

# Protecting our Older People in Northern Ireland

A Call for Adult Safeguarding Legislation

| June 2014 |



**C O P N I**

Commissioner for Older People  
for Northern Ireland



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# Commissioner's Foreword

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In my Corporate Plan, “Hope, Confidence, Certainty,” I committed to undertaking a review of the adequacy and effectiveness of law and policy in relation to older people so that they are better protected from a range of different types of abuse, including physical, emotional, sexual and financial abuse.

The Northern Ireland Adult Safeguarding Partnership (NIASP) has reported an increase in the number of cases of alleged abuse of older people, rising from 1715 in 2011-2012, to 3023 in 2013-14, marking a worrying trend.

This recent increase in the number of referrals and the feedback I received through extensive engagement with older people and older people’s organisations, who expressed concern and anger about the abuse of older people, convinced me that there was a lack of legal protection available to older people who experience abuse.

As Commissioner for Older People, it is my responsibility to safeguard and promote the interests of older people, and so I commissioned a review of existing legislation in Northern Ireland in relation to protection for older people from abuse.

My review identified clear gaps in the legislation which mean that there are some areas in which older people are not adequately protected from abuse. At present, the legislation is disjointed, and draws on several different laws, and whilst it offers protection to individuals who have been deemed to lack mental capacity, those with mental capacity are not afforded the same protections from abuse. This is compared to England, Scotland and Wales, all of which have dedicated adult safeguarding legislation.

This report makes recommendations to Government which, taken together, culminate in a call for a single Adult Safeguarding Bill to be introduced to better protect older people in Northern Ireland. Older people in Northern Ireland must have confidence that they will be supported and protected. I am calling on the Minister of Health, Social Services and Public Safety and the Minister of Justice to introduce legislation which will give older people the certainty they need and deserve.

I would like to thank all the older people and the wide range of individuals and organisations from across the statutory, community, voluntary and independent sectors as well as the legal and academic professions who contributed to this report. All of these individuals and groups have been enthusiastic in giving their advice, support and direction, as well as the benefit of their experience throughout the development of this report which I hope will form the basis of future legislation that will ensure older people in Northern Ireland are better protected from abuse.

A handwritten signature in black ink, which appears to read 'Claire Keatinge'.

**Claire Keatinge**

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# Editor's Note

by Professor John Williams, Head of Department, Law and Criminology at Aberystwyth University

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Elder abuse is a disturbing feature of modern life. Sadly, it has been with us as long as child abuse and domestic violence. However, there is now a growing awareness that it happens, in part because of the publicity given to high profile cases in institutional settings. We are slowly moving away from the stage of denial. It is disturbing to learn that in some places where older people are supposed to be safe, they are subjected to appalling abuse. Of course abuse is not confined to institutional settings. Older people are abused in their own homes. Such abuse takes many forms. It may be physical, sexual, psychological or wilful neglect. Financial abuse is a major area of concern. Sometimes the sum of money involved may appear small, but for a person living on a pension, the loss of that money may involve choosing between heating their homes and having a balanced diet. In other cases it may involve the older person being cheated out of their life savings or their home.

The question is asked – why do we need a special law designed to protect older people who have been abused or are at risk of abuse? Why can't the everyday laws be used to protect them? There are laws designed to protect *everybody* from harm. It may be the criminal law or there may be civil law that can be used. It is important that these are used in appropriate cases; older people are entitled to justice in the same way as everybody else. However, those agencies and organisations responsible for safeguarding and protecting older people need additional powers to ensure that they can intervene to investigate possible cases of elder abuse, and also provide immediate protection when necessary. It is essential that the law clarifies the roles, responsibilities and duties of those agencies and organizations, otherwise cases are missed. What is proposed in this report does not just apply to older people who are at risk; it all applies to all adults who may be at risk as result of disability or illness.

Any law proposing powers of intervention in the lives of older people at risk must be compliant with the European Convention on Human Rights. A number of rights are engaged as the justification for such a law. Articles 2 and 3 of the Convention guarantee the right to have life protected and the right to live free of inhuman and degrading treatment. These are absolute rights and the state has a positive duty to ensure that *all* people enjoy those rights. Article 5 provides for the right to liberty. Only in very limited circumstances and with essential safeguards, is it acceptable to deprive an older person of their liberty in their own home or in an institutional setting. The Article 8 right to private life, family life, home and correspondence is important as it protects the right to autonomy and the right of older people to live the way they want to live.

Any law on the protection of older people at risk must perform a careful balancing act between the protection of the person and respecting their right to autonomy. We do not want a law that is itself abusive and completely indifferent to the person's right to decide. Thus any law must be carefully drafted, include essential safeguards and at all times be proportionate in its scope and application. This is a big challenge for those charged with drafting and enacting legislation.

However, it can be done. The Adult Support and Protection (Scotland) Act 2007, with its significant powers of intervention, includes essential safeguards. The powers of intervention have not resulted in their widespread use; rather it has resulted in more preventative work. The ultimate aim of any legislation is not the extensive use of powers in response to allegations of abuse, but rather the need to change attitudes and challenge ageist assumptions.

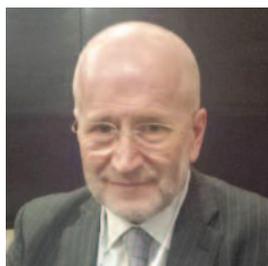
The other European Convention right that needs to be emphasised is the article 6 right to a fair hearing – the right of *all* people to receive justice. Many victims of elder abuse do not receive justice. More welfare support in response to abuse may be helpful and necessary, but it is not justice and it does not always ensure that the abuse stops. Older people deserve justice as well as being safe from further abuse. What they consider to be justice will of course vary given the dynamics of many cases of elder abuse. However, there needs to be a sense that the law is there to protect them.

The proposals made in this report address both the need for a law on protecting adults at risk and the need to ensure that such a law is not disproportionate and includes safeguards.

The case for a properly formulated law is compelling if we are to eradicate elder abuse. Practitioners working in this area need a statutory framework which identifies the parameters within which they can work. Older people at risk of, or are experiencing abuse need the protection of a carefully designed law that helps ensure that they live in a safe and supportive environment free of abuse



### **Professor John Williams**



*John Williams is a Professor of Law at Aberystwyth University. He is the author of many papers and books including “Protection of older people in Wales: a guide to the Law,” published by the Older People’s Commissioner for Wales.*

*In May 2012, he was appointed to the United Nations Panel of experts advising on international human rights and older people. He was the legislative advisor to the National Assembly of Wales on the Social Services and Well-being Act 2014 and is currently a member of the Welsh Government’s Safeguarding Advisory Panel. He is a member of the working group advising the Welsh Government on a Declaration of Rights of Older People in Wales. John is a trustee of Age Ceredigion and Age Scotland.*

# Background

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## Safeguarding Older People - A Priority for Action in “Hope, Confidence & Certainty”

When the Commissioner for Older People for Northern Ireland undertook widespread engagement with older people in order to establish her priorities for action in her inaugural Corporate Plan, older people and older peoples’ groups raised concerns and anger about the abuse of older people.

When the Commissioner’s office looked at the statistics it became clear that there has been a rise in the number of reported incidences of alleged abuse against older people from individuals to Health and Social Care Trusts. This finding is compounded by statistics from the Northern Ireland Safeguarding Partnership (NIASP) which reported a marked increase in reports of alleged abuse of older people, increasing from 1715 in 2011-12 to 3023 in 2013-14<sup>1</sup> in Northern Ireland.

## What is Abuse?

The World Health Organisation (WHO) (2002) defines elder abuse as: *“a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person or violates their human and civil rights.”*<sup>2</sup>

Older people can be abused in many ways, the five most common forms of abuse as stated by Action on Elder Abuse are: physical, psychological, financial, sexual abuse and neglect.<sup>3</sup> In more recent years, reports of “institutional abuse” have been rising in the UK. This kind of abuse or harm takes within a hospital or care home setting.

## Adult Safeguarding

Safeguarding adults is about working “to enable an adult to retain independence, wellbeing and choice and to access their human right to live a life that is free from abuse and neglect.”<sup>4</sup>

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1 Annual Adult Safeguarding Report 2013-14 – Health and Social Care Board

2 <http://www.elderabuse.org.uk/Mainpages/Abuse/abuse.html>

3 <http://www.elderabuse.org.uk/Mainpages/Abuse/abuse.html>

4 <http://www.elderabuse.org.uk/Documents/Other%20Orgs/ADASS%20guide%20-%20SAFEGUARDING%20ADULTS.pdf>

# Human Rights and Safeguarding Older People

## (by Professor John Williams)

Human rights are possessed by everyone and require the state to treat everyone appropriately, openly and fairly. They also require protection from other individuals who unjustly interfere with another person's rights.

Human rights are relevant to the abuse of older people in two ways:

1. Abuse of a human right may constitute abuse of an older person.
2. Human rights require the state to take necessary action to prevent abuse, wherever it happens and to respond to it appropriately.

The European Convention on Human Rights (ECHR) contains a number of rights that are relevant to the abuse of older people:

**Article 2:** “Everyone's right to life shall be protected by law.”

**Article 3:** “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

**Article 5:** “Everyone has the right to liberty and security of person.”

**Article 6:** “...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

**Article 8:** “Everyone has the right to respect for his private and family life, his home and his correspondence.”

**Article 9:** “Everyone has the right to freedom of thought, conscience and religion.”

**Article 10:** “Everyone has the right to freedom of expression.”

**Article 14:** “The enjoyment of the rights and freedoms shall be secured without discrimination on any ground...”

## Use of Case Studies

Anonymised case studies from the Commissioner's office are used in this report to add context where appropriate and to demonstrate how proposed recommendations could benefit older people at risk of abuse or harm. Each case study has been anonymised.

# Executive Summary

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## The Commissioner's role and powers

1. When older people experience abuse or are at risk of abuse they must be confident that the law can adequately protect them.
2. The Commissioner has unique powers and duties that are set out in the Commissioner for Older People Act (Northern Ireland) 2011.<sup>5</sup> In her inaugural Corporate Plan, 'Hope, Confidence and Certainty', the Commissioner set as one of her priorities "*to undertake a review of the adequacy and effectiveness of the law so that older people are better protected from abuse.*"
3. The Commissioner feels there is ambiguity regarding the law in relation to abuse that currently exists. This results in confusion for older people and for those caring for older people, including friends and family. The law needs to be clear, easy to understand, reflect equality and human rights legislation and must be proportionate regarding the right of autonomy and the right to be protected.
4. The Commissioner recognises that new legislation by itself will not protect older people from harm or abuse; however, the purpose of this report is to review legislation and guidance specifically and to make recommendations specific to this particular area.
5. It should be emphasised that the existence of a statutory power does not automatically mean that it has to be used. Powers underpinned by legislation need only be used in specific circumstances and any use of legislation should be proportionate and appropriate. It is essential and assumed that any new legislation is accompanied by adequate guidance, training and resources for effective implementation.
6. This report's focus is on the abuse and harm of older people and the interventions required to protect this group of people. It is acknowledged that the research undertaken and recommendations made will apply to adults of all ages, including older people.

## Context

7. Within the Northern Ireland Executive's 'Programme for Government 2011-15,' there is a commitment from the Northern Ireland Assembly to "*introduce a package of measures aimed at improving Safeguarding Outcomes for Children and Vulnerable Adults.*"<sup>6</sup> To deliver on this commitment the Executive will need to strike a balance between protection, prevention, human rights and the law.

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<sup>6</sup> <http://www.northernireland.gov.uk/pfg-2011-2015-final-report.pdf>

8. The term ‘vulnerable adult’ covers a wide range of people; the bill being proposed by the Commissioner would apply to **all** adults, who are classed as being ‘adults at risk’ of harm or abuse. The Commissioner’s statutory remit is confined to older people and focuses on reviewing the adequacy of the law in Northern Ireland relating to older people.
9. In Northern Ireland, older people are still not afforded ‘adequate’ legislative protection from potential abuse and consequently may not obtain justice. **All** older people should be protected from abuse or harm. New adult safeguarding legislation would assist in providing better protection. There is a disparity of protection within existing legislation for older people with mental capacity and those who are assessed as having “*a lack of mental capacity.*”<sup>7</sup>
10. A lack of mental capacity is defined by the Mental Capacity Act 2005 is as follows;; “*a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*”
11. For older people with mental illnesses, including dementia, there is a higher level of protection afforded through the Mental Health NI Order 1986. In addition, the emerging draft Mental Capacity Bill for Northern Ireland will provide increased protection for older people who lack mental capacity.
12. Older people who have the mental capacity to make decisions but are under coercion from people with whom they have a relationship of trust or dependence can be particularly at risk of abuse. Currently there is no specific legal protection available for older people falling into this category and the recommendations made in this report focus particularly on addressing this gap and improving legislative protection to **all** older people ‘at risk’ of harm or abuse.
13. The Northern Ireland Adult Safeguarding Partnership (NIASP) has reported an increase in the number of referrals of alleged abuse of older people in Northern Ireland - rising from 1715 in 2011-12 to 3023 in 2013-14.<sup>8</sup> This shows a marked increase in alleged abuse against older people.
14. The impact that harm and abuse can have on older people is significant. An older person at risk of harm or abuse can experience intimidation, fear and social isolation alongside devastating physical and mental injuries if abuse or harm occurs.
15. The Commissioner sought research and advice from a consortium of academics and practitioners from Queen’s University Belfast (QUB) and the University of Ulster (UU) and has engaged with professionals involved in adult safeguarding and organisations working with older people across Northern Ireland. The report submitted by the research team to the Commissioner identified a disjointed array of legislation currently in use in adult protection cases.

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7 At the time of drafting the draft Mental Capacity Bill was at public consultation phase. The Bill includes both general safeguards to include best interests and additional safeguards for serious interventions.

8 Annual Adult Safeguarding Report 2013-14 – Health and Social Care Board

16. Professionals involved in adult safeguarding and organisations working with older people are also calling for better and clearer protection for older people and legislation to provide clarity in a number of areas including statutory definitions, duties and powers.<sup>9</sup>
17. The Commissioner is concerned at the disjointed nature of the legislation to protect older people and by the lack of specific safeguarding legislation for older people at risk of harm or abuse in Northern Ireland.
18. Following on from the expert research and substantial engagement with representatives from across health, social care, the legal professions, the PSNI and older people's organisations, the Commissioner is now calling for better and clearer protection for older people in the form of a single Adult Safeguarding Bill for Northern Ireland.
19. The Commissioner recommends that this new Bill should provide clarity in terms of definitions, duties and powers for older people, their friends and families, as well as professionals who work with older people.
20. England, Scotland and Wales have legislation in place at this time, although each of the three have adopted a different approach. The Adult Support and Protection Act has been in place in Scotland since 2007. The Care Bill 2014 received Royal Assent on 14th May 2014 and is now an Act of Parliament in England<sup>10</sup> and the Social Services and Wellbeing Act 2014 has recently been enacted in Wales.<sup>11</sup>

## Summary of recommendations

21. The Commissioner for Older People is calling for the introduction of a single Adult Safeguarding Bill for Northern Ireland which will provide clarity in terms of definitions, duties and powers for all those working to safeguard older people. These proposed duties and powers would apply to all employees and organisations that are listed under the specified 'relevant organisations,' which should be outlined in future legislation.
22. The **definitions** used currently in adult safeguarding in Northern Ireland are unclear. A clear definition is required in terms of:

### 1. A "person who is at risk"

Creating a single, clear and easy to understand definition of a person **'at risk of harm or abuse'** in statute is a critical first step. A clear definition will also help practitioners in their role by assisting them in the exercise of their professional judgement in complex circumstances. Robust and detailed guidance alongside a clear definition will also be required and should be underpinned by statute.

### 2. The "abuse or harm" – i.e; what they are at risk of;

A clear definition of **'harm or abuse'** as well as supporting guidance is also essential.

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9 Practitioners also emphasised the need for the same vetting and training obligations for working with adults as are required for childcare.

10 The Care Act 2014 received Royal Assent on 14th May 2014.

11 The Social Services and Wellbeing Act 2014 received Royal Assent on 1st May 2014.

### 3. What constitutes “financial abuse”

A clear and unambiguous definition of **‘financial abuse’** is also required. Reports of alleged financial abuse are rising in relation to older people. A specific legislative reference to financial abuse in new legislation will help support better recognition and identification of instances when financial abuse is occurring.

23. An **adult safeguarding board** empowered by statute should be created to act as an oversight body to protect older people at risk of harm or abuse. It would be a matter for this board to hold the relevant membership organisations to account. It is expected that “relevant organisations” would include all statutory, community and voluntary organisations working with older people.
  24. Placing specific statutory **duties** on people who work with older people who are at risk of harm or abuse is required. These duties should apply to all relevant organisations working with older people, including the police, health and social care practitioners and care workers across all statutory, community and voluntary organisations.
    1. A **duty to report** any suspected cases of abuse or harm should be placed on all identified relevant organisations.
    2. A **duty** for the ‘most appropriate organisation **to make enquiries or conduct investigations** when a referral is received.’ The most appropriate organisation to make the enquiry or conduct the investigation should be determined on a case by case basis. There should also be a requirement to fulfill this designated duty in a timely fashion and to complete specific stages of enquiry or investigation, which should be outlined by accompanying guidance.
    3. All relevant organisations working with older people at risk of harm or abuse should also be bound by **a duty to provide appropriate services**. ‘Appropriate services’ here would include services such as advocacy.
    4. Throughout the safeguarding process, all relevant organisations should be bound by a legislative **duty to cooperate** with each other in order to best protect an older person at risk of harm or abuse.
  25. Specific **powers** within new legislation to protect older people at risk are required. The Commissioner recognises that these would be used only with appropriate safeguards in place.
  26. The **power of access** to a private home or residence **for the purposes of conducting a private interview** where access is not available should be implemented. ‘Reasonable cause’ here could be tested through an application to a District Judge and only if exercising the power would not result in the older person being at greater risk of harm or abuse. This power would allow for an independent assessment of a person’s situation. Further to this, safeguarding needs to take place in the absence of the suspected ‘abuser.’
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27. The Commissioner recommends that there is **protection from civil liability for those people making a report of suspected abuse**. There should be additional support and encouragement for professionals who whistleblow so that they feel adequately protected when reporting allegations of suspected abuse.

### Issues for further consideration

28. The Commissioner requests Ministerial consideration of a **power of removal** of the individual at risk and the **power to ban** a suspected 'abuser.' England and Wales have considered these powers and Scotland has implemented these powers within the *Adult Support and Protection Act 2007*. Further consideration of these powers for Northern Ireland at this time would gauge public and political opinion.
29. The Commissioner is requesting further consideration of the **power to access financial records** in Northern Ireland. This power is in place in Scotland but not in England and Wales. The Commissioner advises that an immediate campaign be undertaken to highlight the signs of financial abuse and the impact it has on older people across all financial institutions so that reporting and investigation of complaints of alleged financial abuse is actively encouraged.
30. The Commissioner requests further consideration on the introduction of a **specific criminal charge of elder abuse** where someone commits a crime against an older person by way of their action or neglect. It is thought that this may act as a deterrent to perpetrators of abuse or harm. There is currently no specific criminal charge of 'elder abuse' in England, Scotland and Wales but there is a campaign by Action on Elder Abuse to introduce this charge in England.<sup>12</sup>
31. The Commissioner requests further consideration of a **specific criminal charge of 'corporate neglect.'** The introduction of such a charge would mean that any organisation whose employees are found to have committed abuse or neglect of an older person could be liable for the actions of that employee.

### Conclusion

32. It is essential that older people are protected from abuse by the law. A single Adult Safeguarding Bill would introduce a statutory duty on all identified relevant organisations to work together to protect older people and help safeguarding practitioners to investigate the risk to individuals. Future legislation would ensure that Northern Ireland has a clear and defined legislative position on which to further develop good practice in the area of adult safeguarding.
33. Legislation by itself will not comprehensively protect older people from abuse. Detailed guidance, training and resources, as well as a public awareness campaign with the commitment of the public and relevant organisations to work together will ensure improved protection for older people from harm or abuse.
34. The Commissioner for Older People for Northern Ireland recommends that adult safeguarding legislation is enacted at the earliest possible opportunity and that public consultation on the additional areas for consideration, as outlined in this report, is undertaken.

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<sup>12</sup> [http://www.elderabuse.org.uk/Mainpages/Aboutus/aboutus\\_campaigns.html](http://www.elderabuse.org.uk/Mainpages/Aboutus/aboutus_campaigns.html)

# Commissioner's recommendations for an Adult Safeguarding Bill

## Definitions:

- A clear and easy to understand definition of an 'adult at risk.'
- An enhanced definition of 'abuse or harm.'
- A clear definition of financial abuse.

## Oversight:

- An adult safeguarding board on a statutory footing.

## Duties:

- A duty on identified relevant organisations to report suspected abuse or harm to the appropriate body.
- A duty on the most appropriate organisation to make enquiries or conduct investigations once a report or referral is made.
- A duty to provide appropriate services to an 'adult at risk.'
- A duty to cooperate with each other in safeguarding cases.

## Powers:

- A power of access to an individual believed to be at risk of harm or abuse for the purpose of conducting a private interview.

## Protection:

- Protection from civil liability for those making a report.

## Further consideration should be given to whether or not an Adult Safeguarding Bill should include:

- A power to remove an individual at risk.
- A power to ban a suspected 'abuser' from contacting the specified individual or attending a particular location.
- A power to access financial records.
- A specific criminal charge of 'elder abuse.'
- A specific criminal charge of 'corporate neglect.'

# 1.0 Context

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- 1.1 Protection for older people at risk of abuse is essential. The rate of reported incidences of alleged abuse against older people is increasing in Northern Ireland. The Northern Ireland Adult Safeguarding Partnership (NIASP) has reported a year on year increase in the number of referrals of alleged abuse of older people rising from 1715 in 2011-12 to 3023 in 2013-14.<sup>13</sup> This shows a marked increase in alleged abuse against older people. For the previous year, 2013-14, 39% of all regional referrals were in relation to older people.<sup>14</sup> Harm and abuse can have a significant impact on older people. An older person at risk of harm or abuse can experience intimidation, fear and social isolation, alongside devastating physical and mental impacts if abuse or harm occurs.
- 1.2 Abuse can occur through someone's actions towards an individual or through the neglect of an individual. Abuse against older people often occurs within a relationship of trust or dependence. There are many forms of abuse; it can be physical, psychological, financial, sexual or through neglect.
- 1.3 The Commissioner has committed to examining existing adult protection legislation and its adequacy in relation to older people as a key priority for action in her Corporate Plan, 'Hope, Confidence and Certainty' 2013-2015.
- 1.4 The Commissioner for Older People (Northern Ireland) Act 2011 places a legislative duty on the Commissioner to *"encourage best practice in the treatment of older people"* and the power to *"make representations to relevant authorities about matters concerning the interests of older people."*
- 1.5 Engagement with older people has highlighted a lack of knowledge about how the law protects them from abuse. There is also confusion about what happens if concerns about abuse are reported. This is reflected in the issues which are brought to the Commissioner's attention via her legal team.
- 1.6 In order to inform the basis for this report, a cross-functional team from Queen's University Belfast (QUB) and the University of Ulster (UU) completed a review of the existing adult safeguarding framework in Northern Ireland, the United Kingdom (UK), the Republic of Ireland, America and Australia.
- 1.7 The research report emphasises that Northern Ireland is the only country in the UK which does not have specific adult safeguarding legislation. The Adult Support and Protection Act 2007 is in place in Scotland and the Social Services and Well-being Act 2014 has recently been passed by the Welsh Assembly. The Care Act 2014 received Royal Assent on the 14th May 2014 and is now an Act of Parliament in England.

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<sup>13</sup> Annual Adult Safeguarding Report 2013-14 – Health and Social Care Board

<sup>14</sup> Ibid



- 1.8 The academic research, as well as a range of additional discussions with adult safeguarding professionals and organisations working with older people, has convinced the Commissioner of the need for urgent action to ensure that all older people at risk of harm or abuse are better protected.
- 1.9 Within the Northern Ireland Executive's 'Programme for Government 2011-15' there is a commitment from the Northern Ireland Executive to "*introduce a package of measures aimed at improving Safeguarding Outcomes for Children and Vulnerable Adults.*"<sup>15</sup> How the Executive delivers on this commitment to safeguard vulnerable adults must strike a balance between protection, prevention, human rights - in particular dignity, autonomy and safety - and the law.
- 1.10 Whilst the Commissioner's statutory remit is confined to older people and focuses on reviewing the adequacy of the law in Northern Ireland relating to older people, this report and its recommendations should apply to adults of all ages in need of protection.

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<sup>15</sup> <http://www.northernireland.gov.uk/pfg-2011-2015-final-report.pdf>

## Current Position in Northern Ireland

- 1.11 The NIASP was established in 2010. It was put in place to “*determine the strategy for safeguarding vulnerable adults, develop and disseminate guidance and operational policies and procedures, monitor trends and outcomes, and evaluate the effectiveness of partnership arrangements.*”<sup>16</sup> It is not currently underpinned by statute. Within this partnership, there are Local Adult Safeguarding Partnerships (LASPs) in each Health and Social Trust area.
- 1.12 The Department for Health, Social Services and Public Safety (DHSSPS) and the Department of Justice (DOJ) are in the process of developing a new adult safeguarding policy. The Commissioner has been working in partnership with the departments to share the progress and direction of this report. It is anticipated that the Commissioner’s legislative recommendations will support the development of the new policy direction emerging from the departments.
- 1.13 There are currently various pieces of legislation in Northern Ireland that practitioners make use of to safeguard older people at risk of abuse or harm. These include:
- the Family Homes and Domestic Violence (Northern Ireland) Order 1998;
  - the Criminal Law Act (Northern Ireland) 1967;
  - the Terrorism Act 2000.
- Whilst safeguarding professionals can make effective use of existing legislation, the legislative intent for two of these pieces of legislation was not to safeguard.
- 1.14 In Northern Ireland older people are still not afforded ‘adequate’ legislative protection from potential abuse and consequently may not obtain justice. **All** older people should be protected from abuse or harm. Improving legislation would assist in providing better protection. There is a disparity of protection within existing legislation for older people with mental capacity and those assessed as having a lack of mental capacity.
- 1.15 A lack of mental capacity is defined by the Mental Capacity Act 2005 is as follows; “*a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*”
- 1.16 For older people with mental illnesses, including dementia, there is a higher level of protection afforded through the Mental Health NI Order 1986. In addition, the emerging draft Mental Capacity Bill will provide additional protection for older people who lack mental capacity.
- 1.17 Older people who have the mental capacity to make decisions but are under coercion from people with whom they have a relationship of trust or dependence can be particularly at risk of abuse. Currently there is no specific legal protection available for older people falling into this category and the recommendations made in this report focus particularly on addressing this gap and improving legislative protection to **all** older people at risk of harm or abuse.

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<sup>16</sup> <http://www.hscboard.hscni.net/publications/2012/20120905%20September%202012%20-%20NI%20Adult%20Safeguarding%20Partnership%20-%20Annual%20Report%202011-2012%20-%20PDF%20338KB.pdf>

# 2.0 Definitions

## Definitions:

- **A clear and easy to understand definition of an ‘adult at risk.’**
- **An enhanced definition of ‘abuse or harm.’**

## 2.1 A clear and easy to understand definition of an ‘adult at risk’

### Issue

- 2.1.1 Definitions of a ‘vulnerable adult’ vary in Northern Ireland. There is no agreed definition in specific legislation to safeguard adults. The main definition used is from the Safeguarding Vulnerable Adults: Regional Adult Protection and Policy Procedural Guidance, 2006.<sup>17</sup> This describes a vulnerable adult as an individual who is *“in need of community care services or is resident in a continuing care facility...who may be unable to protect themselves from harm or exploitation.”* It is not clear what encompasses community care services. This definition creates confusion and means that individual interpretations vary.
- 2.1.2 Legislation in England, Scotland and Wales contains updated definitions; the definition of a ‘vulnerable adult’ has been replaced by a definition of ‘an adult at risk.’
- 2.1.3 It is acknowledged that the emerging adult safeguarding policy from DHSSPS and DOJ will consider a new definition which defines a person *‘at risk of harm.’*

### Recommendation

- 2.1.4 New adult safeguarding legislation in Northern Ireland should consider the ‘adult at risk’ approach. The legislation should be clear and easy to understand. It should also state the specific criteria to be met and additional guidance should be provided to assist those using the definition.

### How this recommendation could better protect older people at risk

- 2.1.5 A clear and well constructed definition will help support better recognition of harm and abuse in safeguarding practice. It should also support a more consistent response by the various professionals involved in adult safeguarding cases and the quick and accurate identification of older people at risk of harm or abuse.

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<sup>17</sup> ‘Safeguarding Vulnerable Adults: Regional Adult Protection & Policy Procedural Guidance’, (HSCB, 2006), p.10.

## 2.2 An enhanced definition of ‘abuse or harm’

### Issue

- 2.2.1 There is no agreed definition of ‘abuse or harm’ in statute. The main definition of abuse used in Northern Ireland is the definition as stated in the Safeguarding Vulnerable Adults Policy and Procedural Guidance 2006.<sup>18</sup> This definition does not make the connection that a breach of human rights to an ‘adult at risk’ is ‘abuse.’
- 2.2.2 A definition of ‘abuse or harm’ with a focus on human rights would update the definition in line with good practice and legislation in place in other countries. England and Wales have adopted a definition of ‘abuse’ that includes human rights references in legislation for safeguarding adults.<sup>19</sup>
- 2.2.3 Scotland’s legislation differs from the other parts of the UK countries as the definition of ‘harm’ is also included in recently amended adult safeguarding legislation. This is a wide ranging definition which includes self harm. It is not yet clear whether ‘self harm’ will be included in a revised definition of ‘abuse or harm’ for Northern Ireland and it is a matter which would merit further discussion and consideration in the advancement of any new legislation.
- 2.2.4 Article 8 of the European Convention on Human Rights (ECHR) gives the right *‘to respect for his private and family life, his home and his correspondence.’* Private life includes the right to decide for oneself, dignity and respect, the right to make what others may think are ‘unwise or eccentric decisions,’ and the right to refuse medical treatment. Under this Article, self harm could be argued to be an individual’s human right.
- 2.2.5 It is understood that the expected adult safeguarding policy from DHSSPS and the DoJ may include a definition of ‘abuse’ which follows the World Health Organisation’s (WHO) direction. The WHO (2002) defines elder abuse as: *“A single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person or violates their human and civil rights.”*<sup>20</sup>

### Recommendation

- 2.2.6 The Commissioner recommends that the need for a clear definition should extend to clarity on the terms ‘abuse or harm’ and should reflect the definition used by the WHO. Alongside the enhanced definition, appropriate guidance will be required to clearly state the parameters of abuse or harm and the appropriate actions to be taken.

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18 <http://www.hscboard.hscni.net/publications/LegacyBoards/001%20Regional%20Adult%20Protection%20Policy%20and%20Procedural%20Guidance%202006%20-%20PDF%20249KB.pdf>

19 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/194272/No\\_secrets\\_\\_guidance\\_on\\_developing\\_and\\_implementing\\_multiagency\\_policies\\_and\\_procedures\\_to\\_protect\\_vulnerable\\_adults\\_from\\_abuse.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/194272/No_secrets__guidance_on_developing_and_implementing_multiagency_policies_and_procedures_to_protect_vulnerable_adults_from_abuse.pdf)

20 [http://www.who.int/ageing/projects/elder\\_abuse/en/](http://www.who.int/ageing/projects/elder_abuse/en/)

## How this recommendation could better protect older people at risk

- 2.2.7 An enhanced definition of ‘abuse or harm’ will help support better recognition of harm and abuse in safeguarding practice. It should also support a more consistent response by the various professionals involved in adult safeguarding cases and the quick and accurate identification of older people at risk of harm or abuse so that steps can be taken to better protect them.

## 2.3 A distinct and clear definition of financial abuse

### Issue

- 2.3.1 NIASP has reported financial abuse as the second highest recorded form of abuse in Northern Ireland, after physical abuse. Incidences of financial abuse in Northern Ireland are increasing, rising from 498 referrals of financial abuse relating to older people in 2012-13<sup>21</sup> to 598 in 2013-14.<sup>22</sup>
- 2.3.2 The definition of abuse used in Northern Ireland (the existing 2006 guidance) does include a sub-definition of financial abuse.<sup>23</sup> This definition is not, however, supported by existing legislation. New legislation should directly reference financial abuse.
- 2.3.3 General criminal law, including the Fraud Act 2006<sup>24</sup> provides protection for adults or older people when financial abuse is suspected to reach the threshold of a ‘criminal offence.’ Alleged cases of financial abuse are being reported more frequently and the occurrence of abuse against older people is rising.

### Recommendation

- 2.3.4 The Commissioner is recommending that a clear reference to financial abuse is included in any future adult safeguarding bill. Guidance alongside legislation should provide practical examples of financial abuse and enhance and strengthen the definition.

## How this recommendation could better protect older people at risk

- 2.3.5 A specific legislative reference to financial abuse in new legislation will help support better recognition and identification of instances when financial abuse is occurring. This will support those working with older people to take appropriate action. It would also assist identified relevant organisations to intervene and investigate complaints of financial abuse at an earlier stage.

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21 <http://www.hscboard.hscni.net/NIASP/Publications/Annual%20report%202012%20-%2013%20-%20PDF%20591KB.pdf>

22 Annual Adult Safeguarding Report 2013-14 – Health and Social Care Board

23 <http://www.hscboard.hscni.net/publications/LegacyBoards/001%20Regional%20Adult%20Protection%20Policy%20and%20Procedural%20Guidance%202006%20-%20PDF%20249KB.pdf>

24 <http://www.legislation.gov.uk/ukpga/2006/35/contents>



## 3.0 A Statutory Oversight Board

### Oversight:

- **An adult safeguarding board on a statutory footing.**

- 3.1 An **adult safeguarding board** empowered by statute should be created to act as an oversight body to protect older people at risk of harm or abuse. It would be a matter for this board to hold the relevant membership organisations to account. It is expected that 'relevant organisations' would include all statutory, community and voluntary organisations working with older people.
- 3.2 This board could have a similar framework to that of the Safeguarding Board for Children in Northern Ireland which was set up in 2011 under the *Safeguarding Board Act*.<sup>25</sup> An oversight board would help to ensure that the appropriate bodies are fulfilling their duties to safeguard adults at risk of abuse or harm.

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<sup>25</sup> <http://www.legislation.gov.uk/nia/2011/7/contents>

# 4.0 Duties

## Duties:

- **A duty on relevant organisations to report suspected abuse or harm to the appropriate body.**
- **A duty on the most appropriate organisation to make enquiries or conduct investigations once a report or referral is made.**
- **A duty to provide appropriate services to an ‘adult at risk.’**
- **A duty to cooperate with each other in safeguarding cases.**

## 4.1 A duty on all relevant organisations to report suspected cases of abuse or harm to the appropriate body

### Issue

- 4.1.1 The legislation which exists in Northern Ireland does not include a duty on all employees and relevant organisations that work with older people to report suspected cases of abuse or harm.
- 4.1.2 The Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 places a duty on registered health professionals to “*refer suspected cases of harm to the relevant body.*” Under this Order, other healthcare providers that are not contained in the list of ‘registered health professionals’ are not bound by a statutory duty to report.
- 4.1.3 The Safeguarding Vulnerable Adults Policy Guidance 2006<sup>26</sup> recommends that employees of community and voluntary organisations should report instances of abuse or harm. This is not currently underpinned by statute.
- 4.1.4 The Codes of Practice for Health and Social Care staff registered with the Northern Ireland Social Care Council (NISCC) advise of a duty to report suspected cases of abuse or harm to the Regulation and Quality Improvement Authority (RQIA).
- 4.1.5 The Criminal Law Act (NI) 1967 places a duty on citizens to report any ‘relevant offence.’ In practice this is of limited use in the context of safeguarding older people at risk of abuse or harm as not all allegations of abuse would be classed as a ‘relevant offence’ to be dealt with by the police.

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26 <http://www.hscboard.hscni.net/publications/LegacyBoards/001%20Regional%20Adult%20Protection%20Policy%20and%20Procedural%20Guidance%202006%20-%20PDF%20249KB.pdf>

- 4.1.6 The Public Interest Disclosure (NI) Order 1998<sup>27</sup> protects most workers who ‘whistle blow.’ In Northern Ireland the term ‘whistle blow’ is used to describe a situation where an employee makes a protected disclosure about wrongdoing in their workplace. The Public Disclosure Order sets out a list of examples of wrongdoing that qualify for an employee to disclose information. It covers allegations of criminal activity, health and safety compromises amongst other things.
- 4.1.7 The DHSSPS whistleblowing guidance states that *“if someone raises a genuine concern under whistle blowing arrangements, they will not be at risk of losing their job or suffering any form of retribution as a result and harassment or victimisation of a whistle blower will not be tolerated.”*<sup>28</sup> The Minister of Health, Social Services and Public Safety has recently further supported the need for whistleblowing stating *“not only is whistle-blowing something that (they) could do but something that they should do.”*<sup>29</sup>
- 4.1.8 Adult Safeguarding Legislation in Scotland and Wales includes a duty on relevant organisations to report suspected cases of abuse. Wales have not imposed this duty on individuals. Key stakeholders in England have also campaigned for the inclusion of a duty to report within the Care Act 2014.
- 4.1.9 It is recognised that there is a question in terms of how far this duty would extend, from professionals working with older people to individual citizens, and this will require further detailed discussion. The Commissioner would be satisfied that, at a minimum, it should apply to anyone working with older people. It is assumed that anyone subject to this duty would be appropriately trained to recognise abuse and neglect and that an appropriate sanction should be in place for cases where the duty is breached.

## Recommendation

- 4.1.10 The Commissioner recommends that a statutory ‘duty to report’ all suspected incidences of abuse or harm to the appropriate body be placed on all those people working with older people and that the list of “relevant organizations” should be identified by the legislation. There should also be guidance provided as to who the most appropriate body is for these individuals or organisations to make the report of abuse or harm to.

## How this recommendation could better protect older people at risk

- 4.1.11 A statutory duty to report suspected cases of abuse would compel everyone working with older people to make a report. This would extend the current duty on registered professionals and it could be expected that more potential cases of alleged abuse would be identified and referred.

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27 <http://www.legislation.gov.uk/nisi/1998/1763/contents/made>

28 [http://www.dhsspsni.gov.uk/hss\\_\\_\\_f\\_\\_\\_07\\_-\\_2009\\_whistleblowing.pdf](http://www.dhsspsni.gov.uk/hss___f___07_-_2009_whistleblowing.pdf)

29 <http://www.theyworkforyou.com/ni/?id=2012-06-19.6.28>

4.1.12 Engagement with safeguarding practitioners and other professionals in relation to this recommendation raised the issue of resources. There must be supportive services in place to support employees who are upset or distressed due to reports of alleged abuse or making a report. The Public Interest Disclosure (NI) Order 1998 gives some protection to employees who report but it will be necessary for increased resources to implement appropriate supportive measures for all people working with older people at risk.

## 4.2 A duty on the most appropriate organisation to make enquiries or conduct investigations once a report or referral is made

### Issue

- 4.2.1 In Northern Ireland there is no specific statutory 'duty' to make enquiries or conduct investigations to safeguard adults at risk, other than when a suspected crime is reported to the Police Service of Northern Ireland (PSNI).
- 4.2.2 The Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006)<sup>30</sup> outlines a duty for managers in Health and Social Care Services to investigate reports of abuse.
- 4.2.3 There is also guidance available on safeguarding vulnerable adults developed by 'Volunteer Now' for the DHSSPS.<sup>31</sup> This guidance is for "*voluntary, community and independent sector organisations.*" It provides direction on how organisations should make enquiries and conduct investigations when abuse is reported but it is not a statutory duty.
- 4.2.4 The PSNI has a duty to investigate reports of criminal conduct under the Police and Criminal Evidence NI Order (PACE) 1989. This does not apply to all adult safeguarding cases as not all abuse against older people at risk would be classed as criminal conduct.
- 4.2.5 Legislation in England and Scotland includes a duty on appropriate bodies to make enquiries or investigate cases of suspected abuse. In Scotland, an oversight body exists at local authority level to review serious cases and the work of each individual organisation to safeguard adults. It is expected that any future review of Scottish legislation will provide evidence of the positive impact of the oversight body in shaping best practice in adult safeguarding.

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30 <http://www.hscboard.hscni.net/publications/LegacyBoards/001%20Regional%20Adult%20Protection%20Policy%20and%20Procedural%20Guidance%202006%20-%20PDF%20249KB.pdf>

31 <http://www.volunteernow.co.uk/training-and-standards/safeguarding-vulnerable-adults-a-shared-responsibility>

## Recommendation

- 4.2.6 The Commissioner recommends that there should be a legislative duty to make enquiries or conduct an investigation placed on ‘relevant organisations.’ The most appropriate organisation(s) to make the enquiry or conduct the investigation should be determined on a case by case basis, in line with the guidance provided. The duty should be placed on a specified organisation(s) alongside the need to act quickly and effectively. There should also be a requirement to fulfill this designated duty to enquire or investigate within a reasonable timeframe and to complete specific stages of enquiry or investigation, which should be outlined by accompanying guidance.
- 4.2.7 As previously referenced, the Commissioner also recommends that an adult safeguarding board should be established to review serious cases and the work of individual organisations on safeguarding.

### How this recommendation could better protect older people at risk

- 4.2.8 A statutory duty to report is important to guarantee that action is taken once a referral of alleged ‘harm or abuse’ is made. An oversight board for adult safeguarding would ensure that everyone working with older people as clients are fulfilling their role to protect older people at risk and complying with statutory duties.

## 4.3 A duty to provide appropriate services to an adult at risk

### Issue

- 4.3.1 In Northern Ireland, the legislation on the provisions of services is outdated. The Health and Personal Social Services (HPSS) (Northern Ireland) Order 1972 includes a duty to *“make advice, guidance and assistance available and to make arrangements and provide the provision of suitable and adequate facilities.”*<sup>32</sup>
- 4.3.2 This legislation was augmented in 2003<sup>33</sup> with a section on quality, improvement and regulation. The aim of this legislation is to increase the quality of health and social care services provided and tackle issues of poor performance.
- 4.3.3 The NIASP states that their aim is to *“improve adult safeguarding provision and good practice over the next 5 years.”*<sup>34</sup>
- 4.3.4 The draft Mental Capacity Bill for Northern Ireland includes additional safeguards to *“protect older people who are assessed as lacking mental capacity.”* The draft bill requires authorisation and the use of an independent advocate in circumstances where the required intervention could have serious consequences for the individual.

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32 <http://www.legislation.gov.uk/nisi/1972/1265>

33 <http://www.legislation.gov.uk/nisi/2003/431/contents/made>

34 [http://www.hscbusiness.hscni.net/pdf/N\\_I\\_A\\_S\\_P\\_Strat\\_2013-18.pdf](http://www.hscbusiness.hscni.net/pdf/N_I_A_S_P_Strat_2013-18.pdf)

The role of an independent advocate in this case will be to consult with professionals to represent the individual at risk's view.

- 4.3.5 Advocacy is defined as “*speaking up or pleading the case for.*” There are different forms of advocacy; self-advocacy, peer advocacy and professional advocacy are some examples. Advocacy should enable older people to find and use their own voice wherever possible, as well speaking up on their behalf if needed.<sup>35</sup>
- 4.3.6 It should be emphasised that the provision of services will only be one part of the response from organisations and employees working with older people at risk of abuse or harm. A continuum of responses, from advice and information, advocacy, and finally, legal protection in serious and complex cases would be essential to better protect older people at risk.

## Recommendations

- 4.3.7 The Commissioner recommends that adult safeguarding legislation should clearly state the appropriate services that ‘relevant organisations’ are required to provide for an older person at risk of abuse or harm. These would include services such as advocacy and victim support.
- 4.3.8 The Commissioner is recommending that the safeguarding oversight board would have a role in ensuring all relevant organisations provide appropriate services to older people at risk of abuse or harm.

## How this recommendation could better protect older people at risk

- 4.3.9 Appropriate services, such as advocacy could help empower and support an older person at risk of abuse or harm. When an older person is at risk of abuse or harm they may have reduced independence and resilience which could make it difficult for them in a situation of abuse or harm. An independent advocate could advise the older person and provide assistance and options for their scenario.
- 4.3.10 A statutory duty to provide appropriate services to an adult at risk will support direct action being taken. Intervening at the stage where abuse is suspected is vital to empower and support the older person at risk.

## 4.4 A duty on relevant organisations to cooperate with each other in safeguarding cases

### Issue

- 4.4.1 In Northern Ireland there is no statutory duty for people working with older people to cooperate in adult safeguarding cases.

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<sup>35</sup> Information. Advice and advocacy for older people. 2005. Joseph Roundtree Foundation.



- 4.4.2 The Safeguarding Vulnerable Adults Policy and Procedural Guidance (2006) highlights the benefits of a multi agency approach in safeguarding. As this is not a statutory duty, the penalty for failing to follow the guidance is disciplinary action by the relevant organisation.
- 4.4.3 Engagement with safeguarding professionals by the Commissioner has identified that there can be a fear or reluctance amongst some professionals to share information in adult safeguarding cases. These professionals can be reluctant to share information due to data protection and confidentiality concerns. It will be necessary for work to be undertaken to prepare those working with older people for the better sharing of information across all relevant organisations.
- 4.4.4 Currently, adult safeguarding practitioners in Northern Ireland are relying on the good will of other professionals to share relevant information. Therefore a statutory obligation to cooperate rather than relying on good practice would help to provide increased sharing of relevant information and ultimately, better outcomes.

### **Recommendation**

- 4.4.5 The Commissioner recommends that a statutory duty be placed on all people working with older people to cooperate with each other on safeguarding cases. To enable organisations to fulfill this duty, there needs to be specific protocols in place for data protection and information sharing for investigatory purposes in adult safeguarding cases.
- 4.4.6 An adequate sanction should also be included alongside legislation for any 'relevant organisation' that fails to cooperate in a case relating to safeguarding older people at risk of harm or abuse.

### **How this recommendation could better protect older people at risk**

- 4.4.7 This duty would increase the effectiveness of multi-agency working in this area and provide improved protection for older people who are at risk of abuse or harm.

# 5.0 Powers

## **Powers:**

- A power of access to an individual believed to be at risk of harm or abuse for the purpose of conducting a private interview.

## 5.1 A power of access to an individual believed to be at risk of harm or abuse for the purposes of conducting a private interview

### **Issue**

- 5.1.1 There are situations that occur when an older person is suspected to be at risk of harm or abuse by an individual who can prevent safeguarding professionals from accessing the person at risk.
- 5.1.2 Currently in Northern Ireland there are a range of tools used by adult safeguarding practitioners on the ground to gain access to people or property. Professionals are skilled in maintaining open dialogue and using negotiation to gain access to individuals suspected to be at risk. There is a continued need for this important interaction between practitioners, suspected ‘abusers’ and the older person at risk to build effective relationships, but, on occasion, this will not be enough.
- 5.1.3 Article 129 of the Mental Health Order (NI) 1986 states that a Health and Social Care Trust or Board Officer may apply to a Justice of the Peace for a warrant to search a premises or remove an individual who is *“believed to be suffering from a mental disorder if they are or have been ill-treated or neglected or they are unable to care for themselves and they live alone.”*<sup>36</sup>
- 5.1.4 The QUB and UU research found that this is only normally used to gain access to an individual with a *“medically assessed mental disorder”* who needs assessment for hospital admission.
- 5.1.5 The PSNI have specific powers of entry for the purpose of *‘saving life or limb’* under the Police and Criminal Evidence NI Order 1989.<sup>37</sup> This may apply in some serious adult safeguarding cases but not when a practitioner requires access in order to have a conversation with the individual at risk and to assess the situation.

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<sup>36</sup> <http://www.legislation.gov.uk/nisi/1986/595>

<sup>37</sup> Part III, Article 19 of the Police and Criminal Evidence (NI) Order 1989.

- 5.1.6 The Terrorism Act 2000 also includes a power of entry for police to ‘*preserve peace or maintain order.*’<sup>38</sup> Roundtable discussions with relevant organisations revealed that this Act has previously been used by police in safeguarding cases.
- 5.1.7 The power of access for a private interview would be an important power to fulfill the duty to make enquiries or conduct investigations.
- 5.1.8 Other parts of the UK are divided on the issue of including powers of access in legislation to safeguard adults. England has decided not to include a power of access in adult safeguarding legislation after consultation. A power of access is included in adult safeguarding legislation in Scotland and Wales.
- 5.1.9 A review of the use and effectiveness of the power of access in Scotland has not yet taken place. Discussions with safeguarding experts in Scotland have emphasised the usefulness of this power as a deterrent in practice.

## Recommendation

- 5.1.10 The Commissioner recommends a power of access for the purposes of conducting a private interview, with specific limitations in place. A power of access would allow a social worker and/or police officer to enter a home by means of a warrant. This would allow a social worker to speak privately to someone who they suspect could be at risk of abuse or harm, in order to ascertain that they are making decisions freely and to make an assessment of likely harm or abuse.
- 5.1.11 Baroness Greengross has campaigned for a “*power of access for confidential interview*” in England where:<sup>39</sup>
- There is reasonable cause to suspect a person is at risk of abuse or neglect;
  - Access is not available through any other means;
  - ‘Reasonable cause’ is tested via application to a Justice of the Peace; and
  - Exercising the power will not result in the person being at greater risk of abuse or neglect.
- 5.1.12 The Commissioner is recommending a power of access for private interview with similar limitations for an adult safeguarding bill in Northern Ireland.

## How this recommendation could better protect older people at risk

- 5.1.13 A power of access would enable a practitioner to carry out a private interview in order to make an assessment without the presence of the individual suspected of abusing the older person. This power is essential to protect older people under varying degrees of coercion, who are dependent on the individual and may feel unable to speak freely in their presence.

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<sup>38</sup> Part VII, Section 90. Terrorism Act 2000.

<sup>39</sup> <http://www.elderabuse.org.uk/Documents/Legislation/Power%20of%20Access%20briefing%20paper.pdf>

- 5.1.14 Proposing a power of access has clear human rights implications. It may be seen as an infringement of Article 8 of the ECHR - the right to private and family life - which identifies a person's home as important and something that should be respected. Human rights practitioners indicate that a power of access may be subject to challenge on this basis which is why the Commissioner is proposing that this is only in specific circumstances and subject to appropriate checks and balances.
- 5.1.15 The human rights of a person at risk in these circumstances could be further supported by the provision of access to a solicitor and special measures, such as those afforded for vulnerable witnesses,<sup>40</sup> when being interviewed.
- 5.1.16 An anonymised case study from the Commissioner's office is inserted below to demonstrate a situation where a power of access to carry out a private interview would have assisted practitioners and benefited the older person at risk of harm or abuse.

## Case Study 1

An older person's relative contacted the Commissioner's office and outlined a catalogue of safeguarding concerns. This older person, who had a learning disability, was residing at a care home, where they had married another resident. The older person's family had serious concerns about this marriage and contacted social services who were unable to stop the wedding. The older person was discharged from the care home by a relative of the new husband and the older person's family was prevented from contacting them. This older person's relative managed to locate them after prolonged investigations and discovered the older person in a serious state of neglect, after which the relative contacted the police and local HealthTrust. The older person was deemed to have mental capacity at that time and remained in the care of the new husband's relative, despite the concerns of the family that this person was a malign influence on their relative. The family of the older person at risk were later contacted by a neighbour and advised that this older person was in hospital due to dehydration and malnourishment. The family obtained a court injunction preventing this older person's 'carer' contacting them.

How a power of access for private interview could have helped the older person in Case Study 1:

- When the older person's concerned family contacted social services, a power of access for private interview would have allowed practitioners to conduct a private interview to assess whether the older person was making decisions freely.
- In this case, a power of access for private interview would have revealed the level of abuse and neglect of the individual at an earlier stage.

- 5.1.17 A power of access for private interview is a strong protective measure for older people at risk where there is reasonable cause to suspect the person is at risk. If access is not available through any other means and exercising the power will not result in the person being at greater risk, it should be used by practitioners.

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<sup>40</sup> <http://www.legislation.gov.uk/nisi/1999/2789/contents>



# 6.0 Protection

## Protection:

- Protection from civil liability for those making a report.

## 6.1 Protection from civil liability for those making a report

### Issue

- 6.1.1 The Public Interest Disclosure (Northern Ireland) Order 1998<sup>41</sup> protects workers who 'whistle blow,' which provides a level of protection if the act is in good faith and procedures are followed. However organisations often have their own policies and procedures for whistle blowing practice. This results in varying levels of support available for staff who whistle blow.
- 6.1.2 Those professionals who attended the Commissioner's roundtable consultation felt that additional support and protection may help to increase the number of reports made.
- 6.1.3 The issue is not just about the liability for making the report; it is also about liability for not correctly identifying abuse or neglect.

### Recommendation

- 6.1.4 The Commissioner recommends that a high level of protection is afforded to all professionals and people working with older people who report suspected abuse or harm of older people. Consistent support and encouragement must be extended to all professionals who whistleblow so that they feel adequately protected in reporting allegations of suspected abuse.

### How this recommendation could better protect older people at risk

- 6.1.5 People working with older people at risk of harm or abuse who are concerned about making a report will be more inclined to make the report if they are adequately protected.

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<sup>41</sup> <http://www.legislation.gov.uk/nisi/1998/1763/contents/made>

# 7.0 Further Considerations

## **Further consideration should be given to whether or not an Adult Safeguarding Bill should include:**

- A power to remove an individual at risk.
- A power to ban a suspected 'abuser' from contacting the specified individual or attending a particular location.
- A power to access financial records.
- A specific criminal charge of 'elder abuse.'
- A specific criminal charge of 'corporate neglect.'

## 7.1 A power of removal

*A power of removal would involve the removal of an older person who is believed to be at risk of harm from the situation to a safe place for a period of time. If this power was considered for legislation it would be likely that an application for the power would be to a District Judge.*

### **Issue**

- 7.1.1 If there is a concern that a high level of abuse or harm will continue to happen after it has been identified, the power to remove the older person at risk of abuse or harm to a safe place for a specified period of time could help to better protect the individual at risk.
- 7.1.2 In consideration of a power of removal, there should be a discussion of how this would reinforce the power of access for a private interview. Powers implemented would be subject to safeguards and clearly defined guidelines which would ensure that the older person is not at greater risk of harm or abuse.
- 7.1.3 In a case where the individual suspected of causing the harm or abuse is also an 'adult at risk' but there are concerns about the older person's level of care, a power of removal may be a helpful intervention to protect the older person. An example of this can be seen in an anonymised case study from the Commissioner's office overleaf.

## Case Study 2

The Commissioner's office was contacted by a relative of an older person with concerns for their parent who was residing with another family member. The older person had been diagnosed with dementia. Their capacity for making legal and financial decisions was deemed to be 'fluctuating.' There were significant concerns about the level of care and supervision that this older person was receiving, including concerns that the older person was suffering from neglect. Attempts at providing regular 'respite care' proved difficult as the family member with caring responsibilities threatened on occasions to self-harm and the family were conscious of causing undue upset to the older person by removing them from familiar surroundings. The complexity of this case was enhanced by the fact that the older person was terminally ill. The relevant Health Trust subsequently implemented a safeguarding plan which provided day care with carer respite twice weekly. The older person was removed from his home and placed in emergency respite.

How a power of removal could have helped the older person in Case Study 2:

- The issue is the limited legal protection for older people at risk of abuse or harm who are assessed as having mental capacity, borderline capacity or uncertain or 'fluctuating' mental capacity.
- The Trust could not intervene early in this case as the older person was assessed as having 'fluctuating capacity.'
- Removal of the individual to a safe place for a period of time would allow the practitioner the opportunity to discuss the older person's wishes and would also allow time to put extra measures or procedures in place to further protect the older person at risk.
- A power to remove in this situation could have ensured that the older person was removed without undue delay, reducing the risk of further harm.

7.1.4 The Health and Personal Social Services (HPSS) (Northern Ireland) Order 1972, Article 37 permits:

*"the removal to suitable premises of persons in need of care and attention who are suffering from grave or chronic disease, or being aged, infirm or physically incapacitated, are living in insanitary conditions and are unable to devote themselves, or to receive from persons with whom they reside, or from persons living nearby, proper care and attention."*<sup>42</sup>

7.1.5 Discussions with the Northern Ireland Association of Social Workers (NIASW) indicated that this power has only been used twice and in both cases it was to protect an individual's life. It was also considered to be difficult to use because of the requirement to gain consent from the individual at risk, as specified in the Order. Practitioners are encouraged to apply to the High Court to determine the 'best interests' of the individual at risk, rather than use the HPSS Order 1972 in serious safeguarding cases.

42 <http://www.legislation.gov.uk/nisi/1972/1265>

7.1.6 The Mental Health Order (Northern Ireland) 1986, Article 129 allows a Health and Social Care Trust or Board Officer to apply for a power of removal. Firstly, this order only grants power to the public sector, and so does not apply to community and voluntary sector organisations. Secondly, this power is only granted under the order when the older person is assessed as lacking mental capacity. For an older person at risk, assessed as having mental capacity but who may be under coercion or without their personal resilience and independence, this safeguard is not available.

### Further consideration

7.1.7 The Commissioner is requesting further consideration of a power of removal in Northern Ireland, to be tested through public consultation.

7.1.8 The power of removal should only be considered in the most serious and significant cases given the fundamental Article 8 human right; the right to private and family life.

### How this consideration could better protect older people at risk

7.1.9 A power of removal would allow safeguarding practitioners to keep the older person who is at suspected risk of abuse or harm safe for a period of time. It also allows the practitioner time to talk to the individual about their situation without the suspected 'abuser' being present.

7.1.10 A potential risk associated with the power of removal is the impact that this power has on an individual's human rights. Both the right to liberty and security (Article 5) and the right to private and family life (Article 8) would be affected by this power. It could be argued that the state do not have any right to remove an older person at risk from their home as it is their decision to stay there, particularly for older people at risk who have mental capacity.

7.1.11 Scotland has included the power of removal as part of the protection orders within the Adult Support and Protection Act 2007.<sup>43</sup> There has been no review of the legislation in Scotland at this stage but discussions with Scottish practitioners have not reported any issues of concern with the power to remove in adult safeguarding.

## 7.2 A power to ban

*The power to ban is to prohibit a suspected 'abuser' of an individual from contacting that person or being in a specified place for a certain amount of time. This power could be granted by a District Judge.*

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43 Section 14, Adult Support and Protection Act, 2007

## Issue

- 7.2.1 When harm or abuse against an older person has been identified, the power to ban the suspected 'abuser' from the person or a specific place for a period of time would mean that the older person at risk could be better protected.
- 7.2.2 There are pieces of legislation in Northern Ireland that include a power to ban an individual from a specific place or person for a period of time. These are not specific to safeguarding adults at risk of harm or abuse.
- 7.2.3 The Family Homes and Domestic Violence (Northern Ireland) Order 1998 can grant a power to ban a family member, partner or ex-partner from being in a specific place and from contacting a certain person.
- 7.2.4 The Harassment Northern Ireland Order 1997 provides the power for a civil injunction which gives a power to ban an individual from contacting the specified person with whom they have been involved in a course of harassing conduct.
- 7.2.5 The Anti-Social Behaviour (Northern Ireland) Order 2004 and the Northern Ireland Housing Order 2003 also include powers to ban.
- 7.2.6 Despite these powers already existing in legislation in Northern Ireland, they are for specific circumstances, such as domestic violence cases. These pieces of legislation may not be suitable for an older person who is at risk of abuse or harm and under coercion as the person affected needs to instigate the use of the power.
- 7.2.7 The power to ban a suspected 'abuser' to safeguard older people could, in certain circumstances, be enforced by the state.
- 7.2.8 In consideration of a power to ban, there should be consideration as to how the power to ban would reinforce the power of access for a private interview. Powers implemented would be subject to safeguards and clearly defined guidelines which would ensure that the older person is not at greater risk of harm or abuse.

## Further consideration

- 7.2.9 The Commissioner requests further consideration from government and consultation on whether the power to ban should be included in future adult safeguarding legislation. An important consideration associated with this is the proposed role of the state in having this power.

## How this consideration could better protect older people at risk

- 7.2.10 There are specific circumstances of abuse or harm against an older person where the power to ban could help better protect older people. An example of such a situation can be seen in the anonymised case study from the Commissioner's office below.

## Case Study 3

An older person had recently lost their partner of 35 years and had suffered a fall which resulted in a period of hospital treatment. During their stay in hospital the individual was visited by a person they had briefly met before. This person initially offered to provide assistance in preparing the older person's house for their return from hospital. Concerns were raised by neighbours when some items of the older person's property were sold by this person and there was a concern that money had gone missing from the older person's house. Neighbours were aware that the older person was vulnerable and contacted social services. Social services are involved in the case but the older person is still susceptible to approaches from this particular person.

How a power to ban would have helped the older person in Case Study 3:

- When the neighbours reported concerns over this individual's motives with regard to the older person, investigations could have been made (which the duty to make enquiries and conduct investigations would cover). Then when investigations revealed a level of abuse against the older person, powers of intervention would have been essential.
- The power to ban would have allowed practitioners to ban this individual from the older person, hospital and/or their house for a period of time.
- This time could have been used by practitioners to assess the older person's welfare and safety as well as their willingness to remain in the situation.

7.2.11 Scotland's Adult Support and Protection Act 2007 includes a power to ban.<sup>44</sup> It is too early to fully assess the effectiveness of the legislation but practitioners have voiced that having no criminal offence or sanction for breaching a banning order may impact the effectiveness of this power.<sup>45</sup> Therefore, from Scotland's example, any consideration of powers to ban in Northern Ireland should include an appropriate sanction.

7.2.12 The proposed power to ban received a mixed response from relevant organisations in Northern Ireland due to the impact on an individual's freedom of movement and their human right to liberty (Article 5, ECHR) which could make it difficult to implement.

7.2.13 The power to ban would need to be enforced by the state and as a result it would need to be established where the "burden of proof" lies. This means that it needs to be clarified whether the state would have to provide evidence that the individual is 'guilty' or whether the individual in question has to prove they are 'innocent'. This is why the power of the state to ban is a proposed step which the Commissioner feels would merit further, more detailed consideration.

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<sup>44</sup> Part I, section 19 Adult Support and Protection (Scotland) Act 2007.

<sup>45</sup> Comley, P. (2012) Adult Support & Protection: A report to Scottish Government around emerging issues and themes, Stirling: WithScotland

## 7.3 Power to access financial records

### Issue

- 7.3.1 In Northern Ireland, there are legislative powers in place to enable the appointment of an individual to look after someone else's financial affairs. There can be an issue when financial abuse occurs and there is a suspicion or allegation that the financial abuse is being carried out by the individual responsible for an older person at risk's financial affairs.
- 7.3.2 An Enduring Power of Attorney (EPA) allows someone to appoint one or more persons to act on their behalf, should they become incapable of making financial decisions in the future. This power becomes operational when the individual is assessed by a professional as lacking mental capacity.
- 7.3.3 The proposed draft Mental Capacity Bill will introduce a Lasting Power of Attorney (LPA) to replace the existing EPA scheme. This will allow a person to make decisions on someone else's behalf on **both** financial matters and health and welfare issues.
- 7.3.4 The Office of Care and Protection (OCP) has the responsibility for the management of the property and affairs of people in Northern Ireland, who through an assessed mental disorder are incapable of managing their own financial affairs. It is the OCP which have the power to grant EPA's.
- 7.3.5 Financial abuse needs to reach a certain threshold before the OCP will intervene. The OCP have implemented a maximum threshold of £20,000 which applies where Health Trusts are seeking an enduring Power of Attorney on behalf of patients. There is no minimum amount or limit for private applications. If the money involved exceeds £20,000 then the OCP have to gain a 'Controllership Order' to intervene.
- 7.3.6 When financial abuse occurs. adult safeguarding practitioners have to report their concerns to the OCP; this is under their duty to report "*suspected financial abuse to an individual with a mental disorder*" under Article 107 of the Mental Health (Northern Ireland) Order 1986. With limited powers for practitioners to safeguard adults from financial abuse, there is a concern over the protection available. A delay in referring the suspected abuse to the OCP and then for the OCP to gain controllership could result in serious financial loss to the older person.
- 7.3.7 If adult safeguarding practitioners could access relevant financial records when there is reasonable suspicion of financial abuse, it would allow an assessment of the level of risk to the older person of whether financial abuse is occurring and any appropriate interventions required. Safeguarding practitioners have communicated to the Commissioner that financial institutions are keen to cooperate with them on suspicions of financial abuse but they are restricted in terms of their ability to share data or to intervene due to limited legal powers.

## Further consideration

7.3.8 The Commissioner recommends that further consideration of a power to access financial records in Northern Ireland should be considered and actively kept under review. In the intervening period, the Commissioner recommends that there is an immediate campaign undertaken to highlight the signs of financial abuse and its impact. This campaign should extend to engagement with financial institutions across Northern Ireland so that reporting and investigating complaints of alleged financial abuse is actively encouraged.

### How this consideration could better protect older people at risk

- 7.3.9 A power to access financial records, placed with a relevant, identified organisation could aid early identification of financial abuse and mean that intervention is appropriate and quick. Ultimately, this could reduce large amounts of financial assets being lost for an older person at risk.
- 7.3.10 This power is included in legislation in Scotland. Communication with colleagues in Scotland revealed that access to financial records under the Adult Support and Protection Act 2007 is requested through a “section 10 application,”<sup>46</sup> and that this is served by the relevant statutory organisation on any party holding financial records. At present, the request system in Scotland seems to be working effectively alongside the duty to cooperate with investigations.
- 7.3.11 The issue of ‘autonomy’ over an adult’s own finances and the impact that this power would have on an individual’s human right to ‘respect for his private and family life’ remains an area of concern. An individual’s financial affairs are a matter for themselves. In the case of an older person at risk of financial abuse who has mental capacity, but perhaps does not ‘possess all the facts relating to the spending’ in order for them to make an informed decision, consideration of such a power has merit. In this case the individual might need assistance from the state to support them to gather a clear picture of all the facts.

## 7.4 A criminal charge of ‘elder abuse’

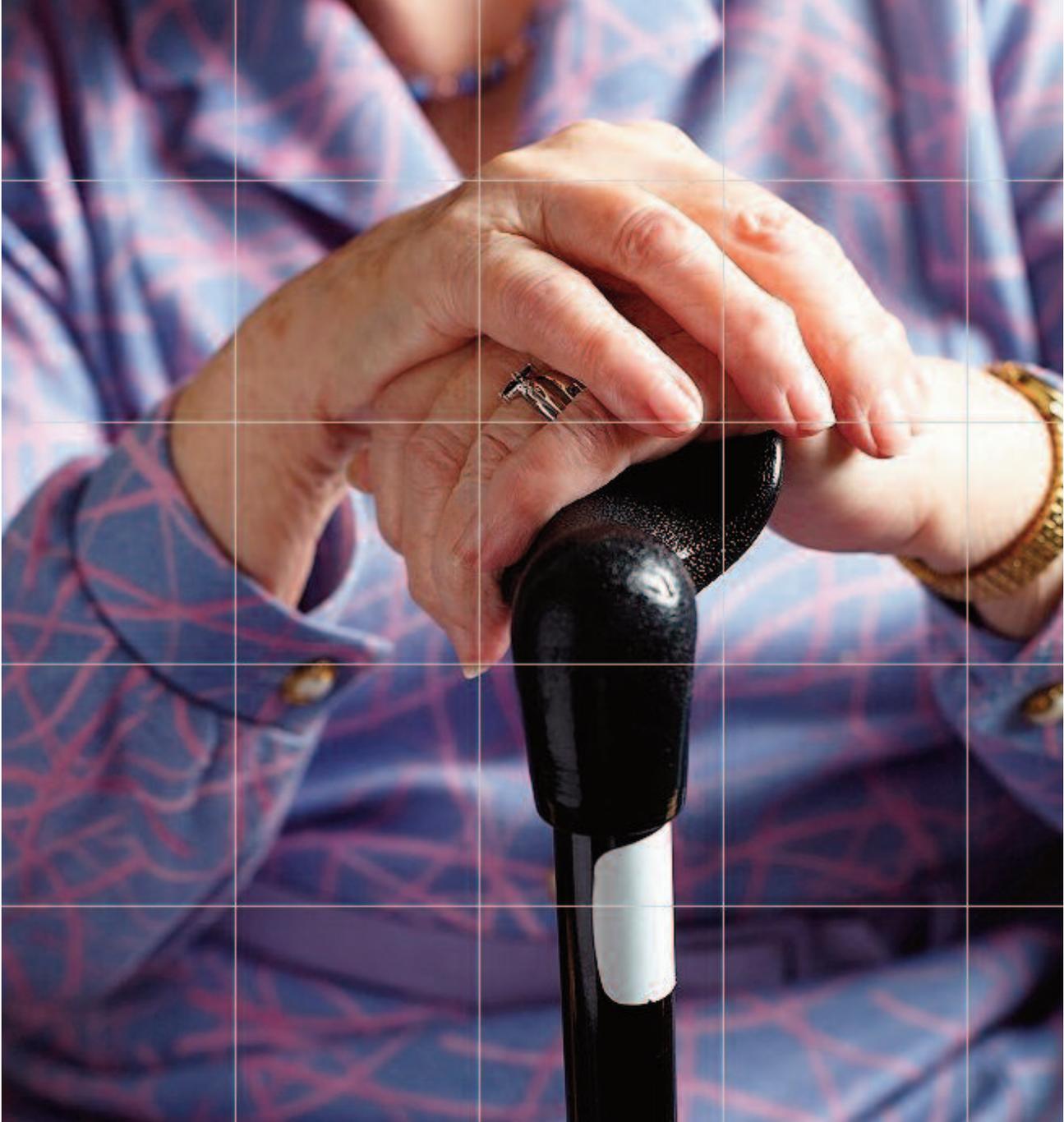
### Issue

- 7.4.1 In Northern Ireland there is no specific criminal charge of ‘elder abuse.’ However Article 121 of the Mental Health (Northern Ireland) Order 1986 provides an offence of ill-treatment or willful neglect of someone in a hospital or a nursing home being treated for a mental disorder.
- 7.4.2 Currently, no other part of the UK has a specific criminal charge of ‘elder abuse;’ Action on Elder Abuse have called for a criminal charge of ‘elder abuse’ to be introduced during consultation on the Care Bill 2013 in England.<sup>47</sup>

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<sup>46</sup> <http://www.legislation.gov.uk/asp/2007/10/contents>

<sup>47</sup> <http://www.elderabuse.org.uk/Documents/Legislation/AEA%202013%20Short%20Briefing%20Adult%20Safeguarding.pdf>



They proposed that this would cover circumstances “*where an adult uses their relationship or position to cause or allow an older person or dependent adult to suffer unnecessary physical pain or mental suffering, or injures their health, or steals, defrauds or embezzles their money or property.*”<sup>48</sup>

### **Further consideration**

- 7.4.3 The Commissioner requests that further consideration and consultation on whether a criminal charge of ‘elder abuse’ where someone commits a crime against an older person by way of action or through neglect should be undertaken. Associated with this would be the need to consider ‘vulnerability’ as an ‘aggravating factor’ in terms of sentencing.

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<sup>48</sup> <http://www.elderabuse.org.uk/Documents/Legislation/AEA%202013%20Short%20Briefing%20Adult%20Safeguarding.pdf>

## **How this consideration could better protect older people at risk**

- 7.4.4 A criminal charge of ‘elder abuse’ may act as a deterrent to perpetrators of abuse or harm and help to secure convictions and effective sanctions against people who abuse or harm the most vulnerable in our society.

## **7.5 A criminal charge of corporate neglect**

### **Issue**

- 7.5.1 Another issue for consideration raised in the research and writing of this report is the proposal to develop a criminal charge of ‘corporate neglect.’
- 7.5.2 At present in Northern Ireland there is no requirement for social care workers to be registered with NISCC. For some workers registration is not mandatory but optional at this point.
- 7.5.3 In a case of abuse against an older person whether the social care worker is registered or not, the responsibility should lie with the employer.
- 7.5.4 In England, there is ongoing consultation regarding a new offence of ill-treatment or willful neglect. As part of this consultation process there have been recommendations that a specific neglect offence is introduced to cover organisations such as corporate bodies and partnerships providing care services.

### **Further consideration**

- 7.5.5 The Commissioner requests that further consideration be given to the introduction of a criminal charge of corporate neglect for Northern Ireland. This is a matter that should be consulted on further both with the public and professionals.

## **How this consideration could better protect older people at risk**

- 7.5.6 A criminal charge of corporate neglect would encourage higher standards of care and better reporting of alleged abuse across all care services. Care providers could then be made liable for the actions of their staff and therefore would be encouraged to ensure the provision of high quality of care and better reporting.



## 8.0 Conclusion

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- 8.1 The Commissioner is calling for the creation of a single Adult Safeguarding Bill for Northern Ireland. The current legislation in Northern Ireland protecting older people at risk of harm or abuse is disparate and inadequate.
  - 8.2 There needs to be a balance between protection of older people from abuse or harm, as well as prevention, and specific legislation underpinned by human rights principles. It is recognised that legislation on its own is not a solution but it is a crucial part of improving protection for older people at risk of harm or abuse.
  - 8.3 This report highlights the key elements for consideration in any future adult safeguarding legislation. The Commissioner recommends that adult safeguarding legislation is enacted at the earliest possible opportunity and that public consultation on the additional areas for consideration, as outlined in this report, is undertaken.
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