are huge organisations like the NHS or small care homes in rural Wales.

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## Safeguarding

After many years of campaigning by my office and others, such as Age Cymru, I was delighted when Part 7 of the Social Services and Well-being (Wales) Bill<sup>11</sup> proposed putting adult safeguarding on a statutory footing. In broad terms, the new legislation will:

- develop a coherent legal framework for adult protection
- establish a National Independent Safeguarding Board
- establish Safeguarding Boards for children and adults

### Definition of ‘adult at risk’

Whilst I am generally content with the provisions in the Bill, I do still have concerns with the proposed definition of ‘adult at risk’ (s.116) and have expressed these concerns to the Deputy Minister for Social Services and all Assembly Members.

The current definition requires a person to have pre-existing needs for care and support and those needs for care and support are said to be the reason why a person cannot protect himself/herself against abuse or neglect. This excludes any person who does not have care and support needs, presumably as assessed by the local authority.

For example, Mr Powell (age 86) may live alone and receive no support yet he has become the victim of a neighbour or acquaintance who is abusing him in some way. He would not meet the definition. The definition is too narrow.

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<sup>9</sup> Jackson D, Peters K, Andrew S, Edenborough M, Halcomb E, Luck L, Salamonsen Y & Wilkes L (2010) Understanding Whistleblowing: qualitative insights from nurse whistleblowers. *Journal of Advanced Nursing* 66(10): 2194-2201

<sup>10</sup> Corley MC, Elswick M, Gorman M & Clor T (2001) Development and evaluation of a moral distress scale. *Journal of Advanced Nursing* 33: 250-256

<sup>11</sup> <http://www.senedd.assemblywales.org/mgllssueHistoryHome.aspx?lId=5664>



Additionally, the fact that someone has needs for care and support does not necessarily mean that they cannot protect himself/herself from certain kinds of abuse. The definition 'labels' people as 'at risk' based solely on their need for care and support. This is akin to the current definition of 'vulnerable adult' which defines a person by the services they receive rather than by their personal circumstances. Any kind of risk assessment of the situation in collaboration with the adult is missing from the definition.

For example, Ms James (age 34) may be in receipt of support from a carer. She may be well aware that her carer is abusing her in some way but she may also feel that she can manage this abuse in her own way. It is for her to decide whether or not she needs the help of safeguarding/adult protection services to do so. (This is not to say that there will not be circumstances in which a person would lack capacity to make such a decision, but the starting point needs to be that a person does have capacity to make these decisions – this is a fundamental principle of the Mental Capacity Act 2005). The definition risks paternalism.

An amendment was put forward by Kirsty Williams AM to address these deficiencies, but it was not adopted. I will, therefore, monitor the application of the definition when the new legislation comes into force and, as it is one of my functions to review the adequacy of the law as it affects older people; will issue a report to the First Minister if the definition fails older people in any way.

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### Adult Support and Protection Orders

The Social Services and Well-being (Wales) Bill provides for authorised officers of a local authority to apply to the court for an "adult protection and support order". Such an order will confer a power of entry to facilitate practitioners in speaking to an adult suspected of being at risk in private and enable them to find out whether that person is making decisions freely.

There seems to be some confusion as to whether these Orders could be used to gain access to an older person living in a care home or a hospital. It is important that people who are living in such environments should not be disadvantaged in any way and, therefore, the Welsh Government should make it explicit that the Order would be equally applicable to them.

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**Adult Support and Protection Orders should apply not just to private homes but also to care homes and hospitals where a person is suspected of being an adult at risk.**

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## Independent Advocacy

Those who are at risk of, or experiencing, harm have a right to a voice. Although the Human Rights Act 1998 does not say explicitly that a person has a right to a voice, it is implicit in the rights that the Act lists. To have freedom of expression, a person needs a voice; to express a belief, a person needs a voice; to be free of inhuman and degrading treatment, a person needs a voice. If a person does not have a voice – for whatever reason – they need someone to speak up for them.

Sometimes the abuse a person has experienced, or is currently experiencing, makes it impossible for them to speak up with their own voice. They may be fearful of saying what they really think, or they may not know who to speak to. They may not trust the person who claims to speak for them. Sometimes people listen more to family members than to the older person concerned – they talk about the person in the third person - “What does he think? What would he want?” - instead of asking the person directly.

The benefits of having an advocate are clear, however, there is no time in a person’s life when it is more important to have an independent advocate than when a person is at risk of, or experiencing, harm. An independent advocate speaks only on behalf of the older person – not the family, local authority, health board or any other person. The person at risk, or potential risk, needs to trust the person speaking for them.

During discussions around the Social Services and Well-being (Wales) Bill, there have been suggestions that the provision of independent advocacy should be means-tested. It is my position that advocacy for those who are at risk of, or experiencing harm, should never be charged for this invaluable service. That would, after all, be charging someone to have their voice heard.

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**Older people who are at risk of, or experiencing, harm should be entitled to independent advocacy and should never have to pay for that service.**

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## Domestic Abuse

Domestic abuse is the actual or threatened physical, emotional, psychological, sexual or financial abuse of a person by their partner or former partner, family member or someone with whom there is, or has been, a close relationship.<sup>12</sup> In the minds of the public there exists a stereotype of the ‘typical’ domestic abuse victim – a young woman living with an abusive man, with young children. We know that this stereotype – whilst true in the majority of cases – by no means presents the full picture and can lead to domestic abuse not being recognised early enough in those situations that do not conform to it, for example, amongst those in the fifty plus age bracket.<sup>13</sup>

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<sup>12</sup> <http://www.welshwomensaid.org.uk/>

<sup>13</sup> For example, see [Domestic Abuse & Equality Older Women report by the Equality and Human Rights Commission, 2011](#) and [Intimate partner violence against older women in Europe \(UK Report\), Penhale and Porritt, 2010](#)



Most domestic abuse takes place in or around the home – the media reports much about abuse or mistreatment in care homes or hospitals, yet many older people experience abuse in their own homes by people they are related to and rely upon. In 2008, the Welsh Government's Communities and Culture Committee<sup>14</sup> undertook a review of domestic abuse in Wales and one of its findings was that older people who are victims of domestic abuse do not receive the services they need and, in some cases, are not even considered to be victims. Yet some older women have lived with domestic abuse for decades<sup>15</sup> and we know that older women are less likely to report abuse, particularly if they have lived with it all their life.<sup>16</sup> However, when services are specifically designed for older women, referrals increase dramatically.<sup>17</sup>

My own casework supports this finding as on numerous occasions an incident that is clearly domestic abuse of an older person is referred to adult protection services (currently non-statutory) rather than to the police. This has significant implications for the basic human rights of older people, not least the right to support and justice.

The voices of older people are absent from some aspects of abuse reporting. For example, the '2012-13 Crime Survey for England and Wales' questionnaire<sup>18</sup> limits its self-completion sections on domestic violence, sexual victimisation and stalking to those aged 16-59 only; no reason is given as to why this might be the case. It may be that, since self-completion takes place on a laptop for privacy, there is an assumption that older people will not be able to use a laptop. Any information from an older person aged 60 or older on these matters, therefore, is not collected.

One of the initiatives arising from the Welsh Government's 'Right to be Safe' strategy was a pilot study focusing on the needs of older victims of abuse. This Access to Justice pilot study<sup>19</sup>, of which the Commissioner was a key supporter, was evaluated in 2012 and recommended that the Welsh Government look more closely at how domestic abuse and adult protection procedures can be better integrated. Since the inception of the Social Services and Well-being Bill the Commissioner has called for statutory guidance that clearly demonstrates the interlinks between the adult protection and safeguarding elements of that Bill and domestic violence legislation, both UK legislation and the any forthcoming domestic abuse legislation in Wales.

The Wales Interim Policy and Procedures for the Protection of Vulnerable Adults helpfully draws attention to the distinctions and overlaps between domestic

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<sup>14</sup> [Domestic Abuse in Wales, Communities and Culture Committee, 2008, 6.1.7, p.12](#)

<sup>15</sup> [Older Women's lifelong experience of domestic violence in Northern Ireland, Changing Ageing Partnership, 2010](#)

<sup>16</sup> McKibben, M. (1988) "Self-neglect: An issue for the battered women's movement" Wisconsin Department of Health and Social Services, USA

<sup>17</sup> [Speltz, K. & Raymond, J. \(2000\) "Elder Abuse, Including Domestic Violence in Later Life" Wisconsin Lawyer; Vol. 73 \(9\); September 2000.](#)

<sup>18</sup> [2012-13 Crime Survey for England and Wales Questionnaire \(from April 2012\), Self-completion module: Domestic violence, sexual victimisation and stalking module, page 205, Section 19](#)

<sup>19</sup> <http://wales.gov.uk/docs/caecd/research/121220accesstojusticeen.pdf>

abuse and adult protection.<sup>20</sup> This guidance needs to be strengthened and built upon, especially in relation to older people, in the Codes of Practice and statutory guidance that accompany both the Social Services and Well-being (Wales) Bill and any Welsh domestic abuse legislation.<sup>21</sup>

The evaluation of the Access to Justice pilot study also identified differences between domestic abuse of younger people and domestic abuse of older people, for example, the fact that older men are at greater risk of being victims of domestic abuse than younger men, or that older people need a different kind of service because their needs and that of their abuser can be complex. It is important that the public and practitioners are made aware of how domestic abuse presents in and affects older people, and images representing older victims of abuse should be shown in publicity campaigns and all publications by the Welsh Government in order to break down stereotypes.

By the end of this financial year, I will have published research – carried out by Aberystwyth University - that highlights where there are ‘gaps’ in the services available to older people who experience. The report will recommend the action that should be taken to fill those gaps.

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- **Older people are not routinely identified as victims of domestic abuse and the Welsh Government must act on the findings of the evaluation of its Access to Justice Pilot Scheme, undertaken in 2012 by Aberystwyth University.**
  - **The Welsh Government must ensure that legislation, Codes of Practice and guidance on domestic abuse and adult protection are better integrated so as to ensure understanding of the differences and overlaps between the two, and how they should work together.**
  - **The Welsh Government must also ensure that its publicity campaigns and publications represent older victims as well as younger victims.**
  - **The Welsh Government should fund work to identify support services that work for older victims of domestic abuse.**
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## Criminal Law

### Wilful Neglect

The recent collapse of a set of cases collectively known as ‘Operation Jasmine’ has caused me to examine the current law on wilful neglect and I have concluded that it is not effective in securing justice for many older victims of abuse and neglect. Despite a seven-year investigation, costing £11.6 million, the Crown Prosecution Service found it

<sup>20</sup> [Wales Interim Policy and Procedures for the Protection of Vulnerable Adults, January 2013, 6.6.5, p.30](#)

<sup>21</sup> <http://wales.gov.uk/about/cabinet/cabinetstatements/2013/evaw/?lang=en>

could not bring charges of wilful neglect in six serious cases that resulted in death because the offence requires the prosecution to prove that an act, or a failure to act, not only amounts to neglect but that the defendant acted with a 'guilty mind'. Even where care is clearly substandard, leading to horrendous injuries and death, this will not equate to a criminal offence unless there is sufficient evidence to prove the 'wilful' element of the offence.

There are several pieces of legislation applicable to the abuse of older people in care homes<sup>22</sup> but this legislation deals only with individual-to-individual offences and does not hold corporate bodies to account. There is further legislation relating to 'care'<sup>23</sup> as well as a plethora of regulations and guidance but the greatest sanction available is to close a care home.

### Extending Wilful Neglect

During its review of adult social care law in 2010/11, the Law Commission highlighted the fact that the law on wilful neglect only applies to mental health patients (Mental Health Act 1983) and those who lack capacity (Mental Capacity Act 2005).<sup>24</sup> In his report into events at the Mid Staffordshire NHS Foundation Trust, Robert Francis Q.C. suggested that wilfully causing death or harm to any patient (regardless of mental health or capacity) should be a criminal offence<sup>25</sup>; the Government agreed that attaching criminal sanctions to key areas of public service delivery would send an important message about the expected standards of care and duty to the public.<sup>26</sup>

In November 2013, the Health Secretary Jeremy Hunt announced that wilful neglect (regardless of mental capacity) will become a criminal offence and that hospital trusts, managers, frontline clinicians and individuals will come under its scope.<sup>27</sup> However, this does not address the barrier faced by the families of the Operation Jasmine victims, namely, proving that neglect or mistreatment was 'wilful'.

Whilst the proposed new law would help protect those who would not be covered by the Mental Health or Mental Capacity Acts, it does not take us much further forward because it is still difficult to prove that a failure to carry out an act (an 'omission') led to injury or death and the need to prove intent, or a 'guilty mind', is problematic.

We must also remember that the nature of care work – high turnover of staff, sometimes untrained staff, sometimes lack of record keeping – can make it difficult to identify a specific 'perpetrator' and so a charge cannot be brought. Staff who do identify poor or dangerous care are often too fearful to speak up or act as a witness

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<sup>22</sup> For example, Offences Against the Person Act 1861, Mental Health Act 1983, Criminal Justice Act 1988, Domestic Violence Crime & Victims Act 2004, Sexual Offences Act 2003 and Mental Capacity Act 2005

<sup>23</sup> Care Standards Act 2000 and Health and Social Care Act 2008

<sup>24</sup> [Adult Social Care report, The Law Commission \(LAW COM No 326\), 2011, 9.142, p.139](#)

<sup>25</sup> [Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Volume 3 \(2013\), 21.93, 22.160 & Recommendation 184, p. 1495](#)

<sup>26</sup> [Patients First and Foremost, 2013, 2.33, p.46](#)

<sup>27</sup> [BBC News, 16 November 2013](#)

because this may well cost them their job – see my reports ‘Raising Concerns in the Workplace’<sup>28</sup> and ‘Whistleblowing in Wales’.<sup>29</sup>

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**The law on wilful neglect, even if extended to those who have capacity, will not overcome the hurdles of a ‘guilty mind’ and intent or the problems of proving an ‘omission’. It has value for the older person seeking access to justice, but limited value.**

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## Corporate Neglect

The owner/director of a care home owes a duty of care to those who choose to live there, or who are placed there by a local authority. Ultimately, the directors or senior management team of an organisation are responsible for ensuring that staff are trained, competent and work in a culture where poor treatment and abuse can be reported and will not be tolerated.

It is my position that if the owner/director/senior management team of a care home neglect to take reasonable steps – whether deliberately or recklessly - to ensure that residents are provided with the level of care they need, and this results in injury or death, they should be prosecuted for corporate neglect as a result of serious management failures resulting in a gross breach of a duty of care.

Since 6 April 2008, the Corporate Manslaughter and Corporate Homicide Act 2007 has aimed to enable more prosecutions to proceed by tackling the difficulties created by the requirement to identify a ‘directing mind’ within the organisation that is guilty of gross negligence manslaughter. This test considers the adequacy of the way in which an organisation’s activities are overseen by its senior managers. A similar offence of corporate neglect, which removes the requirement for a ‘directing mind’, would assist older people in accessing justice because it would remove one of the current barriers to justice for older people who suffer injury or death as the result of neglect in care homes.

Since the criminal law is not devolved to the National Assembly for Wales, there is no scope to amend the Social Services and Well-being (Wales) Bill. However, an amendment to the Care Bill, currently going through the Westminster, could apply to Wales as well as to England.

A new offence of corporate neglect could be inserted after the current s.47 of the Bill whereby the owner/directors/senior management team of a corporate body can be found guilty of a criminal offence if they fail to take reasonable steps – either deliberately or recklessly – to properly manage the organisation’s activities and this leads to neglect which results in a gross breach of a duty of care.

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<sup>28</sup> [‘Raising Concerns in the Workplace’, Older People’s Commissioner, December 2012](#)

<sup>29</sup> [‘Whistleblowing in Wales – a report by Public Concern at Work for the Older People’s Commissioner for Wales](#)

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**A new offence of corporate neglect must be included in the Care Bill (UK Government) because this will address some of the barriers faced by the families of the victims of Operation Jasmine – and by numerous other families – and will send a clear message that those at the top of organisations are responsible for the delivery of safe care to older people.**

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## Hate Crime

Hate incidents and hate crime are acts of violence or hostility directed at people because of who or what they are or who or what someone thinks they are. There is no statutory definition of a crime against an older person and no general statutory offence. The Crown Prosecution Service (CPS) ‘flags’ crimes against older people where there is a relationship and an expectation of trust, e.g. assault or theft by a carer or family member (which could also be domestic abuse), or which are specifically targeted at the older person because they are perceived as being vulnerable or an ‘easy target’ e.g. a distraction burglary or a mugging.<sup>30</sup>

In its helpful policy document ‘Prosecuting Crimes Against Older People’<sup>31</sup>, the CPS recognises the direct link between crimes against older people and prejudice in the form of ageism:

*“We understand that racist crime has a link to racism as a Prejudicial set of ideas; just as sexual crime or domestic violence has a link to sexism and the application of power and control.*

*Some crimes against the older person have a link to ageism as a Prejudicial set of ideas. The CPS acknowledges that ageism may provide the backdrop where crimes against older people are tolerated”.*<sup>32</sup>

Despite this very obvious link being made, no move has been made to recognise this discrimination and provide a statutory definition of a hate crime against someone who has the protected characteristic of age (either older or younger).

The Welsh Government has recently finished consulting on a draft of ‘Tackling Hate Crimes and Incidents: A Framework for Action’.<sup>33</sup> One area the Framework will seek to address is hate crime against older people. The Welsh Government must make the link between such crimes and the underlying discrimination faced by older people on a day to day basis, which enables them to be targeted as a result of stereotyping and general lack of dignity and respect. To do so would be in keeping with the Government’s strategic equality objective of reducing the incidence of all forms of

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<sup>30</sup> [Hate Crime and Crimes Against Older People, Crown Prosecution Service 2012](#)

<sup>31</sup> [Prosecuting crimes against older people policy, undated](#)

<sup>32</sup> [Prosecuting crimes against older people policy, undated, at 3.2](#)

<sup>33</sup> <http://wales.gov.uk/consultations/equality/130711-hate-crime-framework-consul/?lang=en>



violence against women, domestic abuse, 'honour' based violence, hate crime, bullying and elder abuse.<sup>34</sup>

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- **The criminal justice system must recognise more openly the direct and indirect discrimination that older people face at a societal level, as a result of stereotyping and attaching little value to them as human beings.**
  - **Criminal offences carried out against older people because of their age, or perceived age, should be classed in law as a hate crime so that judges can impose tougher sentences under the Criminal Justice Act 2003.**
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## Civil and Public Law

### Breach of Contract (self-funders and top-up fees)

There are a number of older people who fund their own care in care homes as well as families who contribute to a 'top up' fee in order to place their relative in a home of their choosing. In these instances there is a contract between an individual and the care home which is governed by standard contract law. The Office of Fair Trading has produced guidance on unfair terms in care home contracts.<sup>35</sup> Any reasonable person entering into a contract for care would expect that the care provided will be sufficient and safe and that they or their relative should not be exposed to harm or risk of it. However, many older people and their families are reluctant to take action – legal or otherwise - when the care they contracted for is substandard or even dangerous or detrimental.

Older people and their families need much clearer guidance, when entering into such contracts, on how to complain about poor care and what to do when care is so unacceptable that it constitutes breach of contract.

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- **Older people and their families must be informed of, and have access to, civil remedies when things go wrong.**
  - **Independent providers of care who enter into contracts with self-funders and families who pay 'top-up' fees must make certain that the contract terms are very clear before the contract is entered into. People often enter into these contracts during a time of great difficulty or distress.**
  - **Local Authorities and Local Health Boards who commission social care should make families and carers who pay 'top-up' fees aware that they have contractual rights.**
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<sup>34</sup> <http://wales.gov.uk/topics/equality/equalityactatwork/?lang=en>

<sup>35</sup> [Office of Fair Trading guidance on unfair terms in care home contracts, 2003](#)



## Human Rights Act 1998 and self-funders

The Human Rights Act 1998<sup>36</sup> can protect those people who receive care services provided or arranged by local authorities or local health boards. This is because these bodies are public bodies who, under section 6 of the Human Rights Act, are under a duty to act compatibly with the human rights protected by the Act. In the legal case *YL v Birmingham City Council*,<sup>37</sup> the House of Lords held that in providing care and accommodation for residents placed with it by a local authority, a privately owned care home was not performing functions of a public nature within the meaning of the HRA. This means that those who pay for their own care in a private care home are not protected by the Human Rights Act 1998 and cannot bring a claim against the care home for a breach of human rights.

Many older people and older people's organisations are fighting for an amendment to the Care Bill currently being considered by the UK Government so that this gap in the law is closed. This amendment has become known as Clause 48 – see:

<http://www.ageuk.org.uk/home-and-care/campaign-for-better-care/care-in-crisis-blog/dates/2014/1/save-clause-48/>.

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- **Protection under the Human Rights Act 1998 should be extended to self-funders because the human rights of anyone receiving some kind of social care must be upheld and this is a matter of importance to society and not just the individual.**
  - **Independent providers of care in Wales, as regulated bodies, should be accountable for the extent to which they uphold the human rights of older people.**
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## Personal Injury

There are times when the care given to older people is unacceptably poor and, sadly, they may be injured as a result of negligence. Typically, personal injury claims are brought in relation to injuries caused by pressure ulcers and pressure sores, medication errors, and fractures from falls or handling errors. Legal advice needs to be sought when considering a personal injury claim.

Whilst I would not want us to live develop a litigious culture of care in Wales, there may be times when the only way to get across the message that negligent or dangerous care will not be tolerated is to bring such legal action.

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<sup>36</sup> [Human Rights Act 1998](#)

<sup>37</sup> [YL v Birmingham City Council \[2007\] UKHL 27](#), see <http://www.bailii.org/uk/cases/UKHL/2007/27.html>

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- **Older people and their families must be informed of, and have access to, civil remedies when things go wrong.**
  - **Care providers owe a duty of care to those they offer a service to. If that duty of care is breached, and this results in injury to the body, mind or emotions, an older person or their family may bring a personal injury claim. Older people and their families have as much right as anyone to bring a personal injury claim.**
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## Conclusion

This paper does not cover everything to do with older people, safeguarding, protection, domestic abuse and access to justice. What it does do is illustrate that there is far more to the subject than is encompassed in the term 'elder abuse'. In order to really tackle the abuse older people experience, and the barriers they may face in accessing support and justice, we need to take a more nuanced look at how various aspects of abuse overlap with each other and where they are distinct.

Abuse or mistreatment of older people should not be looked at in isolation from other work that is done to help and support people generally. Instead, we should carefully consider whether older people's needs are being met through generic services and identify what specific issues need to be addressed so that they are not disadvantaged.

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**Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.**

UN Principles for Older Persons, Principle 17

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# Older People's Commissioner for Wales Comisiynydd Pobl Hŷn Cymru

## The Older People's Commissioner for Wales

The Older People's Commissioner for Wales is an independent voice and champion for older people across Wales, standing up and speaking out on their behalf.

The Commissioner and her team work to ensure that older people have a voice that is heard, that they have choice and control, that they don't feel isolated or discriminated against and that they receive the support and services that they need.

The Commissioner and her team work to ensure that Wales is a good place to grow older – not just for some but for everyone.

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