

CHAPTER 03 OF THE COPFS VICTIMS AND WITNESSES MANUAL

Introduction

1. This Chapter of the Victims and Witnesses Manual explains the way in which COPFS deals with crimes against older people who are victims and witnesses of crime. The chapter outlines not only what the prosecution policy is but also how we will assist victims and witnesses through the criminal justice process by referral of the case to our Victim and Witness Information and Advice Service, known as VIA.

Why are we publishing the chapter?

2. We are publishing this Chapter because we want older people, their families, communities and the general public to have confidence that we understand the serious nature of crimes against older people and also the impact that being a witness to a crime can have on older people, including the impact of being a victim or witness and requiring to attend Court.

3. Safety and security, and the right to live free from the fear of crime, are fundamental human rights. Feeling and being unsafe, or "at risk", impacts significantly and negatively on older people's health and sense of wellbeing and can leave them isolated and unable to participate socially and economically in their communities. Older people may be more fearful of crime. The British Crime Survey in 2001 found that older people were less at risk of crime. A further reason for addressing crimes against older people is that with increasing longevity we have a significant growth in the older population in the United Kingdom. Negative and discriminatory attitudes towards older people can be widespread in our society and can even be reflected in organisations that care for older people, whether in a domestic setting or in a residential care setting. For example, in the publication *Hidden Voices: Older People's Experience of Abuse*, (Action on Elderly Abuse, 2004) it was found that 23% of reports to the Action on Elder Abuse Helpline concerned care homes. We are determined to play our part in challenging this.

4. We are committed to taking equality issues into account in all our prosecution policies. Development of a policy for prosecuting crimes against older people recognises renewed public sector general equality duty under the Equality Act 2010 which requires Scottish Public Authorities to pay due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Act;
- (b) advance equality of opportunity between persons who share relevant protected characteristics and persons who do not share it; and
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

5. We recognise diversity in circumstances of older people. Some older people will be in greater need of help and support to cope with the impact

of being a victim or witness of crime or to manage their resulting anxiety and fears. The nature and level of help are therefore dependent on individual circumstances. We also recognise that many older people are not, and do not consider themselves to be frail, vulnerable or in need of significant support in any way.

6. It is important however that proactive approaches are made to assess what help/support may be required. Some older people may be reluctant to admit their fears but may withdraw from social contact and find it difficult to return to their usual way of living.

7. We recognise the diversity of older people in terms of gender, gender identity, ethnicity, religion or belief, disability or sexuality. Older people may experience discrimination, not only by reason of their age, but also multiple discrimination on any of these grounds.

8. We are committed to being responsible to the particular needs of victims and witnesses. Information on our commitments to victims and witnesses was launched by us in October 2010 COPFS published 10 commitments towards victims and witnesses. If you are a victim or witness we will:

- (i) give you respect and professional service at all times;
- (ii) communicate with you clearly;
- (iii) communicate information you need when you need it;
- (iv) deal with your case as quickly as possible;
- (v) require you to give evidence in Court only when we have to;
- (vi) ensure you can communicate with us if your first language is not English;
- (vii) take account of any extra support you may need;
- (viii) give the Judge information about the effect of the crime on you;
- (ix) tell you how to claim expenses and deal with your claim as quickly as possible; and
- (x) work with other organisations to help you get the services you need.

Crimes against Older People Policy- the Background

9. We recognise that crimes against older people may take place in the context of what is known as elder abuse which is defined 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. Such abuse or mistreatment can include neglect, financial abuse, physical abuse and sexual abuse. The United Kingdom Study of Abuse and Neglect of Older People Prevalence Survey Report, prepared for Comic Relief and the Department of Health which was published in 2007. This found that 2.6% of people (about 227,000) aged 66 and over living in private households reported that they had experienced mistreatment involving a family member, close friend or care worker during the previous year. This study also suggested that over half the situations of

abuse involved partners, often struggling to provide care, especially if frail or unwell themselves.

10. However we also recognise that none of these figures reflect the full picture of crime experienced by older people. We know that older people can experience crime not only in their own homes but in other places, for example in nursing homes, residential care homes, hospitals, prisons and in public places. Some of the circumstances mean that there are barriers to the reporting of the crimes. We are also aware that abuse can be perpetrated by those not known to the victim.

11. Incidents of elderly abuse are under-reported to criminal justice authorities. The UK Prevalence Study in 2007 found that only 6% of respondents reported abuse to the police.

12. The report, *Hidden Voices: Older People's Experience of Abuse (Action on Elderly Abuse, 2004)*, and other studies have identified the following as some of the possible reasons for under reporting:

- (1) lack of access to trusted people to tell of concerns or allegations; this may be a particular issue for older people who are socially isolated;
- (2) older people with mental health issues may find it especially difficult to report crime;
- (3) fear that the authorities will remove the victim from the abusive situation in the belief that it is the best course of action for the victim (as a consequence of which the victim may lose the home or be placed into an institution or care home which may be the exact outcome that the abuser was hoping for);
- (4) lack of access to telephone or other means of informing trusted people;
- (5) embarrassment, particularly if the abuser is a family member;
- (6) When crimes against older people occur in a private home, there may be less chance that this comes to the attention of social care or other professionals.
- (7) In cases of financial abuse, older people can be too embarrassed to report fraud if they have been duped into giving away money or valuable possessions;
- (8) English is not some people's first language. People may lack confidence to come forward and might need the support of an independent interpreter, especially if a crime is committed by a family member or friend.

13. We therefore recognise that where crimes against older people are reported a robust approach must be taken to both the investigation of the offence and the prosecution. We consider it is an aggravation if a person commits an offence against someone because of vulnerability or perceived vulnerability based on their age or perceived age. There is a strong presumption in favour of prosecution where the crime is committed against an older person and where there is sufficient evidence.

14. There is no statutory definition of a crime against an older person, and no general statutory offence of neglect of an older person.

15. Older people can be targeted because of their perceived or actual vulnerability or, their unequal access to safety.

16. The list below outlines the wide and complex range of crimes that older people might experience;

- (i) Criminal abuse or neglect of older people where there is a relationship and an expectation of trust. This can include family members, friends, case workers, volunteers etc. Offences under this heading would include:
 - Domestic abuse;
 - Cruel and unnatural treatment in relation to any neglect or abuse;
 - Assault; and
 - Sexual offences.

- (ii) Crimes which are specifically targeted at older people because they are perceived as vulnerable or potentially easy to steal from. Offences under this heading would include:
 - Bogus workmen cases which are cases where a person pretends that certain works require to be done to a property which are not required or where a person exaggerates the cost or value of any work which needs to be done;
 - Robberies from older people;
 - Rogue traders;
 - Theft/doorstep theft;
 - Financial abuse – for example the illegal or unauthorised use of a person's property, money, pension book or other savings;
 - Investment scams;
 - Fraudulent investment schemes;

- (iii) Crimes against older people which are not necessarily related to age but may later become so:
 - Housebreaking where the age of the householder is not known at the outset but the situation is exploited when the housebreaker discovers that the householder is an older person;

- (iv) Crimes against older people which are in part or wholly motivated by hostility based on age, or perceived age, or vulnerability. Offences under this heading would include:
 - Harassment;

- Anti-social behaviour;
- Threatening and abusive behaviour;

Prosecution Policy- Strong Presumption in favour of Prosecution

17. In the crimes described in point 16 there is a strong presumption in favour of prosecution where the crime is aggravated by the targeting of the victim because of vulnerability or perceived vulnerability on the basis of age or perceived age.

What happens when an allegation is reported to the police

18. There are two stages to a criminal investigation and prosecution. The first is the investigation stage which is carried out by the police. If the police consider there is sufficient evidence, they submit a report to the Prosecutor. The Prosecutor then considers whether to take prosecutorial action. These stages are explained more fully in the following paragraphs.

First Stages-Investigation of Crime by the Police and Trading Standards Departments

19. When a crime is reported to the police, they will investigate the crime and gather evidence.

20. The police will interview victims and witnesses. If the incident occurred, for example, in a care home, hospital or other institution, the police will interview staff and conduct their investigation independent of any other investigation other authorities may be conducting

21. The police will also during the investigation identify any additional support needs that the victim may have to assist them through the criminal justice process. The police will also let the Prosecutor know if a person is vulnerable. This helps the Prosecutor find out if a case goes to court whether special measures will be needed to help a victim or witness give evidence. We will explain more about special measures in paragraphs 70 and 71.

22. If there is uncertainty over the mental capacity of a victim or witness the police will also investigate this by taking statements from the relevant health professionals and this information will also be passed on to the Prosecutor.

23. The police will submit a prosecution report to the Prosecutor outlining the evidence in a case. Police officers must record in their report to the prosecutor their observations about:

- a witness's reactions to the crime and to the accused
- any expressed fears related to the crime or to involvement in the criminal justice process, and
- any personal characteristics exhibited by the witness which might suggest vulnerability.

24 Trading Standards Departments within Local Authorities also investigate criminal offences and will gather evidence and report to the Procurator Fiscal. The types of cases they investigate include bogus workmen cases and financial scams. Trading Standards Officers will also work with the police in investigations.

What does the Prosecutor do when a crime is reported to them?

25. The police submit their report of the crime to the prosecutor, who will take a decision on whether to take action on the basis of that report. This action can range from a warning letter, or a fine issued by the prosecutor to taking court proceedings.

26. The information the police give the prosecutor about a victim or witness will assist the prosecutor in deciding whether it is appropriate to cite a person to give evidence if there is other available evidence. If the person is to be cited to give evidence, this information will help the prosecutor identify if there are measures which can be taken to assist the person to give evidence in court.

27. In deciding whether to take up criminal proceedings the prosecutor must, in line with the COPFS Prosecution Code, consider:

- (1) whether there is a sufficiency of evidence; and
- (2) the public interest

Guidance to Prosecutors

28. Where there is sufficient evidence and the crime was perpetrated because of the perceived or actual vulnerability of the victim based on their age or perceived age there is a strong presumption in favour of prosecution.

29. There are instructions to prosecutors on specific crimes on what action should be taken based on a number of different factors contained in case marking instructions. The case marking instructions are confidential. However reference to this policy has been included in the case marking instructions for the following specific crimes:

Crimes against the person

- Assault
- Assault and Robbery
- Sexual Offences
- Cruel and unnatural treatment

Crimes of Dishonesty

- Theft
- Theft by housebreaking

- Fraud
- Embezzlement
- Uttering

Disorder offences

- Threatening and abusive behaviour
- Breach of the Peace
- Communications Act 2003

Further investigations- Where there are issues of whether the victim or witness can give evidence if they have fluctuating mental capacity

30. Many crimes against older people may be committed because of their perceived vulnerability and inability to provide a coherent narrative of events due to age related illness. It is important that a robust approach is taken to the investigation of these offences by the prosecutor and issues about the capacity of witnesses to give evidence are identified at the earliest point. Prosecutors must ensure that any evidential difficulties are explored at the outset of a case, so that if there are insurmountable difficulties in securing the evidence of an essential witness, proceedings are not taken up as this can lead to raising the expectations of victims and witnesses and their families and increase anxiety and stress for them.

The Capacity of a Witness

31. Older people with dementia or other age related diseases may lack capacity for some decisions. This means that not only may their capacity to understand information and make decisions change over the course of a short period of time, it may also fluctuate in relation to different types of decision. A person with fluctuating capacity, for example, may be able to decide to give a witness statement but be unable to understand and make decisions in relation to taking part in the Court process.

32. Older people with dementia have the same rights as all victims and witnesses and should receive an equal and accessible service. We will not make assumptions about the reliability or credibility of a victim or witness with fluctuating capacity.

33. We must consider what can be done to support the victim or witness to give their best evidence and to seek other sources of evidence from other witnesses to support the case for the prosecution.

34. Where there are concerns about the witness's capacity to recall events or to give evidence then further investigation with a health care professional who has the necessary expertise to carry out an assessment as to whether the witness' evidence was reliable at the time or will be reliable at the time of trial. The assessment of the victim or witness's General Practitioner or other relevant health or social care practitioner, can be sought at the initial stages when the General Practitioner or health or care professional has expertise in the area and knows the person. In

some circumstances an assessment may have to be carried out by a psychiatrist or a community psychiatric nurse.

If the Witness Cannot Give Evidence

35. Section 259 of the Criminal Procedure (Scotland) act 1995 allows for statements to be used in court proceedings instead of oral evidence in certain limited circumstances. Consideration should be given to this where a potentially vulnerable witness has given a statement, and because of a mental or bodily condition is unfit or unable to give evidence.

Alternative sources of evidence

36. Consideration must be given to alternative sources of evidence to prove the crime. These may include.

- the possibility of forensic evidence, DNA, or fingerprints for instance.
- the possibility of evidence by exclusion in relation to when events must have happened especially in relation to physical and other abuse.
- records - for instance from Care or Residential homes to show who was on duty at what times and who may have had access to the victim or witness.
- whether there is any CCTV evidence or other recorded evidence which would help support the case against the accused.

Public Interest

37. If there is a sufficiency of evidence, prosecutors must consider whether it is in the public interest to prosecute. The Prosecution Code provides details of the public interest considerations that the prosecutor must take into account. These include the age and personal circumstances of the victim and other witnesses as well as the age background and personal circumstances of the accused.

38. As stated earlier there is a strong presumption in favour of prosecution in cases involving crimes against older people for which a sufficiency of evidence exists. The nature and the gravity of the offence and the potential or actual impact on the victim or other witnesses means that only in exceptional circumstances will the public interest be served by not prosecuting these cases.

39. The effect of prosecution on the accused must also be considered. This is particularly so in circumstances where the accused him/herself is an older person and the offence has taken place in a domestic context and where there are other interventions which could address the underlying issues. It may be in such cases that it is an inappropriate and

disproportionate response and the public interest may be better served by another option such as referral to social work.

Referral of the Case VIA

40 Prosecutors should refer a case in which an older person is a victim or witness to Victim Information and Advice (VIA) service of COPFS. VIA provide information about ongoing cases, refer victims and witnesses to other agencies which may be able to assist them, and advise on giving evidence by special measures. Please see paragraphs 67-69 about the service about the services that VIA can offer.

41 There is a presumption that all victims and witnesses over the age of 60 should be referred to VIA to ensure that they can access the necessary support and information. Consideration should also be given to referring those under 60 where the person was targeted due to vulnerability or perceived vulnerability due to age or perceived age.

Bail

42. The normal considerations for opposing bail or seeking bail conditions contained within the bail manual apply.

43. The over-riding considerations will be public protection and personal protection.

Conditions of bail

44. Where it is considered there are public or victim protection issues which can be addressed by special conditions of bail it will be appropriate for special conditions to be sought. These can include preventing the accused from approaching or contacting a particular victim.

Advising victims of special bail conditions

45. Special conditions of bail are only likely to be effective if they are known to the victim or witness. Prosecutors must ensure that a system is in place for that information to be conveyed to those affected. This is particularly important for older people whose concerns about safety and security may be greater. This duty is undertaken by VIA who are responsible for advising victims about

- initial bail decisions;
- any change in the accused's bail status (for example if the accused is initially in custody awaiting trial and gets out of custody on appeal) ;
- any change in the accused's bail conditions (for example where they were subject to special bail conditions which have now been altered either by appeal or review);
- when bail conditions cease to apply (for example after there has been a disposal in the case); and

- when the accused has been granted bail pending an appeal against conviction or sentence.

Proceeds of Crime

46. In some cases of financial abuse, (for instance bogus workmen cases), we recognise that the accused may have obtained significant financial gain from their criminal endeavours and in particular from the exploitation of older people. Therefore at the marking stage prosecutors must consider whether the case should be referred to the Proceeds of Crime Unit to consider whether a financial investigation should be carried out with a view to obtaining a confiscation order.

47. To make that assessment the prosecutor must assess if the offences pass the *criminal lifestyle test* on 1 of the following 3 grounds: -

(1) The offence is one which is specified in Schedule 4 of Proceeds of Crime (Scotland) Act 2002. This schedule covers offences of money laundering, drug trafficking, directing terrorism, people trafficking, arms trafficking, counterfeiting, intellectual property, pimping, brothel keeping and blackmail; or

(2) The offence constitutes conduct forming part of a course of criminal activity. Section 142 of the Proceeds of Crime (Scotland) Act 2002 states that conduct forms part of a course of criminal activity if the accused is convicted of at least 4 charges on one indictment/complaint from which he or she has benefited or in the period of 6 years prior to proceedings being instituted, the accused has been convicted on at least 2 separate occasions of an offence constituting conduct from which he or she has benefited. In both these cases the relevant total benefit must be not less than £1,000; or

(3) The offence is committed over a period of at least 6 months and, again, the relevant benefit is not less than £1,000.

48. As can be seen from the above, criminal lifestyle cases are intended to target those accused who are engaged in an activity which is profit making.

49. There will also be cases where the accused may not pass the criminal lifestyle test but there is benefit from his particular criminal conduct. Such cases tend to be cases of fraud, embezzlement and robbery.

50. Cases of dishonesty should be carefully considered for referral to Proceeds of Crime Unit at Crown Office. Careful consideration should also be applied to how the charges are set out in the complaint or indictment.

Bringing the case to a swift conclusion

51. The time after an offender is charged with a crime can cause anxiety to the victim. Older people may feel especially vulnerable, particularly if the offender is also their carer, partner or relative.

52. Prosecutors must therefore seek to ensure that cases involving older people are dealt with as a priority and are brought to a conclusion as swiftly as possible.

Discontinuation of proceedings

53. There is a presumption against discontinuation of proceedings unless the circumstances change. Relevant changes might be those affecting the sufficiency of evidence or the decision as to whether it remains in the public interest to prosecute. Cases may also be discontinued when it is no longer in the public interest to proceed. Any decision to discontinue the case where sufficient evidence exists will be approved by a senior prosecutor.

If a Victim or Witness does not wish to Proceed

54. Where the witness or victim does not wish to proceed with the case, the case should not be discontinued until further information has been obtained about why the victim does not want the case to continue.

55. The police officer who reported the case may be asked to visit the victim at their home or to speak to the victim's representative or carer to find out the reasons why the victim does not wish the case to proceed.

56. If there are concerns about the impact on the health or well-being of the victim or witness if they are to attend court, the victim or witness's general practitioner or other relevant health or social care professional should be consulted. They should be asked to provide a report in relation to the impact on the victim of attending Court. Consideration must be given to what support or any special measures would be available to the victim to help them overcome any concerns to allow them to take part as a witness.

The investigations we will take where a victim does not want to proceed

57. If we suspect that the victim has been pressurised or frightened into withdrawing the complaint we will ask the police to investigate further.

58. We will consider all options before we decide whether to proceed with a prosecution. We recognise that there may be complex reasons why a victim may no longer wish to proceed with the case. Some of the factors which should be considered in determining whether the prosecution should continue are:

- the ability of the victim to testify;

- whether there is an ongoing relationship between the victim and the defendant eg. where the defendant is the victim's carer;
- whether the victim is in a place in which they feel isolated or particularly vulnerable or if supporting the prosecution would place the victim at risk of harm;
- if there is an ongoing relationship, the history of the relationship and any previous instances or previous abuse (eg. any previous incidents of domestic violence). Where the case is one of domestic abuse, we will apply our domestic abuse policy;
- the impact on the victim of proceeding or not proceeding with the case; and
- whether there have been any threats made since the incident

59 The decision as to whether to take up cases or to discontinue cases is one for the prosecutor and not for the victim or witness. It is not appropriate for prosecutors to indicate to a victim that the onus is or the option of instituting or discontinuing proceedings lies with them.

60. As part of our decision making we will take the safety of the victim or any other potential vulnerability into consideration before making a final decision. If the prosecutor is of the view that proceedings ought to be discontinued they will take account of the factors in paragraph 58 above and if they are to be discontinued, approval from a senior prosecutor must be obtained.

Plea Adjustment

61. If the accused offers to plead guilty to some of the charges against him or her, the prosecutor has a duty to consider whether it is in the public interest to accept the guilty plea and so resolve the case without having a trial.

62. However it will not be appropriate to accept a plea of guilty to resolve the case in relation to crime against an older person where this would prevent the prosecutor telling the court about the accused's knowledge of the victim or their knowledge of any vulnerability, or the impact of the offence on the victim or witness. Prosecutors should understand that the incidence and severity of the crime may seem out of proportion to the devastating impact the crime may have had on the life, health or level of trust in the community of an older person. The impact of the crime should not be discounted on the basis that it may seem to be out of proportion.

Information to sentencers

63. Where a case is resolved because the accused pleads guilty, the prosecutor must ensure that he or she provides full details of the impact of the crime on the victim and witnesses to the judge to allow the judge to select the most appropriate sentence.

Plea in mitigation

64. Before being sentenced the accused is entitled to tell the judge about their circumstances and the reasons for the commission of the crime. This

is generally done by their solicitor. It is known as a plea in mitigation. The prosecutor should ensure that he or she is aware of the facts that the defence are likely to tell the court and where the prosecutor cannot agree with the version given by the defence the prosecutor should not accept a plea. Where the prosecutor does not agree with something said by the defence solicitor during the plea in mitigation, which is important and could affect the sentence or contradicts the prosecutor's narrative the prosecutor should tell the court and if necessary a hearing can be fixed for evidence to be lead.

Sentence Options- consideration of compensation orders and protective orders for the victim.

65. Full consideration must be given to whether there are other orders which should be sought on conviction which would compensate the victim or enhance their protection. The prosecutor should ensure that the appropriate documentation is available to place before the Court to seek orders such as:

- a Compensation Order - a judge can make an order for the accused to compensate a victim for any personal injury, loss or damage or alarm or distress they have suffered;
- a Non-Harassment Order - where an accused has been convicted of misconduct towards a victim, the prosecutor can ask the judge to make a court order to stop the accused doing specified acts towards the victim;
- an Anti-social Behaviour Order-where an accused has acted in a way or has engaged in a course of conduct that causes or is likely to cause alarm or distress to a person who does not live in the same house, the judge can make a court order specifying conduct that the accused must stop doing.

66. The prosecutor must ensure that charges are drafted in sexual offences to ensure that if convicted the accused will be subject to the notification requirements of the Sexual Offences Acts.

Information about a Case you are Involved in- Victim Information and Advice Service (VIA)

67. The COPFS Victim Information and Advice (VIA) service, which has offices around the country, offers help to child victims and victims of crime in cases of domestic abuse, hate crime, sexual crime, cases where the prosecutor considers that the victim or witness would benefit from the involvement of VIA or where it is likely that a trial will involve a jury.

68. Cases which involve crimes against older people should be referred to VIA to ensure that the victim is kept advised of progress of the case, any bail conditions and where appropriate, offered advice on giving evidence by special measures.

69. The VIA staff can help victims and witnesses by:

- providing information about the criminal justice system
- assisting in a case where a victim appears to be vulnerable for any reason, or where the prosecutor believes the victim will benefit from VIA involvement
- keeping victims/witnesses up-to-date on key developments in the case that affects them – such as, dates of hearings, decisions about bail, verdicts and sentences – or why no proceedings are taken
- helping them get in touch with organisations that can offer practical support e.g. changing locks, reporting to insurance companies, and emotional support e.g. listening and encouraging social contact, combating isolation
- assisting if victims/witnesses need additional support e.g. help with access into court or interpreting facilities,
- discussing any additional support that might help, e.g. if you have to give evidence. With consent, helping arrange a visit to court so that a victim/witness knows what to expect if the case goes to trial and s/he is to give evidence

Assistance to help a victim or witness to give Evidence- Special Measures

70. Usually a witness gives evidence in court in the presence of the public and the accused. If there is a trial, and an older person needs to give evidence, in some circumstances a witness can give evidence by special measures. These include:

- giving evidence in court but having a supporter
- use of a screen, so the witness does not have to see the accused
- giving evidence by a live television link so that the witness will not have to see the accused.

71. The prosecutor has to apply to the judge to ask for a witness to give evidence by any of the special measures, and there is a legal test which must be applied. Victims and witnesses can contact VIA to discuss this if they think they would benefit from having a special measure to give their evidence.