



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Justice Committee

**Tuesday 26 February 2019**

**Session 5**



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Pàrlamaid na h-Alba

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**JUSTICE COMMITTEE**  
**7<sup>th</sup> Meeting 2019, Session 5**

**CONVENER**

\*Margaret Mitchell (Central Scotland) (Con)

**DEPUTY CONVENER**

\*Rona Mackay (Strathkelvin and Bearsden) (SNP)

**COMMITTEE MEMBERS**

- \*John Finnie (Highlands and Islands) (Green)
- \*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
- \*Daniel Johnson (Edinburgh Southern) (Lab)
- \*Liam Kerr (North East Scotland) (Con)
- \*Fulton MacGregor (Coatbridge and Chryston) (SNP)
- \*Liam McArthur (Orkney Islands) (LD)
- \*Shona Robison (Dundee City East) (SNP)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

- Lesley Carcary (Action on Elder Abuse Scotland)
- Anthony McGeehan (Crown Office and Procurator Fiscal Service)
- Chief Superintendent John McKenzie (Police Scotland)
- Rosalyn McTaggart (Law Society of Scotland)
- Gordon Paterson (Care Inspectorate)
- Adam Stachura (Age Scotland)

**CLERK TO THE COMMITTEE**

Stephen Imrie

**LOCATION**

The Mary Fairfax Somerville Room (CR2)



# Scottish Parliament

## Justice Committee

*Tuesday 26 February 2019*

*[The Convener opened the meeting at 10:00]*

### Prosecution of Elder Abuse

**The Convener (Margaret Mitchell):** Good morning and welcome to the Justice Committee's seventh meeting in 2019. We have received no apologies.

Item 1 is the start of a new piece of work for the committee. We will take an initial look at issues to do with the prosecution of elder abuse in Scotland. Our work follows on from Lord Bracadale's independent review of hate crime legislation in Scotland.

We will hear from two panels of witnesses today. I am pleased to welcome our first panel: Lesley Carcary, director of Action on Elder Abuse Scotland; Adam Stachura, head of policy and communications at Age Scotland; and Gordon Paterson, chief inspector, adult services, at the Care Inspectorate. Thank you for the detailed written evidence that you supplied to the committee, which is immensely helpful to our scrutiny.

I refer members to paper 1, which is a note from the clerks, and paper 2, which is a private paper. I invite John Finnie to start the questions.

**John Finnie (Highlands and Islands) (Green):** I thank the witnesses for their submissions. I note that Mr Paterson said in his submission:

"we would ordinarily be wary of an arbitrary approach, based on age, that could have the effect of perpetuating a perception of older people as members of a demographic distinctly lacking the ability to protect themselves from harm or abuse."

That is an important statement.

Will the panel talk about the nature and extent of elder abuse?

**Lesley Carcary (Action on Elder Abuse Scotland):** From our research and recent prevalence studies, we estimate that around 9 per cent of over-65s in Scotland have experienced some form of elder abuse, which might be physical, sexual, financial or psychological abuse, or neglect. We think that that is likely to be the tip of the iceberg, because in our experience—and I am sure that other panel members will corroborate this—many older people are reluctant to speak up. Therefore, we think that the extent of elder abuse is much greater.

**Adam Stachura (Age Scotland):** I concur with that. Studies from the World Health Organization put the proportion of older people who could be subject to elder abuse at nearer to 16 per cent.

Let me put that in the Scottish context. We have 1.65 million people over 65, so even if the rate of elder abuse is at the lower end of the estimates and nearer to 10 per cent, we are talking about a huge number of people who could be being subjected to frankly terrifying abuse. A lot of people are affected, with estimates ranging from perhaps the best part of 150,000 people, at the lower end, to upwards of 200,000 people. It is therefore really important that action is taken.

**John Finnie:** Are you able to say how that group of people is dispersed across Scotland? Are they concentrated in particular geographical areas or sectors?

**Lesley Carcary:** It is very difficult to tell. The best statistics that we can get in Scotland are based on the adult support and protection statistics that are collected in each local authority area biennially. Unfortunately, those statistics are collected in different ways, which means that it is difficult to get a national picture.

We run a national helpline, which gets more calls from urban areas, but I do not think that that is an indication of there being more elder abuse in urban areas. Remote areas tend to be less well served by other support services and there tends to be less access to information, so it can be difficult to let people in remote areas know that support is available, which might mean that they are less likely to speak up.

**John Finnie:** Do you want to comment, Mr Paterson?

**Gordon Paterson (Care Inspectorate):** I defer to my colleagues' specialist knowledge about the prevalence of elder abuse.

For us, part of the challenge is the definition, as always. We register and inspect 13,500 care services in Scotland, including 832 care homes for older people. We are for ever debating and wrestling with the question of when poor care becomes neglect, neglect becomes harmful and harmfulness constitutes criminality, and then there is the challenge of pursuing effective prosecutions with regard to the public interest, the reliability of witnesses and the ability to prove things beyond reasonable doubt. It is therefore very difficult to put a figure on prevalence; it is also difficult to deduce from that whether particular parts of the country face particular challenges. People in rural and remote areas are no less vulnerable than those in urban areas, but we do not purport to have any robust statistics on prevalence.

**John Finnie:** Is anyone on the panel able to say whether someone is more likely to be subjected to abuse if they are in an institution instead of in their house? Is there anything to support that?

**Lesley Carcary:** Our evidence suggests that someone is much more likely to be abused or harmed in their own home than in care settings, and we have found that the majority of abuse comes from family members, with a fairly even split between partners and spouses, and grown-up children and other relatives. We have heard of cases in which carers or other health professionals have been the perpetrators, but in the vast majority of cases, the perpetrators are, unfortunately, family members—in other words, the abuse involves someone who is very well known to the older person and takes place in their own home.

**Adam Stachura:** Given the length of time that someone might live in their own home in comparison with how long they might live in a care home, they might be subjected not necessarily to a one-off instance of abuse but to abuse over a prolonged period of time from a family member, close friend or paid-for care worker in their own home. I concur with Lesley Carcary with regard to the balance in that respect, but for many people, elder abuse will happen over a long period of time, not on a one-off occasion.

**Lesley Carcary:** One of the biggest problems that we deal with is loneliness and social isolation among older people—indeed, that is one of the biggest factors in older people choosing not to report harm or abuse. We have heard of older people choosing to put up with abuse rather than risk having their grown-up son not visiting, and of grown-up children bribing older parents by saying, “If you tell anyone about this, you’re not going to see your grandchildren.” For a lot of older people, the fear of loneliness is actually greater than the fear of abuse, and as a result, they choose to put up with it, unfortunately, rather than tell anyone about it.

Moreover, as members will have seen in our written submission, we have heard evidence of older people handing back free call blockers that are intended to block nuisance calls, because they were so lonely they would rather speak to scammers than be on their own. We would class scams and doorstep crime as forms of abuse, too. I think that that indicates some of the reasons why so few people speak up about the issue.

**John Finnie:** Some of my colleagues will ask about the criminal aspects—offences and so on—but I note that Mr Paterson has already talked about the factors involved in escalating something to a criminal matter. My question, which is for the other two panel members, is whether all aspects of elder abuse should be considered criminal.

**Lesley Carcary:** Not always. One of the main differences between how elder abuse and domestic abuse are dealt with is that, with domestic abuse, the approach is all about empowering the woman to take decisions and actions to keep herself safe, get out of the situation in which she finds herself and seek justice through the criminal justice system. Unfortunately, as far as older people are concerned, the prevailing view is quite a paternalistic one—in other words, here is a poor older person who needs our help and support—and we therefore tend to find that elder abuse cases are primarily social worked rather than prosecuted.

We keep an eye on media stories on abuse in care homes—abuse in private homes is not as well publicised—and we find, quite often, that the carer in question is struck off the register, disciplined or sacked. In such cases, we always write to the media, pointing out that a criminal charge was not considered and asking why. We also find that in cases involving a younger person or child, criminal charges will be considered in the first instance, but I am sad to say that that is not the case for older people. The first response tends to be adult support and protection, which we agree is good, but we cannot forget about the criminal aspects. If we do, older people will not speak up. Without any effective deterrent, the problem of elder abuse will continue.

**Adam Stachura:** I want to back up a lot of what Lesley Carcary has said, particularly with regard to adult support and protection. Scotland’s approach to the issue is unique in the United Kingdom, but with regard to the criminal aspects, we need to think about the result and impact of the actions on the older person and their life. A lot of the abuse is psychological, but it can be physical and financial, too. As I have said, we might not be talking about just a one-off act; if the abuse goes on for a prolonged period of time, it can have a serious impact on the person’s life, and that is where the element of criminality should come into the judgment of prosecutors.

**Gordon Paterson:** I would not want to undervalue the contribution that adult support and protection has made in Scotland during the past 10 years. It is important to recognise that our experience, distinct from that of colleagues, is that adult protection is about not just the social working—whatever that is—but a multi-agency response that gives due consideration to how protective measures should be brought by all parties involved, including social work, housing, health and the police. The active involvement of Police Scotland and the police concern hubs is an effective means by which those who have a responsibility for investigating and reporting crime—that is, Police Scotland—do so in relation

to any number of adult protection concerns that are considered day in, day out across Scotland. Prosecutions come about as a result of adult protection issues, but I am not sure whether an additional offence is necessary to address the lack of success of some of those prosecutions. That is perhaps an issue that could be pursued with the second panel.

**The Convener:** With regard to the extent of the issue and the fact that the figure of 9 per cent represents underreporting, could you explain how the Care Inspectorate records these incidents?

**Gordon Paterson:** In relation to our strategic scrutiny of the work of social work departments and health and social care partnerships, which we do jointly with other regulators, it is not for us to record such incidents. We go out to inspect how effectively social work departments and health and social care partnerships are discharging their duties in relation to adult support and protection, in the same way as we do in relation to self-directed support or integration.

**The Convener:** How is that written up, then?

**Gordon Paterson:** It is written up by the adult protection co-ordinators and the staff who are employed in the health and social care partnership, and, as Lesley Carcary has alluded to, it is reported in the adult protection committee conveners' biennial report, which is submitted to the Scottish Government for its consideration.

**The Convener:** Is the age of the person recorded anywhere? Will the Care Inspectorate record that and have a note—even a light note—of the type of abuse or incident that had been recorded?

**Gordon Paterson:** Information would be recorded in the biennial reports that are pulled together nationally, and there is now a national strategic adult protection forum that is chaired by Clare Haughey, the Minister for Mental Health. It is meeting next week, actually.

We would probably have more information on the prevalence of abuse and harm in relation to registered care services. We require them to notify us of any incidents that fall into that category. We record them and monitor how the service is affected and what action is taken in response. We know, therefore, that a number of referrals come to us involving allegations of harm relating to elder abuse in care services that support older people. Again, those would be referred to the local adult protection team in the health and social care partnership for it to investigate. We would oversee how that progresses, and might take enforcement action in relation to that care service if that were necessary.

**The Convener:** Do you think that it would help if the age of the person were flagged up, along with the fact that an incident might potentially be a case of elder abuse? If you were to revise how you reported on incidents in that way, would that be a starter for 10?

**Gordon Paterson:** It would be a starter for 10 if we recorded the age of people who were the subject of allegations of harm. Not all the allegations are substantiated, of course. However, I would be less concerned about the person's age and more concerned about their vulnerability. We often deal with people who happen to be under the age of 65 and who are the subject of abuse. That could be one of the most significant challenges for the committee to consider.

**The Convener:** Is there not a problem with the fact that, if you do not record the age, you cannot tease out the instances where people are targeted because they are seen as an easy target because of their age? If you make the assumption that vulnerability is the only factor, and you put all the instances under one heading, does that not mean that you are missing an opportunity to tease out that issue?

10:15

**Gordon Paterson:** That might be the case if you subscribe to the view that something happens on a person's 65th birthday that makes them an older person and that, by virtue of that, there is a need to classify, view and treat them differently. However, as Lord Bracadale said, the question of proving age hostility is quite significant.

**The Convener:** I know that other members still have questions, but Jenny Gilruth will ask about barriers to reporting and then I will bring in supplementary questions on that, which may cover all the points.

**Jenny Gilruth (Mid Fife and Glenrothes) (SNP):** On the barriers to reporting, the submission from Action on Elder Abuse Scotland talks about a reluctance to report—as Lesley Carcary has already mentioned—and an unfair perception, or stereotype, that older people make less credible witnesses. The Social Work Scotland submission says:

“We also have to understand that many victims of harm may not wish their relative to be prosecuted”.

Does the panel acknowledge the tension between victims needing help and not wanting to prosecute someone who is a family member?

**Lesley Carcary:** That is an issue that we come across regularly. We have a national helpline and every day we speak to older people or family members who have been affected by elder abuse. The vast majority of people who call our helpline

are family members—only a very small proportion of callers to the helpline are the older people themselves. Without speaking to older people directly, it is difficult to know why that is the case, but we can perhaps safely assume that it is because they find it difficult to report their loved ones.

Our definition of elder abuse makes a clear distinction between situations in which there is an expectation of trust but that trust has been abused and opportunistic crime. Our definition focuses on situations in which there is an abuse of trust, which is why we specifically deal with family members, friends, carers and health professionals. We would not include doorstep crime or bogus tradesmen and other scams. It is very difficult for older people to speak up about the type of crime that we deal with.

I mentioned that family members are most likely to be the perpetrators of such crime. The most recent prevalence study found that 66 per cent of perpetrators were family members, which broke down to a fairly even split between partners and spouses on the one hand and other family members on the other. In our experience, it tends to be grown-up sons, followed by grown-up daughters, who are the most common perpetrators after spouses or partners.

Sometimes older people will call the helpline to discuss their concerns about their grown-up children or other family members. Occasionally, I take helpline calls, and some of the people I have spoken to have told me that they are in a quandary: they are embarrassed and feel guilty that their own children could do that to them, yet at the same time the perpetrator is still their child and they do not want to report them.

The type of abuse most commonly reported to us is financial abuse. That is fairly consistent across various local authorities. We often hear of abuse of trust over things such as power of attorney. We find that there are two types of people who abuse power of attorney. First, there are people who know that it is wrong and who use the power as a means to steal from an older relative. Secondly, there are people who do not realise that they are misusing the power. There are many misconceptions about what power of attorney is and what it can and cannot be used for. Some people who have power of attorney for financial issues believe that it gives them the power to spend that money however they like.

Sometimes we get callers to the helpline who will say things like, "But it's my mum. She would want me to have this money," or "She wouldn't mind because it would be coming to me anyway," or that their mum would want them to spend it on such and such. We tell them that it is not their money and ask whether they have asked their

mum or dad whether they want it to be spent in that way. Many people genuinely do not realise that they are doing the wrong thing. For the people that that is happening to, it is very difficult to report.

We have heard of older people who are struggling financially and going into debt because they do not want to stop giving money to their children. It is a very difficult issue. We give them all the support and encouragement that we can, but if the older person does not want to report it, there is nothing that we can do about it. It is that person's right not to report it. That is why we need to be more creative in how we encourage them to seek support elsewhere.

I mentioned that many older people are very lonely. They might choose to put up with the situation if they think that if they do not give their son that money, their son will not visit, they will not see the grandchildren, their son will not drive them out and about and so on. That is why we need to think about what other support we can signpost that older person to so that they are not completely reliant on their abuser to meet their social or care needs. We need to think about it from that point of view, too.

It is not always about criminalisation. At the same time, we think a lot more needs to be done to criminalise such behaviour so that there is a real deterrent and so that children and other family members think twice if they are considering it.

**Adam Stachura:** If we consider the dynamic of the relationships, we can see that older people are very dependent on the rest of their family and, as Lesley Carcary rightly said, most of the perpetrators are close family members. A lot of people—especially older people—have to think about what support is available to them, once they have made a report; they also have to know that they are not on their own. On the issue of loneliness and isolation, at the worst extreme, there is one older person in every street in Scotland who feels lonely all or most of the time.

It is also important that older people understand how to get access to the right information. Half a million Scots who are over the age of 65 do not have access to or use the internet, so most of the information about behaviour that is wrong and what they need to do about it is not at their fingertips. Lesley Carcary's charity has a helpline and Age Scotland also has a national helpline. We speak to people and their families about instances of abuse and the first question that they ask is, "What do I do about this and where do I go next?"

Therefore, for a lot of people, the barrier is not just about making the report; it is about what happens if they make a report and they are ostracised from their family or something happens



to that relationship. They want to know where to go and what support is in place for them. If we look across the piece, we can see that there is a big question for many victims of these serious crimes: how can we support older people who report these crimes in the best way possible?

**Jenny Gilruth:** In relation to prosecution, we have seen evidence from Police Scotland and Age Scotland about specialist support for victims of elder abuse, on which both organisations agree. I was taken by Lesley Carcary's submission, which points to specialist staff and gives an example of units in police and prosecution services in America. What do the barriers to prosecution look like and what more could be done?

**Lesley Carcary:** In my submission, I point to the case of Lynn Harrison, whose elderly aunt experienced quite severe financial abuse, in which £44,000 was stolen

“at the hands of her carer”.

That was a terrible situation, but we found it to be a good example that highlighted problems in the system. I included in the submission a quote from Lynn Harrison, in which she talked about having persistently to “badger” the police for the case to be taken seriously.

Unfortunately, not everyone has someone who is persistent and is willing to do that badgering. When a person is told that the police are not going to investigate, they will often not push things any further. The more often it happens that when, on behalf of an older person, someone else makes a report to the police and nothing happens, the less likely older people are to report such things.

A few years ago, we came across a case of an older lady who had dementia and lived in her own home. She had a carer who came in twice a day to meet her personal care needs. Her grown-up son believed that the carer was stealing from her purse. He did not have any evidence to instigate either criminal proceedings or an adult support and protection investigation, but he was so adamant that the carer was stealing that he took the drastic step of installing cameras in his mum's home. Lo and behold, they found evidence to show that the carer was stealing and the case was eventually taken to court. We feel that cases should not have to reach such extreme states in order for them to be taken seriously. The woman's son found that, because his mum had dementia, any time he reported the issue people would just say that she had dementia and was getting a bit muddled or making it up. That happens—we appreciate that—but it does not mean that such cases should automatically be dismissed and put down to confusion or memory problems. Each case needs to be investigated on its own merits.

**Liam Kerr (North East Scotland) (Con):** Gordon Paterson mentioned that we are wrestling with definitions. At some point, the committee will need to seize hold of terms that are to be defined. Lesley Carcary's submission talks about what the definition will be of “older people”. We have a paper that talks about elder abuse of people who are 60 or older. What do you think should be the definitions of “elder” and “older person”?

**Gordon Paterson:** That is the issue with which I have most difficulty. I think that the Care Inspectorate would, too, in so far as we have consistently sought to promote the notion that people of age should not be defined by what they lack: we should not have a deficit-based approach. As people age, they continue to be able to contribute and they have hopes, ambitions, experiences and wishes.

Some people aged 64 are as vulnerable as some people are at 84: nothing magical happens on that birthday. The challenge is in how we can develop a definition that picks up on age hostility, which can happen at various ages because there are younger people with dementia or learning disabilities—albeit that they might already have a protected characteristic under the Equality Act 2010. That is where things are at odds. We need to ensure that there is sufficient protection, because there are significant variations between people who are 65, 85 or 105. We are working with quite an outdated age cut-off that is a reflection that, 50 years ago, 65 was considered to be quite elderly. Now, 75 is considered to be not at all elderly.

There are real challenges with definitions. The questions should not be about chronological age, but about the fact that people, at different times in their lives, can have degrees of vulnerability, frailty and infirmity. People can choose to target such people and prey on that.

**Adam Stachura:** Liam Kerr's question is a very good one, which Age Scotland, as a national charity for older people, thinks about all the time. The first stage that we look at is people who are 50. That is not by virtue of their being vulnerable or anything like that, but because we know that that is when age discrimination kicks in in the workplace. There will be different priorities for people throughout the age spectrum.

On the actions that are behind elder abuse by family members, care givers or close friends, who are taking advantage of someone who might be vulnerable and unable to report things and who has assets, for example, we need also to look at their capacity. It is very difficult to think about and to set an age, which might be arbitrary. The majority of perpetrators are close family members who are grown-up adults, so we might be looking

at people who are aged in the mid-50s to 65, for example. The situation could be quite fluid.

**Lesley Carcary:** I will read our definition of elder abuse, which we produced 20-odd years ago and has subsequently been adopted by the World Health Organization and is used internationally. Our definition of elder abuse is:

“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”.

You will notice that the last two words are “older person”, but we do not define what that means: we, too, experience the tension in respect of putting a number on it. A few weeks ago, we posted something on Facebook that deliberately said, “Please complete this survey if you’re aged 55 or over.” Quite a few people got back to us and were quite offended that we would class a 56-year-old as an older person.

For us, the number should not matter. In respect of prosecutions, we believe that older people as a group have deliberately been targeted because often they are perceived as being more vulnerable. That takes away some of the confusion in trying to determine whether a victim was deliberately targeted. It should not matter whether we have a definition of a vulnerable person; the fact is that, quite often, older people as a group are perceived to be vulnerable. We use the example of an older person who might be frail and blind, but who might not think of themselves as vulnerable. Perhaps they are not, but the fact is that it is very likely that the person who perpetrates a crime will choose an older person because they perceive them to be vulnerable, whether they are or not. That is the important point.

**Liam Kerr:** Members of the committee will come back to that point later on.

I found Gordon Paterson’s point to be very persuasive, in that if we do not draw a category, it will be very difficult to say who is in the protected category. Therefore, should we protect age as a general characteristic, as we have done in employment legislation, for example, and say that we should not discriminate based on age, rather than trying to draw an arbitrary line and saying that a person who is 64 years and 364 days old is not within the category until they reach their 65th birthday? Would that be a better approach?

**Lesley Carcary:** I agree that we should do that. I have always felt a bit of tension because, unfortunately, the name of our organisation includes the term “Elder Abuse”, but we have all come to accept over the past few years that the term is not used very commonly.

10:30

We tend to work within the adult support and protection framework, in which the terms “abuse” and “elder” are very rarely used. We talk about harm, abuse or exploitation of an older person. Again, there is no definition of “older person”, but for us the issues are vulnerability and, perhaps, frailty. It might be useful for the committee to consider the definition that is used in the Adult Support and Protection (Scotland) Act 2007. It does not use the term “vulnerability”, but it is clearly intended to describe vulnerable people. It covers any person over the age of 16. That approach could be a route to consider, because it would also take into account younger adults with learning disabilities. In terms of consistency, that would be a useful crossover.

**Liam Kerr:** That is useful. Does anyone else want to comment?

**Adam Stachura:** It is certainly worth reflecting on that suggestion, but we should also consider Lord Bracadale’s review of hate crime legislation and the proposal for a statutory aggravation in relation to age in general. That is obviously separate from the question about what elder abuse is, but a statutory aggravation that would top up the sentence when such an offence has been committed would be a welcome move.

We know that a huge number of older people are subject to such crimes over a prolonged period, although, as has been said, the age is somewhat fluid. As Gordon Paterson rightly said, a person who is 75 could still be fit as a fiddle and not seen as being old or elderly—although those are terrible phrases to use. We therefore must reflect on the cut-off point. The Bracadale recommendation that age should be a protected characteristic is a good place to start, but we should also look hard at the impact that such crimes have on older people in general. That is something to pivot round.

**Gordon Paterson:** On adult support and protection, the three-point test that applies in consideration of whether an intervention is warranted is whether a person is able to safeguard their welfare, property rights and interests; whether they are at risk of harm; and whether they are more vulnerable—the word “vulnerable” is in there—because of age, infirmity or disability. I am sorry—age is not in there, which is the point that Lesley Carcary made. The test refers to adults who,

“because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.”

The addition of the word “age” might not make much difference, because the issue is not age on its own; it is also about vulnerabilities that are

sometimes associated with age, which are probably already covered by the words

“disability, mental disorder, illness or physical or mental infirmity”.

Therefore, the adult protection legislation is robust and allows a multi-agency response to situations in which a person has, by virtue of their age, vulnerability that is associated with frailty or social isolation, so interventions can follow.

There is a need to reinvigorate the agenda around adult support and protection, and not just the protection elements. That is where we can begin to address social isolation and to tackle issues of misuse of power of attorney, and where we can have dialogue with people about capacity, consent and their confidence in being reliable witnesses and in making complaints.

**Rona Mackay (Strathkelvin and Bearsden) (SNP):** My question relates to the convener’s line of questioning to Gordon Paterson about reporting and definitions of abuse. Mr Paterson asked us to consider when neglect becomes harmful. Will you explain that? I would have thought that, by definition, neglect is harmful.

**Gordon Paterson:** The challenge is in application of the three-point test for adult protection in situations such as we often encounter. I was interested in the submission from Protect, which talks about whistleblowing and care services. It talks in great detail about some of the care challenges and the fact that care staff have been raising concerns about situations of harm, abuse, neglect or poor care. I researched that further and identified from the sources that were used that Protect’s work in care services is predominantly in England. It talks about the Healthcare Commission, which is the regulator that preceded the Care Quality Commission in England, and about the percentage of care workers who are whistleblowers relative to the number of care workers who are recorded in the census in England and Wales. Therefore, the submission is describing quite a different situation from the one in Scotland.

Unlike most regulators, the Care Inspectorate has a statutory responsibility to receive complaints. In each of the past three years, we have received more than 4,500 complaints about care services, of which about 45 per cent were related to care homes for older people, in the most recent years. Whether it is a complaint or an adult protection referral, the response should be robust and the investigation thorough. However, we encounter situations or reports in which it is difficult to substantiate what has occurred, or in which peer-on-peer incidents have occurred. There are high numbers of those—when someone

with dementia has lashed out or been sexually disinhibited, for example.

That takes us into the territory of what response is most effective in each circumstance. It is not always about involving the police or having a full investigation; it can be about how to manage distress or stressful behaviour, or about how we, as the regulator, can intervene. Last year, we had situations in which, as a result of whistleblowing, we closed five care homes because of poor care, which was unprecedented in our history. Our complaints procedure encourages staff to blow the whistle, anonymously or confidentially. In two situations, the intelligence that we gathered with regard to what action was necessary was informed by staff who were whistleblowers.

We have lots of examples of engaging with Police Scotland in such situations, from which prosecutions have followed. We would always refer to the Mental Welfare Commission, the Scottish Social Services Council and the Nursing and Midwifery Council. We are currently engaged with Police Scotland on cases that I need to be sensitive about discussing because they are sub judice. Police Scotland is for the first time pursuing possible prosecutions under the Health (Tobacco, Nicotine etc and Care) (Scotland) Act 2016, which is new legislation that allows courts to consider taking action with regard to ill treatment or wilful neglect by a member of care staff or a care provider. A lot is going on in that area—we need to recognise how recent that legislation is and that the cases are probably the first to come through. The 2016 act might increasingly be used to tackle challenges that arise in care services.

**Rona Mackay:** If you received several complaints or heard from a whistleblower about neglect at a particular care place, would you look into it and take action?

**Gordon Paterson:** We might not wait for several complaints; we would put a complaint together with other intelligence, such as when we last inspected, what we found then, and whether there had been notifications from the service about incidents or accidents or a change of manager, which can be a critical point in a care home’s journey. We would take action by arranging an inspection, carrying out an investigation or making a referral to the local health and social care partnership, which could initiate adult protection measures. We might, at that point, also make a referral to the Scottish Social Services Council or to the Nursing and Midwifery Council, which can make interim suspension orders pending investigations. We would also make demands on the provider about whether they were managing the service effectively and taking robust action, such as disciplinary action or having an internal investigation.

**Shona Robison (Dundee City East) (SNP):** Gordon Paterson talked about the definition of vulnerability in adult support and protection legislation, which probably gets to the heart of what we are talking about. Rather than basing vulnerability on a person's chronological age, which the panel has said it is very hard to do, it bases it on whatever is the factor—whether age or a learning disability—in the person becoming a target for whoever. Do you think there is a gap or an opportunity to build on what is in the adult support and protection legislation to create a potential statutory aggravation that is not specific to older victims? That would send out a message that this is judged a very serious crime and will be regarded by the courts more seriously than society might view it at the moment. Do you have sympathy with that approach, or do you think that there is no gap that needs to be addressed?

**Gordon Paterson:** Such a move would be important and significant in raising awareness and would send out a strong message. However, I am not sure whether it would deter people from committing such offences or increase the likelihood of people coming forward to report them, thereby effecting a prosecution.

The question is how we ensure that people are not socially isolated but are supported with advocacy or whatever else is necessary for them to be confident in reporting and progressing any concerns that they have about what is, as we have heard, often familial abuse and how we reassure them that doing so will not result in reprisals or losing whatever value that family connection brings.

For me, the issue is how we more effectively emphasise the support element of adult support and protection. Any number of measures—including, say, raising awareness through a public campaign—could be taken to heighten awareness of this difficult issue, but we might be able to do that through the existing definitions in adult support and protection instead of through revising the wording of the three-point test.

**Shona Robison:** There are quite a lot of parallels with domestic abuse legislation, and there is a recognition that society has a duty to send a very clear message to perpetrators and potential perpetrators that a vulnerable person should not be treated any differently in the eyes of the law with regard to their rights to be protected and have redress. I guess that it is all about striking a balance. I hear what you say about the complexities of family relationships, but I would point out that some of the same arguments were previously used in domestic abuse situations—people would say that such matters were complex and that it was all about supporting the victim.

That is true, but I think that the law needs to be very clear that this is a crime.

Aside from any complexities that might exist in the household in question—which is an issue that needs to be addressed—would such an approach not send the message that such matters will be treated seriously and the fact that someone is vulnerable does not mean that they will be less protected in the eyes of the law? Do you see what I mean?

**Gordon Paterson:** I will defer to my colleagues and give them an opportunity to respond. I agree with you that such heightened awareness and added protection are aligned with the kinds of approaches that led to the domestic abuse legislation. Perhaps we should give that approach time to play out and see how it develops.

**Lesley Carcary:** There has been a lot of debate over whether singling out age as a specific category is ageist and whether we should not be treating older people as a separate group in case it marginalises them. However, I totally disagree with that. If we can treat domestic abuse as a unique issue with its own prosecution system, dynamic and processes—I note that there are also specific protections for victims of hate crimes and, indeed, very specific and comprehensive protections for children—why on earth can we not treat the protection of older people as a distinct issue?

**Shona Robison:** But you have said that it would be very difficult to define age in that respect. Surely, the issue is the vulnerability of the person involved rather than their chronological age. Should we, as one way forward, have the person's vulnerability rather than their chronological age as a statutory aggravator?

10:45

**Lesley Carcary:** I think that there are possibilities for both approaches. You may have seen that I make such a suggestion in my written submission. Forgive me—I am not a legal expert, so I do not know whether this is legally possible, but I quite like the idea of having both systems. There could be a statutory aggravation based on vulnerability, which would take into account any age group and focus on vulnerability, and a specific, stand-alone offence of elder abuse for use in different cases. The specific offence would be our preference, but we could perhaps have both systems at the same time, if that was deemed workable. We would very much support a statutory aggravation based on vulnerability, and it makes sense for that to be available for all age groups.

We would support use of the definition of vulnerability under the Adult Support and

Protection (Scotland) Act 2007, because it works very well. However, as I said earlier, there is a problem to do with harm and abuse of older people being treated in a paternalistic way. Although the approach to adult support and protection is very good in supporting, protecting and safeguarding older people, it is not part of the criminal justice system and there is a danger that it could lead to the problem that we are already seeing whereby people do not consider the criminal aspects but focus just on the safeguarding side.

Although the domestic abuse framework works very well in securing prosecutions, the committee will be aware that it applies only to partners and ex-partners. We have always been concerned that it does not take into account situations in which the perpetrators are grown-up children or other family members. A few months ago, a lady called our helpline because she was being physically and financially abused by her grown-up son. According to the definition and the three-point test for adult support and protection, she is not vulnerable enough for support under that framework because she is not frail and does not have mental capacity issues. She is also unable to access support in relation to domestic abuse because it was not her partner or spouse who was abusing her. There is a bit of a loophole for such people. Which route do they go down? How do they seek justice?

**Shona Robison:** Thank you. That is helpful.

**Adam Stachura:** Shona Robison's question is a very good one. The Bracadale review suggested creating an aggravation based on vulnerability, and the Scottish Government has just closed its consultation on that. As a previous Lord Advocate said, legislation can affect behaviour. That is a compelling argument for lots of different things, but the type of legislation that we are discussing, however it is enhanced, could be a real statement of intent that such offences and crimes are absolutely not on. Scotland could be unique in taking that approach.

Three elements are critical to people who come forward feeling protected and supported and having confidence that they will be taken seriously. We have discussed briefly the barriers that they may face, and it is important that they know that support is available to them. Prosecutors need to have further legal tools at their disposal when they think that something might be lacking—perhaps the committee will hear about that from them in a later evidence-taking session. Finally, the approach would act as a preventative measure as well, because it would enhance the severity of the crime, so that those people who perpetrate it might think twice about doing so.

Drawing on the parallels with the domestic abuse legislation, I note that—rightly—that

legislation was not watered down with anything else. We should consider the effects of the enhanced publicity when people see adverts everywhere that say, "This is not on," "This is what you need to do," and, "This is what will happen to you if you commit these offences," and the same applies in the circumstances that we are discussing. I hope that, in the future, we will see more reporting, more prosecution and less crime.

**The Convener:** I will bring in Daniel Johnson now, as that is the subject of his line of questioning.

**Shona Robison:** Sorry, Daniel.

**Daniel Johnson (Edinburgh Southern) (Lab):** It is fine. It is useful to explore these things.

We are talking about what changes are needed in the law, and the Bracadale report has been touched on a number of times. My reading of what it recommended is that we should consolidate the law on hate crime with a baseline offence and aggravators for protected characteristics. Will the panel state what their thoughts are on that model?

A second, connected point is the extent to which such an approach would be sufficient. Is the abuse that we are talking about really what we might consider to be a hate crime, or do other elements need to be considered?

Other members will ask about the merits of creating a stand-alone statutory offence; I want to focus on the Bracadale model of having a statutory aggravation.

**Lesley Carcary:** Our preference—if this is legally possible—is for three different models to work in tandem. We know that there is hostility based on age, but instances of such behaviour are very much in the minority. We hear of antisocial behaviour or negative attitudes towards older people because of their age—I am thinking of, for example, resentment of people who are thought to be claiming more benefits or getting more state support. We do not hear about that very much, but for the people who experience such behaviour, we would, first, support any proposal to have an age-related hate crime.

Secondly, we think that a statutory aggravation based on victims being targeted because of their perceived vulnerability could work on top of that.

Thirdly, as I said, if there is the possibility of having a stand-alone offence of elder abuse for more complicated cases that involve an older person and all the complicated dynamics that go alongside elder abuse, we will support such an approach.

**Daniel Johnson:** Lord Bracadale said explicitly that that would be difficult because of the issues that we have talked about. In his view, a broader

aggravation based on age would be more workable and more useful. How do you respond to that?

**Lesley Carcary:** Age-related hostility can happen in relation to any age—there could be resentment of a younger person, for example—so such an approach makes sense. I am less aware of hostility towards younger adults, of course, given that our experience is to do with older adults, but it would make sense for age in the widest sense to be the aggravation instead of old age specifically being pinpointed.

**Adam Stachura:** I should add the caveat that Lesley Carcary gave: I am not a legal expert. I think that the Bracadale review was neat in that it looked at how things work across Scotland's criminal justice system and proposed statutory aggravations that are a step up from where we are now.

We are very supportive of there being a statutory aggravation based on age. I can see that working in tandem with work on fraud and scamming. Older people can be perceived to be vulnerable, and, when a scammer goes after 10 people who are all in their 70s, we are dealing with not just fraud but a pattern.

The same goes for the hate crime part of this. There are examples of older people being blamed for the vote to leave the European Union, with bricks being thrown through people's windows. That is a hate crime based entirely on age. It is not just criminal damage with an aggravation; it is more extreme.

I think that elder abuse is separate. When we look at the types of crime that are committed, sometimes over a long period, we see that they do not necessarily fit neatly into the aggravation category—it is not just theft with a statutory aggravation; it is part of a prolonged period of financial, physical or psychological abuse that has parallels with domestic abuse.

In general, I think that the Bracadale review's approach to how things fit into the Scottish criminal justice system was well considered.

**Daniel Johnson:** Let me paraphrase. The model is one of baseline offences and statutory aggravations, whether we are talking about hate crime or other common-law offences. Having an aggravation based on a person's old age would be the means of attaching that perspective or importance to the crime. Is that roughly what you think that we should take away from Bracadale?

**Adam Stachura:** Sure, and I think that the aggravation really belongs with the sentencing part of the process. How prosecutors think about a crime that has been reported is a different kettle of

fish. Having a statutory aggravation is helpful when sentencing happens.

**Daniel Johnson:** It could be argued that statutory aggravations also serve a function for prosecutors and people who investigate crimes in the way that you described when you were talking about communication.

Mr Paterson, do you have any thoughts on the usefulness of the Bracadale model, particularly around hate crime or more broadly in relation to the issues that we are talking about?

**Gordon Paterson:** I acknowledge my lack of legal expertise in such matters. However, I was attracted to Lord Bracadale's phrase in the submission from the Law Society:

"Age as a category is wider than just including elder as this would cover all ages from youth to elderly."

Younger people could potentially be targeted, vulnerable or exploited. I am thinking about county lines and what we are hearing about young people being exploited. Sometimes those are young adults who have had adverse childhood events or have been through the care system and may have challenges around mental health or substance misuse. Therefore, any aggravator should probably not be linked to an arbitrary age of 60 or 65, as it may add value if it is about any age at which people have a degree of vulnerability and experience hostility as a result of that.

**Daniel Johnson:** I have a final question. An interesting point has been raised on the use of power of attorney. It strikes me that that area needs some specific focus and changes because of particular issues and would stand alone from the point of statutory aggravation. Another point that has come to my attention is around probate and when somebody is nominated as an executor and is implicated in the abuse, or, indeed, the death of the individual. Whether one believes in the merits of a statutory offence or aggravators, those two examples stand alone as areas of law that require focus and attention if we are to deal with those issues. Are there any other comparable areas of the law that might require review in order to deal with the particular matters that have arisen in recent times around the wider issue of elder abuse?

**Lesley Carcary:** I certainly agree with you about the use of power of attorney, and I would probably extend that to a lot of situations in which there is a family tension. The dynamics of such harmful behaviour or abuse are very different from things such as doorstep crime and the area merits a unique set of approaches—first, because it is difficult for the older person to speak up about that behaviour and, secondly, because the family dynamics and the associated tension that those dynamics can cause make the issue unique.

I know that, in the discussions on the Domestic Abuse (Scotland) Bill, it was recognised that certain types of behaviour and long-term patterns of abuse are not easily prosecuted. I would say that the position is very similar for elder abuse and that certain behaviours would be more easily identified and prosecuted as a separate offence.

**Adam Stachura:** We have to think about the extra offences, but Daniel Johnson's point about the use of power of attorney—and maybe even guardianships—might be addressed through the Adults with Incapacity (Scotland) Act 2000. There are big problems with people's understanding of their responsibilities. Perhaps not enough people get power of attorney in the first place because of the cost, the complexity of needing a lawyer or the person not having said explicitly whether their will confers financial or welfare powers. Guardianship orders are also particularly difficult, because they are imposed on the person once they have lost capacity. The person who is granted the guardianship is under less scrutiny because the person who is subject to it never has an opportunity to outline how they wish to live their life. I hope that the Adults with Incapacity (Scotland) Act 2000 will settle that down in due course, but I am very happy to go away and consider what other offences might be treated in the same way.

**Gordon Paterson:** I agree with that, and I agree with Social Work Scotland, which said in its submission that it has particular concerns about the misuse of power of attorney—in particular, about an older relative's money being misappropriated. That issue needs to be addressed either through the revision of some of the provisions of the Adults with Incapacity (Scotland) Act 2000 or as a policy issue.

I am reminded that the Scottish Government consulted fairly recently on a strategy on social isolation. There is probably a policy strategy response there in relation to some of the issues that colleagues have highlighted as drawing attention to the vulnerability that some people sometimes have.

11:00

**The Convener:** We will move on to the question of a statutory offence. Can the panel comment on the point that Social Work Scotland made in its submission that

“Elder abuse is not a hate crime where the older person is targeted because of a hatred of them; it is more the case that older people are seen as an easy target”

and

“as intrinsically of less worth than younger adults”?

It is that prejudice and the idea that older people have less worth that would bring such abuse under the equalities banner of a crime that was aggravated.

**Lesley Carcary,** can you comment on the point about your lack of data? How on earth are we ever going to analyse the extent of the problem if Police Scotland, the Crown Office and Procurator Fiscal Service and other organisations do not record age?

**Lesley Carcary:** We have found that it is an on-going problem. Action on Elder Abuse is a UK-wide charity and Action on Elder Abuse Scotland is the only part that has not been able to produce comprehensive statistics on adult support and protection—we can get really useful local statistics but, because they are collected differently, there is no way of collating them all.

We also submitted freedom of information requests to both Police Scotland and the Crown Office and Procurator Fiscal Service in 2016 and we were told that they could not provide a breakdown on age because that information was not recorded. It has been very difficult for us to get any information on the true extent of elder abuse. That is why we often have to refer to statistics in other parts of the UK as comparative evidence. I know that anecdotal evidence does not hold as much sway as hard statistics, but we are hearing that the picture in Scotland looks very similar.

I draw the committee's attention to the statistics that came out of Action on Elder Abuse's research in England and Wales. We found that, of criminal cases that were reported regarding older people, the majority were not acted on or resulted in cautions or suspended sentences. We submitted freedom of information requests to all police forces in England. One police force investigated 76 cases of elder abuse and all 76 cases resulted in police cautions. Another police force did not record a single case of elder abuse. We also found that very few of the cases that reach court result in a successful prosecution. The number of successful criminal convictions in 2016 represented just 0.7 per cent of the total prevalence of elder abuse.

Those figures are from England and Wales, but we hear that the situation in Scotland is very similar. We need to be better at collecting statistics so that we can gather our own evidence to confirm and corroborate that that is also the case in Scotland.

**The Convener:** What about the issue of prejudice as opposed to hate crime and older people being seen as having less worth? That definition would mean that abuse would fall under the aggravated offence.

**Lesley Carcary:** We hear of some cases of hatred, ill will and hostility towards older people,

but that is very much the minority of cases. We believe that the majority of older people are targeted because they are seen as being vulnerable or an easy target. I made the point earlier that much of the financial abuse in family situations is not regarded as criminal by the perpetrator—they think that, if it is a family situation, it is okay to do it and they very rarely consider the criminal aspects. We want to send a message to perpetrators that just because they are stealing from their mum, it does not mean that it is not criminal.

**Adam Stachura:** That is a very good point about vulnerability. If we think about the future, in the next 20 years there will be half a million more people over the age of 65 and, over the same period, the number of people in Scotland living with dementia will increase by 50 per cent to more than 120,000, which means that—to use a crass phrase—people who are looking for vulnerable people to pick out will have a bigger audience. It is a stark warning. We need to get it right, right now.

Older people are seen as a soft touch and that is why they are targeted. That does not apply to everyone and not every older person is vulnerable by any stretch of the imagination. In a sense it is a numbers game—the more people someone goes after, the more people they might be successful with. However, older people realise that they are a soft touch because of that interdependence, the close trusting relationship and their inability to see a way out when they are subject to such abuse.

**Gordon Paterson:** I agree with what colleagues and Social Work Scotland have said about people rarely being targeted because they happen to be older. I think that people are targeted because they are seen as a potentially easy target.

On the data issue, the adult support and protection strategic forum, which the Scottish Government convenes and which is monitoring progress on the implementation of the legislation 10 years on, should be able to work with the conveners of the 28 or 29 adult protection committees across Scotland to come up with a common data set that is used universally and which addresses the challenges that we have seen in identifying the types of abuse that people experience and their ages. That could probably provide a baseline, and we could look at how that develops as the years progress.

**The Convener:** That is helpful.

**Liam McArthur (Orkney Islands) (LD):** Good morning to the panel. I will follow up on what Mr Paterson said about concerns about how the power of attorney system operates and the opportunity that it provides for abuse. I think that we would all acknowledge those concerns but, in calling for changes, do you accept that we need to

take care not to make the system unsustainably more complex and costly? It is clear that many people who currently seek to obtain powers of attorney for legitimate reasons find the process overly complex and, in some places, unsustainably costly.

**Gordon Paterson:** My experience in that regard is fairly limited. I am aware—Social Work Scotland has highlighted this—that, on the very small number of occasions when concerns are raised about how powers of attorney may be being misused, there are significant challenges in taking them back to court, having them removed or making an intervention. The challenge is best addressed by a campaign to heighten public awareness of the need for all of us to get powers of attorney for our 60th birthday and the idea that they should become part of what we do in our forward planning. The Scottish Government has a clear role to play in promoting those powers as a way of ensuring that people make preparations for the situations that they might encounter in later life and are explicit about what their wishes would be in those circumstances.

**Liam McArthur:** That is helpful. I want to follow up on a line of questioning based on what Ms Carcary said. I think that Shona Robison pursued it earlier.

We came to this issue through consideration of the Domestic Abuse (Scotland) Bill. I think that we accepted that there was a read-across in respect of the types of situations that we were looking at in our consideration of that bill: coercive and controlling behaviour, patterns of behaviour over a prolonged period of time, abuse of an existing vulnerability, the creation of a vulnerability, and a power dynamic. That touches on what the witnesses have talked about in relation to the abuse of older people. We have established this morning that determining the point at which a person is defined as an older person and therefore elder abuse should come into play is difficult. From the experience of the Domestic Abuse (Scotland) Act 2018, is there a model that you see as being transferable to a situation in which the abuse of a position of responsibility or a position of control takes place and which therefore could be taken forward under criminal proceedings in the way that we have identified and put in place through that act?

**Lesley Carcary:** I see elder abuse and domestic abuse as quite different issues. There is some overlap and crossover, but there are unique dynamics in both areas.

A model similar to that for domestic abuse prosecutions could work well for elder abuse prosecutions. I do not believe that elder abuse cases should be prosecuted under domestic abuse legislation, because, first of all, there is a



perception in society that domestic abuse is a younger woman's issue. We know that it affects men and older people, but it seems to be associated very much with women and certain power, control and gender dynamics in that respect. As a result, I do not think that it would work well for prosecuting elder abuse cases, but there are merits in having a very similar model that recognises the unique dynamics in elder abuse.

I have also suggested in my written submission that the process of jury direction in sexual assault cases could work well in elder abuse cases. A lot of people are not quite aware of the unique dynamics, tensions and nature of such abuse, and it would be very useful to give juries direction so that they have a better understanding of the matter. We quite often hear of cases in which elder abuse has been reported quite some time after the incident, and people will say, "Why are you only reporting it now?" The same is very common in rape cases. The assumption is that the person must be lying, that someone is trying to get hold of the older person's inheritance and so on. Indeed, a couple of years ago, we dealt with a lady whose father was being abused by the other daughter, but the abuser was also psychologically abusing the lady with whom we were dealing. As a result, the lady and the older person were terrified to speak up at the time, and she only had the courage to speak up a year after the father's death. In such cases, it would be useful to have jury direction to ensure that some of the reasons why people either do not speak up or speak up later can be explained. It would be a very useful addition to the system and would raise awareness of the unique dynamics of elder abuse.

**Liam McArthur:** I absolutely take your point about the need to view elder abuse in a very different way from domestic abuse, but one of the other elements of the recent domestic abuse legislation was the opportunity that it provided not simply to rely on complaints being made by those who had been abused but, on occasion, to take the process out of the victim's hands in the interests of public safety and all the rest of it. Given your description of some older people's reluctance to report abuse, either because they do not recognise that it is taking place or because of the potential implications for family relationships, would you see that kind of provision as being necessary in any future changes to legislation with regard to elder abuse?

**Lesley Carcary:** Definitely. I have already mentioned the debates on whether singling out older people as a specific group is ageist, but I would argue that something similar to our treatment of domestic abuse victims, which is quite unique and specific and gives them very specific protection, should be offered to victims of elder abuse. I take the earlier point that it would be

difficult to have definitions with regard to the age at which such prosecutions should kick in, and I agree that the issue needs to be considered further, but I urge that the issue be seen as a stand-alone one.

In that respect, I would also point to other countries where such an approach has worked well. As I have mentioned in my submission, in certain American states—and, most notably, in certain places such as San Diego, where there is a specific elder abuse offence—there are very high prosecution rates for such matters. Of course, it is not just about prosecuting these offences; the department that deals with the issue also offers quite intensive support to older victims going through the court process. There is a presumption that such matters will be prosecuted; there is a lot of awareness raising for the general public; and a lot of work is done to encourage older people to speak up. I urge members to look at that model, because I think that it could work well in Scotland.

**Liam McArthur:** My final question is perhaps more for the following panel, but do you feel that there is a gap in the law with regard to bringing forward these kinds of prosecutions?

**Lesley Carcary:** I would say so. Going back to an earlier point, it is very difficult—in fact, impossible—to get statistical evidence on that, so anything that I could add would be anecdotal.

In my submission, I have highlighted quite a few media reports, and every day, we look at criminal cases involving older people. We probably write to the media on a daily basis about cases in which care workers have been struck off the register but criminal charges have not been considered. We are always pushing the message that, although the adult support and protection system and other protective systems in Scotland work very well, the criminal aspect seems to be missing.

11:15

**Liam McArthur:** Mr Paterson, you said—quite rightly—that it is not always about criminal prosecutions, which I think that we would all accept. However, are you aware of circumstances in which colleagues of yours might be persuaded that criminal charges could be brought, but the nature of the crime that has been committed is such that the taking of such action is problematic?

**Gordon Paterson:** It would probably be better for that question to be directed at Police Scotland and the Procurator Fiscal Service. I recognise the distinction between the standard of proof for criminal prosecution and the standard of proof that is considered in relation to workers being struck off the SSSC's register or the NMC's register. Part of the challenge is to do with the difference between

“beyond reasonable doubt” and “on the balance of probabilities”.

**The Convener:** Before we leave the issue of the statutory aggravator, in its submission, Social Work Scotland talks about the prosecution process failing people

“whose reliability as witnesses may be questioned, for example vulnerable frail older people”

and points to the reluctance of such people to give evidence, because it might be too traumatic for them.

In such circumstances, Social Work Scotland suggests that guidance could be provided to the COPFS and Police Scotland about how best to support such witnesses. The committee has recently completed its stage 1 consideration of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill. We began by looking at the position of child witnesses. Is the timeous taking of video evidence from vulnerable adult witnesses something that should be considered, given that the length of time that it can take to get to court means that their health or their mental state might well deteriorate? Would you like to comment on that?

**Lesley Carcary:** We made a submission on the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, and we support many of the measures that the bill includes. In particular, we see no reason why the measures that are available to children should not be available to older witnesses, too.

However, I make the more general point that we can have the best prosecution system in the world and the best-ever support to encourage people to go through the court process, but if they do not speak up in the first place, that is a bit of a wasted exercise. We are a very small charity that does its best to raise awareness of elder abuse, but there needs to be a concerted effort whereby we all work together to encourage people to speak up, otherwise they will never go to court in the first place. If measures of the kind that you mentioned are made available and we let people know that they are there and that there are alternatives to having to give evidence in court, that might make them more likely to speak up, so I think that that would be a step in the right direction.

**The Convener:** The ability to give evidence in that way would certainly make the process a lot easier for people.

**Adam Stachura:** I agree. Any mechanism that could give comfort to older or more vulnerable witnesses would be a good move. The issue is partly about culture. We want to ensure that prosecutors, the police or whoever it is do not think of older or more vulnerable people as any

less credible but take every step that they can to help them. That could include the way in which they communicate with them—I am talking about not just the language that they use, but the need for regular reporting back on the progress of the case. That is important so that the older person knows that something is happening. We have anecdotal evidence that, on a number of occasions, older people have reported something but have never heard any more about it. People need to have confidence in the process. Lesley Carcary mentioned older people referring to friends who might talk about such situations; they might wonder whether there is any point in reporting instances of abuse, because they think that nothing will happen.

**Gordon Paterson:** I agree that different ways of supporting people to be witnesses should be explored. Video evidence would be one such method. In addition, it is possible that the appropriate adult scheme could be extended to older people who have a degree of frailty or vulnerability.

Quite late yesterday, I received the COPFS's submission to the committee. I was very reassured by the guidance that it provides on how older people, as witnesses and potentially as victims, should be supported through the processes. That guidance is already in place. However, if older people are not reaching that stage, that is of limited value. We need to think about what we can do to help people to reach that stage.

**Liam Kerr:** In response to Liam McArthur's line of questioning, Lesley Carcary mentioned the successful San Diego model. Does that have a definition of “elder” that we could refer to?

**Lesley Carcary:** Yes. I cannot remember what it is offhand, but it is in one of our reports. I can certainly send that to you, if that would be useful.

**Liam Kerr:** It would be, if you do not mind. Does it peg to an age, as far as you are aware?

**Lesley Carcary:** I cannot remember whether an age is mentioned—I think that it might be. I will look into it and send you the information.

**Liam Kerr:** I would be very grateful.

**Fulton MacGregor (Coatbridge and Chryston) (SNP):** This has been an interesting session and you have all articulated the views of your agencies very well. The Law Society of Scotland said in its submission:

“human rights compliance does not principally mean prosecuting offences once they have occurred. It means that as far as possible ... they should not occur.”

The panellists, particularly Lesley Carcary, have touched on that issue. Do you think that the current system—at the prosecution level and in

relation to the adult support and protection framework that is in place—meets Scotland's obligations on equalities and human rights?

**Lesley Carcary:** I take the point that it is preferable that crime does not occur in the first place. Unfortunately, the vast majority of harm and abuse of older people takes place in their own homes behind closed doors, which makes it very difficult to pick up and for preventative work to be carried out.

The adult support and protection process works very well in Scotland—it is the envy of the United Kingdom, because we are the only part of the UK that has dedicated legislation in this area. However, with the best will in the world, if someone does not speak up and the abuser is carrying out the abuse in such a way that it cannot be picked up on, it can be very difficult. We encourage people as much as we can to open up and call our confidential helpline. However, to return to the issue of family, you can imagine that, if your grown-up children were carrying out the abuse, you would probably be very reluctant to tell anyone.

We know that, through the Adult Support and Protection (Scotland) Act 2007, various public bodies and professionals such as general practitioners, for example, have a legal duty to report to the council any suspected incidences of harm or abuse. However, we also know that they cannot pick up everything; in particular, they cannot pick up abuse that is taking place behind closed doors. Therefore, all agencies need to do a lot more to work together and encourage people to speak up.

Gordon Paterson mentioned the Scottish Government's important work on the strategy to tackle social isolation and loneliness. I submitted information as part of the evidence gathering for that work. I have quickly skimmed through the strategy, and I do not think that there is any mention of the increased risk of harm or abuse from loneliness, which is a key factor. A key reason why people do not speak up about the abuse is that, because they are so lonely, they are choosing to put up with it. There is a lot that we as a society need to do to tackle the problem of loneliness and social isolation, to make it a lot easier for older people to speak up.

**Fulton MacGregor:** How could the system help in that regard? You have given that powerful example a couple of times. I am sure that, as members of the Scottish Parliament, we have all come across constituency situations in which a relative—you mentioned that it could be a grown-up child—is committing an offence knowingly or unknowingly, as you have also pointed out. How does that fit with the human rights aspect? A person might have had an offence committed

against them, but they might be clear that they do not want the matter to be prosecuted.

I apologise for putting an ethical question to the panel at the end of our evidence taking, but do you have any thoughts on that issue?

**Lesley Carcary:** That is a very difficult issue and one that we grapple with all the time when we hear from older people who tell us that they are being harmed or abused by their children. We have a confidential helpline, so we would never urge someone to report if they do not want to; the best that we can do is to tell them about the benefits of reporting and what might happen should they do so.

As I said, sometimes we need to accept that a person will not report their child or other family member, so we think of other routes to tackle the matter. For example, if loneliness is an issue, we might refer the person to a befriending group. If there is financial abuse, we might ask whether the person has considered giving power of attorney to another trusted person, rather than, for example, their son.

To return to a point that was raised about power of attorney, that is a difficult issue for our organisation, because we need to make people aware of the potential pitfalls of such things but, at the same time, we do not want to scare people off because, if power of attorney is done well, it is an effective safeguard against financial abuse. The problem arises when people leave it too late and then, all of a sudden, the long-lost nephew comes out of the woodwork and says, "I can help manage your finances," and, because there is no one else in that older person's life, they allow them to do that.

It is a difficult issue, and I do not think that we could compel someone to report somebody else against their will, but we need to look at various Government policies and developments to consider how to create a safe space and remove some of the barriers so that people can report comfortably and so that other people can advocate on their behalf where necessary.

**Adam Stachura:** As is pointed out in the submissions, the Scottish Government is absolutely committed to legislation and laws that are fit for the 21st century and to the human rights element. However, in relation to this inquiry into elder abuse, I point out that the Human Rights Act 1998 requires public bodies to act preventatively to protect dignity and human freedom, so we need to reflect on the preventative measures that could be taken. I absolutely take Lesley Carcary's point that people might not want to pursue prosecution, but we need to ensure that legislation is in place so that we prevent these things from happening to people.

**The Convener:** That concludes our questions. I thank our witnesses for what has been an excellent evidence session that has given the committee a lot to think about.

I suspend the meeting to allow for a change of witnesses and a five-minute comfort break.

11:26

*Meeting suspended.*

11:33

*On resuming—*

**The Convener:** We move to our second panel. I am delighted to welcome Anthony McGeehan, who is the head of policy for the Crown Office and Procurator Fiscal Service; Rosalyn McTaggart from the Law Society of Scotland; and Chief Superintendent John McKenzie, who is the head of the safer communities department of Police Scotland. I thank all the witnesses for providing written submissions. It is immensely important for members to see submissions before we take formal evidence. I move straight to questions, starting with John Finnie.

**John Finnie:** Good morning, panel. I am conscious that you were all sitting in during the previous session, so I will roll the first two questions together. Can you comment on the extent and nature of elder abuse? Is the full range of such abuse appropriately characterised as “criminal”?

**Anthony McGeehan (Crown Office and Procurator Fiscal Service):** The Crown Office and Procurator Fiscal Service has some relevant statistics on that question. In answering the question, I recognise that there is no uniform definition of “elder abuse”. This morning, as well as there being recognition that there is no uniform definition, the word “prosecution” has been used, but it was used to describe a variety of stages in the criminal justice system.

I will focus on the relevant statistics in relation to the cases that have been reported to the COPFS, which are different from the cases that might be investigated by the police or other relevant investigating authorities, and from cases that might not be reported by victims or witnesses to the authorities.

The COPFS database was interrogated to examine whether any relevant data could be extracted from the cases that have been reported. With some caveats, the COPFS can provide relevant data. The first caveat is that the COPFS database is an operational database that is not maintained for the purposes of statistical examination or gathering relevant data. What is in

the database is also, in part, dependent on the information that is received by reporting agencies. The information that is provided in cases that have been reported to the COPFS includes the age of each witness or victim. Reporting agencies identify as victims individual witnesses in reported cases.

With those caveats, the available information is that, in reported cases to the COPFS between April 2016 and December 2018, approximately 400 to 550 victims aged over 60 were reported to the COPFS each year. We can break down the profile of the principal charges in those cases as follows: 28 per cent of reported cases related to principal charges of violence; 25 per cent related to principal charges of sexual offences; 22 per cent related to charges that might be described as involving abusive behaviour; and 5 per cent related to charges that might be described as involving dishonesty.

An interesting feature of the cases is that more than 60 per cent of the victims aged 60 or over were recorded as having been involved in domestic abuse incidents. In individual years, that percentage has risen to 69 per cent. Therefore, a significant proportion of that profile of reported offending that might qualify as elder abuse occurs within a domestic abuse context.

**John Finnie:** I accept that everything hinges on definitions. For the avoidance of doubt, by “domestic abuse” do you mean what we would all readily understand by that term?

**Anthony McGeehan:** Yes.

**John Finnie:** Thank you.

**Chief Superintendent John McKenzie (Police Scotland):** I go back to a point that the COPFS’s submission highlighted. Police Scotland does not hold statistics in relation to the term “elder abuse”, because the term “elder abuse” has no legal definition in Scotland.

A point about the ages of witnesses and victims not being recorded has been made. The ages of witnesses are recorded in Police Scotland’s systems, but the challenge relates to the searchability of that information. I do not have statistics to demonstrate the age range of offences. It is questionable whether such statistics would be helpful or useful to this discussion, given that the subject matter is elder abuse and its definition.

However, in relation to the submissions on the underreporting of abuse that is based on age hostility or vulnerability, I am confident in saying that there is significant underreporting of such criminal acts. I base that on a number of factors, including the research on hate crime in its general sense, which suggests that hate crime is anticipated to be underreported by up to about 80

per cent. Therefore, on the question of how widespread is the challenge of dealing with elder abuse, criminal acts that target individuals who are vulnerable due to age, or abuse that is caused by hostility towards people of a certain age, there is significant underreporting for a variety of reasons that I am sure we will explore.

I go back to the point that there is probably a requirement to look more at the analytical opportunities to define the size of the challenge. However, I do not have any more statistical information to give the committee.

**John Finnie:** Can you give background information on who reports such abuse to you? You will receive reports and allegations from the Care Inspectorate, as well as from individuals, but do other statutory bodies make complaints to you?

**Chief Superintendent McKenzie:** It is clearly helpful that the Crown Office has highlighted four areas that it would, from an age perspective, classify as abuse or neglect. Obviously, family members and victims themselves report, but a wide variety of institutions, including the Care Inspectorate, local authorities and care institutions report to the police, after which there would be a robust investigation of the circumstances.

It is interesting that a panel member was asked about differences regarding people being removed from positions. There is a difference between a criminal allegation and a procedural allegation in relation to work-related practices. However, a wide range of bodies would report such instances to the police.

**John Finnie:** While acknowledging the statistical challenge, do you have a gut sense of what percentage of the reports that are made to Police Scotland would result in reports to the Crown Office?

**Chief Superintendent McKenzie:** I could not give a percentage that would be helpful at this moment. I am quite content to go back and have a look to determine whether we could provide that percentage, but I am not confident that I could provide such details. However, I will certainly look, then report back to the committee in writing, as I have done previously.

**John Finnie:** Does Ms McTaggart have any general comments?

**Rosalyn McTaggart (Law Society of Scotland):** In respect of who reports offences, we as solicitors tend to represent the accused, not the witnesses. I therefore defer to the Crown Office and the police on who would report on the statistics on that.

**Jenny Gilruth:** Good morning. In the evidence session with the previous panel, we heard from Action on Elder Abuse, which points in its written

submission to statistics from England and Wales that show that

“the number of successful criminal convictions in 2015/16” was about

“0.7% of total prevalence of elder abuse.”

We heard oral evidence from the organisation about a case in which a victim had to “badger” the police in order to be taken seriously. I therefore wonder whether there is a cultural challenge in terms of elder abuse being part of some sort of hierarchy in which it is not taken as seriously as other crimes.

**Anthony McGeehan:** That is not the case from the COPFS’s perspective. Since 2013, we have had a published policy on crimes involving elder persons that makes it clear that COPFS takes a robust approach to those types of crime, and specifies a presumption in relation to prosecutorial action where there is a sufficiency of evidence. The lack of relevant statistics should not be read as reflecting a lack of a robust approach to such offences.

**Chief Superintendent McKenzie:** From a police perspective, I have highlighted previously at various times that policing has, over the years, changed dramatically from the traditional Peelian principles. Currently, in excess of 70 per cent of calls relate to issues of vulnerability. Police Scotland has invested significantly in training and in our approach to dealing with incidents that are primarily to do with vulnerability.

It is always disappointing to hear parties highlighting cases regarding inadequate service; I believe that having to “badger” the police was mentioned in earlier evidence. I am unable to comment on that specific case because I am unclear about the details.

Is there a hierarchical system in respect of cases’ importance? There is absolutely not: it is clear that we prioritise vulnerability in the community. Our aim is to ensure that we carry out robust and professional investigations into all reports of criminal acts. However, I expect that, across all policing, single incidents involving poor service could be highlighted. They are always disappointing.

I intend to discuss the matter with a colleague to see whether I can provide additional guidance or get some context around it. However, there is certainly no lack of priority in dealing with vulnerable individuals.

**Jenny Gilruth:** On wider support, the Police Scotland written submission points to protecting “elderly people from exploitation”, including through

“building partnerships with staff in other agencies such as Banks, Post Offices, Local Authority Consumer & Trading Standards”

departments. I wonder, therefore, what the police currently do in terms of that support. Is it about signposting victims to the appropriate advice services, or is it about reaching out to them more proactively?

11:45

**Chief Superintendent McKenzie:** We do both those things. In numerous successful campaigns of late, we have worked in partnership with national banking institutions and other agencies on identifying issues, in particular financial abuse. There is a signposting component to our approach, but there is also a proactive component involving our community-based officers. If they interact with individuals whom they believe to be vulnerable due to age or whatever, they will provide them with advice or guidance, or engage with members of their wider family.

**The Convener:** Mr McGeehan said that this type of abuse is robustly prosecuted where there is “a sufficiency of evidence”. However, in its submission, Social Work Scotland says that

“the legal system has challenges in providing protection and justice where the current investigation and prosecution processes fail people whose reliability as witnesses may be questioned, for example vulnerable frail older people”.

The process might be seen as being too stressful for them. Also, if the person has dementia, for example, it might not be possible to gather the same amount of evidence.

That being so, would it be good to include such vulnerable adults in the next tranche of people to be covered by the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, should it be passed? When the issue is a person’s deteriorating mental health, and given the length of time that it can take for such cases to come to court, would such a move be helpful in ensuring that you get the best evidence as soon as possible, including prior statements and video recordings?

**Anthony McGeehan:** As we have outlined in the COPFS’s submission, all witnesses aged over 60 are referred to our victim information and advice service. We recognise that, as the previous panel said, not all witnesses over 60 require special measures, and there is no magic age at which a person becomes vulnerable. However, our victim information and advice service engages with such witnesses on the special measures that are currently available, including evidence by commission, which is the principal focus of the bill. At present, the menu of support that might be available to a witness, depending on their vulnerability, includes screens, a television link,

the presence of a supporter, the use of a prior statement—which has been mentioned—and evidence by commissioner.

The approach in the bill is different in that it relates to the default position for witnesses, depending on, at present, their status as children, but it contains the power to roll that provision out to deemed adult vulnerable witnesses in relation to particular categories of offence. As I have said, there is already scope to use a prior statement, as described by Social Work Scotland, and there is scope for a vulnerable adult witness to give evidence by commissioner. Of course, it would be for Parliament to decide whether that should be rolled out further in the bill.

**The Convener:** You dispute that the approach to such matters is not robust and that there is reluctance to prosecute such cases because the process might be seen as too stressful, or because the person in question has dementia, or because there is some question about the reliability of using the special measures that are currently in place, rather than the measures that could be available under the vulnerable witnesses legislation.

**Anthony McGeehan:** I accept that there are particular evidential challenges in relation to the categories of offences and types of offending that we are talking about, but I rebut any suggestion that prosecutors are not actively looking for the types of support that might be best suited to the individual witness, their status and any vulnerability that they might have, including dementia.

**Daniel Johnson:** In a sense, I will repeat the questions that I asked the first panel, although I will change tack slightly.

I understand that the three organisations that you represent favour something along the lines of the Bracadale model, with aggravators. The previous panel discussed the potential limitation with that model, which is that many such cases are not motivated by hate per se but might be about circumstance. Would an aggravator in relation to vulnerability sufficiently capture that? In particular, would it capture some of the elements that we have discussed, which borrow the coercive and controlling behaviour concepts in the Domestic Abuse (Scotland) Act 2018 and put them in the context of elder abuse? Would that aggravator model capture that limitation? If so, and if we pursue the Bracadale model, how could that be brought about in legislation?

**Anthony McGeehan:** In answering that question, I will reference Lord Bracadale’s assessment. Parallels have been drawn with domestic abuse and the most recent evolution of our approach to domestic abuse in relation to

coercive or controlling behaviour. The COPFS cannot provide any evidence on offences that involve such behaviour. I reference paragraph 4.65 of Lord Bracadale's report, in which he concluded:

"based on the evidence and arguments which I have heard, I do not think there is any real gap in relation to patterns of conduct against the elderly which ought to be criminal but are not."

That took Lord Bracadale on to propose a model that is based on two statutory aggravators—one in relation to age and another in relation to vulnerability. The COPFS is familiar with and recognises that approach for the type of offending that we deal with every day.

**Daniel Johnson:** Before I ask Rosalyn McTaggart the same question, do we need to bear in mind any particular considerations in framing those aggravators to fully capture the issues that have been discussed so far this morning?

**Anthony McGeehan:** The earlier panel recognised the difficulty in identifying a particular qualifying age for an age aggravator. Lord Bracadale proposed an aggravator based simply on age, as opposed to defining a qualifying age for older persons.

Similarly, there would be challenges in defining vulnerability, or perceived vulnerability, and what might qualify as such, and whether that vulnerability would be based on age or, as already mentioned in this morning's discussion, a real or perceived learning disability, for example.

**Daniel Johnson:** I put the same questions to Rosalyn McTaggart.

**Rosalyn McTaggart:** In assessing whether current or proposed legislation can capture all the areas that we seek to protect, we should certainly mention the 2018 act and whether we should now take time to ascertain its effectiveness in affording protection in domestic or intimate relationships. The reason for this evidence session is that we are all concerned that a gap remains and we want to know how best to fill it and provide protection.

The age aggravation would allow for equal protection for people of all ages, and that is supported by the Law Society of Scotland. In our written submission, we suggested other potential areas that might cover any gap should one be left behind by the proposed changes. An aggravation that covers exploitation and vulnerability might provide a route to cover any areas that are left behind.

You will note in our submission that we refer to further potential coverage being taken up—similar to the protection of young persons in the Children and Young Persons (Scotland) Act 1937—as a backstop in terms of allowing a full sufficiency of

protection of people who are affected by vulnerabilities such as those that we have discussed this morning.

**Daniel Johnson:** I will ask Chief Superintendent McKenzie the same question in a slightly different way.

We heard from the previous panel that, given that we are talking about complicated family relationships, there can sometimes be a blurry line between dysfunctional circumstances and relationship breakdown, and when behaviour tips over into being criminal, which is what we are focused on.

Would the police find it useful to have a clearer threshold? Would going down the route of an aggravator help clarify what is criminal and what is simply dysfunctional?

**Chief Superintendent McKenzie:** I am not going to repeat the words that were quoted from the Bracadale report by my colleague from the Crown Office. With the previous panel, you discussed having a baseline offence with aggravators thereafter. Paragraphs 4.66 and 4.70 in the report refer to the merits of recommendations 10 and 11 and why dealing with age hostility does not address the challenge of protecting vulnerable people. There is an issue of not defining age in relation to the term "age hostility" so that we avoid putting in place an arbitrary threshold.

Police Scotland has said that it supports having an aggravator that is concerned with wider vulnerability. In my professional judgment, that would be a more helpful aggravator, as it would enable us to make a decision about what motivated the criminal act, rather than being concerned with a threshold. Even within a family setting, there would require to be a baseline offence that would then be aggravated as a result of the vulnerability of the individual in that family setting.

I want to make a point on the back of one of the final questions that was put to the previous panel, which was about human rights and the ability of police to make a judgment in a family setting about whether progressing the criminal investigation would be in conflict with a person's human rights if that person did not want the complaint to be progressed. In my mind, that does not relate to a threshold scenario. We have a duty to ensure that we prevent wider criminality and protect the individual concerned and wider society. If that means that we must progress an investigation without the support of the victim, I accept that that will create difficulties at a later stage, but it should not prevent the first stage of the investigation from taking place.

**Daniel Johnson:** We heard from the previous panel that there is a case for considering probate and whether we need to have some additional safeguards to prevent abuse in that regard. Likewise, when an individual is found guilty of culpability in someone's death—particularly with regard to cases of murder—there is a question about whether they should be able to be an executor of that person's will. There are certain areas of law where specific changes are required.

Do members of the panel agree that those areas need to be considered, and do you think that there are other specific areas of law that could be reviewed, beyond the question of whether there should be a specific aggravator?

**Anthony McGeehan:** As a prosecutor, I cannot comment on probate law, and it would not be appropriate for me to comment on the consequence of a criminal conviction in relation to, for example, an accused's status as an executor. Again, beyond the improvements that are proposed by Lord Bracadale, I cannot identify any additional improvements in relation to the prosecution of these offences, as distinct from the focus of your question, which concerns the wider context of the consequences of abuse.

**Daniel Johnson:** I recognise that the issue might not be within the scope of the COPFS. Might the Law Society might have a view?

**Rosalyn McTaggart:** Certainly, there are issues that you discussed with the first panel about guardianship orders and people having power of attorney, and there are significant issues in relation to the incapacity of an elderly person. That is perhaps an area where more education is needed about the powers that are granted at the point when power of attorney is granted.

I am thinking in particular of the perhaps anecdotal evidence that Ms Carcary gave of power of attorney being granted to children who might be causing their parents harm and the emotional manipulation or naivety of those who grant power of attorney, which, once granted, affords a significant level of power. It is an area that might well require further education of and outreach to people in vulnerable groups, and one would hope that those people could be reached before power of attorney was granted.

12:00

**Chief Superintendent McKenzie:** On the same basis that Mr McGeehan said that it would be inappropriate for him to comment further, it would be inappropriate for Police Scotland to comment on those questions.

**Daniel Johnson:** I understand.

**Liam Kerr:** Earlier, Rosalyn McTaggart said that we might need to take some time to ascertain the impact of the domestic abuse legislation, and that view is developed in the Law Society submission. So that I fully understand the point, can you tell me whether it is your understanding that someone, or some agency, is proactively assessing the outcomes that are being directly derived from the domestic abuse legislation? If so, what data are they capturing, and when will that work be reported on?

**Rosalyn McTaggart:** I would certainly hope that the Crown Office and Procurator Fiscal Service would be monitoring the effectiveness of prosecution under the new legislation and, indeed, that it would be capturing data to allow the effectiveness of any new legislation to be ascertained.

**Liam Kerr:** But, as far as you are aware, the Crown Office and Procurator Fiscal Service would be the only agency looking at the outcomes. You say throughout your submission that it is quite crucial to know the outcomes, and I would just like to know who is doing that work.

**Rosalyn McTaggart:** Absolutely. I would certainly hope that it would be the Crown Office and Procurator Fiscal Service that was doing it. I would not be able to point you to any other agency that would be collating the data.

**Liam Kerr:** Would you like to comment on that, Mr McGeehan?

**Anthony McGeehan:** The Crown Office and Procurator Fiscal Service currently records data on domestic abuse offences and will continue to record data on the incidence and outcomes of such cases. As for effectiveness, which I think that you and my colleague talked about, the COPFS would provide that information, but it is perhaps for others to judge what is meant by "effectiveness" and whether the legislation meets that definition.

**Rona Mackay:** Is it possible to say what impact on sentencing an aggravator or even a stand-alone offence would have, were it to be introduced?

**Anthony McGeehan:** It depends on the framework within which the statutory aggravator is set, but a common framework would be to require the court to take the aggravation into account and, if it did not, to articulate why it did not think that the aggravator was relevant for sentencing purposes. The courts can take into account aggravating factors in crimes against elderly persons, including their vulnerability and the exploitation of that vulnerability, but one of the advantages of a statutory aggravator is that it creates a framework within which the court can consider the matter.



**Rona Mackay:** I presume that the aggravator's impact on the sentence would depend on the case.

**Anthony McGeehan:** That is right.

**Rona Mackay:** Is that your understanding, too, Ms McTaggart?

**Rosalyn McTaggart:** Indeed. In providing a disposal for any offence once the accused has pled guilty or been found guilty after trial, the person sentencing the accused, be it a justice of the peace, a sheriff or a judge, ought to take into account the relevant facts and circumstances of the offence and the offender. Indeed, in our submissions, we reference a case in which a judge directly referred to not only the age of a vulnerable person but the length of time that they had spent in their home, which added to the emotive nature of the case and the vulnerability of the person, which the judge seemed to be taking into account in disposing of the matter.

**Rona Mackay:** At the moment, there is no statutory aggravator, but such consideration is being given. Would the aggravator's introduction make things clearer or more effective as far the prosecution was concerned?

**Rosalyn McTaggart:** That is not an area that I would comment on, but I certainly think that our judiciary take all relevant facts and circumstances into account. No matter whether there is a statutory aggravator with regard to the offence, I would expect the person who decided the outcome in any offence to take all such circumstances, including the vulnerabilities of those involved, truly into account.

**Chief Superintendent McKenzie:** I refer to the second paragraph on page 4 of the Crown Office submission, which highlights the expectation of an aggravator and fits with my understanding. It outlines the expectation of an aggravator from a court's perspective and the circumstances in which that aggravator would be required to be considered unless there was a rational reason not to do so.

**Liam McArthur:** I want to follow up the line of questioning pursued by Daniel Johnson and Liam Kerr. The Bracadale report sets the statutory aggravator in the wider context of hate crime, in respect of both age and vulnerability. When the committee first addressed the issue, which was in the context of the Domestic Abuse (Scotland) Bill, we were told that although much of what was covered was already criminal, the aspect relating to coercive and controlling behaviour—the pattern of such behaviour as opposed to point-in-time incidents—was not adequately covered.

We were also told about the differences between elder abuse and domestic abuse. There

is obviously an overlap where the abuse takes place between partners or ex-partners, but there are large swathes of abuse that would not be covered. If before the 2018 act there was a gap in the law in relation to domestic abuse covering coercive controlling behaviour and a pattern of behaviour over time, is the same not true of criminal behaviour in relation to older people, where their vulnerability is being exploited and the age dimension comes into play? It seems to me to be self-evident that if there were insufficiencies in criminal law in relation to domestic abuse prior to the 2018 act, there must still be a gap in criminal law in relation to elder abuse.

**Rosalyn McTaggart:** In terms of a gap in the law in relation to coercive conduct, it may be that the gap left behind by the new legislation is not one of age, but is one of the nature of the relationship. The current restriction is that there must be a domestic or intimate relationship. We have heard evidence that the issue in elder abuse is that the perpetrators are family members with whom the victim is not in an intimate relationship. That is where the gap may be, rather than in relation to age. However, that requires further investigation and development.

**Liam McArthur:** I appreciate that. We were told the reasons why there is a need to consider the issues separately, albeit that there is an overlap in relation to intimate relationships. However, if the criminal law has struggled to deal with controlling and coercive behaviour and patterns of behaviour over a period, would it not apply to less intimate relationships that are still in a family setting, where positions of power or authority are being abused? I can understand why the Law Society might want to take time to see the impact of the most recent legislation on domestic abuse. However, that would tend to confirm that a gap remains, but that we are taking time to assess how best to address it.

**Rosalyn McTaggart:** Indeed. I reference some of the findings of Lord Bracadale in saying that there requires to be some time and consideration given to statistics and whether a gap remains in relation to behaviour that is not criminalised as yet. It may well be that there is no behaviour left behind to criminalise—that there is no behaviour that is not caught by current legislation. We now have the legislation which relates to psychological and coercive behaviour that would affect domestic relationships; that would appear to capture many crimes involving elderly people. The Law Society's position is that we would need to ascertain the effectiveness of the legislation as it currently stands and thereafter to assess whether there are any gaps.

**Liam McArthur:** I will not get back into the debate about how the legislation's effectiveness is judged.

Is there an additional complication in this, in that, as we heard from all the witnesses on the first panel, victims are often reluctant to come forward, either because they do not recognise the abuse as abuse, given their relationship with the perpetrator, or because they are concerned about the relationship breaking down if they come forward? I presume that the sensitivity and complexity of the issue make it difficult to take complaints forward. Is that being looked at? Can it be assessed separately from the analysis of the impact of the Domestic Abuse (Scotland) Act 2018?

**Rosalyn McTaggart:** On the difficulties of reporting abuse, I refer to the need for greater support and signposting, to assist vulnerable groups and to make them aware of the various options that are open to them, for example through support networks and agencies. Education about the role of the police and the Crown Office and Procurator Fiscal Service might well assist with the level of reporting—again, the police and Crown Office might be better placed to answer questions on that.

**Liam McArthur:** How do the police currently deal with a situation in which a victim is unwilling either to recognise that a crime has taken place or to make a complaint because of the implications?

**Chief Superintendent McKenzie:** The parameters are probably the same as those we use in a domestic abuse setting. The psychological coercive and controlling behaviour can be such that an individual is not aware that they are a victim of domestic abuse or, by extension, elder abuse—if we are using that term in its widest sense. Therefore, in securing an investigation, the decision about whether a complaint is being made is removed from the victim. If there is any information to indicate that someone is a victim of an abusive, criminal or neglectful act, whether because of their age or another vulnerability, the police do not need to wait for the individual to come forward and provide a statement of complaint; as in the domestic abuse environment, the guidance is clear that the decision-making process can be taken away from the victim, for the benefit of the victim and for the purposes of the investigation.

That approach generates challenges for any subsequent prosecution, but it enables us to undertake an investigation and to engage with wider partners to ensure that support mechanisms are in place. We have talked about social work and adults at risk. An investigation of that type would not be done by the police service in isolation; there would be a multi-agency response,

to ensure that wider support was there. That means that even if the criminal investigation is not founded, the support mechanisms will still be in place.

Your core question was about how we deal with a case in which the victim does not want to come forward, but the decision is taken away from the victim if there is evidence that they have been neglected.

**Liam McArthur:** During our evidence taking on the Domestic Abuse (Scotland) Bill, we often heard that such an approach is unique to domestic abuse, but you are suggesting that Police Scotland also takes such an approach in suspected elder abuse cases, and that there is an opportunity for the police to make a judgment, on the basis of the evidence that is presented to them, about whether to undertake a more detailed investigation.

**The Convener:** At this stage, I need to ask people to make their questions and responses a little shorter, please.

**Chief Superintendent McKenzie:** That applies in respect of a variety of crimes, such as hate crime, which I recognise is underreported—I have highlighted the point that some studies suggest that 80 per cent of such crimes are not reported. We would not neglect the opportunity if a witness who was not the primary victim came forward to highlight that a hate crime had taken place; of course, in that situation, Police Scotland would investigate. Likewise, if someone who was not the victim came forward to highlight a neglectful act, Police Scotland would investigate that.

12:15

**Fulton MacGregor:** At the end of the previous evidence session, I asked the panel for its thoughts on how Scotland is meeting its human rights and equalities obligations, and I will ask about the same issue now.

I quoted the Law Society to the previous panel. The witnesses on this panel will be glad to hear that I will not do that again, but they will have heard the discussion about the sometimes difficult and complex situations that must be grappled with, in which an offence might have been committed against an individual but that is tied up with a close family connection, and the perpetrator perhaps does not realise that they might have committed an offence. Does the panel have thoughts on how the current legislation and frameworks can help to promote compliance with our equalities and human rights obligations in this area?

**Anthony McGeehan:** I am afraid that I cannot comment on the state's compliance with the European convention on human rights in this field.

I can provide a perspective only on the prosecutorial approach.

**Rosalyn McTaggart:** As our submission says, protecting human rights does not necessarily mean prosecuting offences under criminal law once they have occurred; it is far better to prevent offences from occurring in the first place, which goes back to training, education and the provision of multi-agency support in the community.

**Fulton MacGregor:** How can that be done through the systems that are in place, such as adult support and protection procedures?

**Rosalyn McTaggart:** I have no comments on that, but I could ask whether the Law Society can provide a further written response.

**Chief Superintendent McKenzie:** We heard evidence earlier about wider human rights provisions, in relation to prevention, and I have touched on our approach when a victim does not wish to report a criminal act—Mr McArthur raised that issue. I have no wider comment to make on the question that has been raised, other than to say that, in police activity, our ethics and values enshrine the ECHR principles.

**Fulton MacGregor:** The previous panel discussed the police's role in adult support and protection, and one witness said that a multi-agency approach is taken. How do the police see their role in that framework?

**Chief Superintendent McKenzie:** The multi-agency approach to elder protection has synergies with the child protection approach, as it involves an expectation that agencies beyond the police will be involved. People talk about a tripartite approach to child protection, which involves health and social care services, the national health service and the police in a wider discussion, but the approach is not constrained to those parameters—other people might be involved in the discussion.

In elder protection, the expectation would be that an interagency referral discussion—the term “IRD” has probably been used before in the committee—would take place in which various agencies would bring information that was relevant to the matter at hand. That goes back to my point about the police's role going beyond the criminal investigation; because of the vulnerability component, which I highlighted, the police's role enters into support, protection and prevention. We cannot achieve that as a stand-alone agency; we must recognise that health and social care partnerships and wider agencies have a role to play. My expectation is that, in communities across Scotland, agencies will be involved on a multi-agency basis in protecting adults who are at risk.

**Fulton MacGregor:** Thank you for that helpful answer.

**The Convener:** I have a final question. Action on Elder Abuse Scotland submitted a freedom of information request to both Police Scotland and the Crown Office and Procurator Fiscal Service in 2016. The response from both highlighted the fact that neither agency records the age of the victim, which has made it very difficult to gather data on criminal cases involving older people or to analyse the true extent of criminal prosecutions that involve older people in Scotland. Can Police Scotland and COPFS confirm whether that is still the case?

**Anthony McGeehan:** I am happy to speak from the COPFS perspective in that regard. I am afraid that the evidence in relation to the FOI request was inaccurate. I have recovered the FOI request in question, which illustrates some of the challenges that the committee has heard about and explored over the course of this morning's evidence session.

The FOI request was not about the ages of victims. The COPFS and Police Scotland do record, as I have said, the ages of all victims and witnesses who are listed in the police reports received by the COPFS. However, the FOI request that was received in 2016 asked a very broad question and a series of subsidiary questions. The very broad question was:

“How many reports were submitted to COPFS by the police in which the harm, neglect or abuse of an older person was a feature?”

There was no definition of “older person”—to echo an earlier discussion—and no reference to criminal law in respect of offences involving the harm, neglect or abuse of another person.

The COPFS response to that FOI request was not that the information was not held but, rather, that obtaining the information that was asked for in its broadest sense would require a manual interrogation of individual reports and that that manual interrogation would go beyond the limit set by the Freedom of Information (Scotland) Act 2002.

**The Convener:** Was there a gap anywhere in recording the age of the victim?

**Anthony McGeehan:** No. All police reports received by the COPFS record the age of every witness in a case and that of the victim.

**The Convener:** And that is available.

**Anthony McGeehan:** As I have already indicated, we can interrogate the database in relation to the ages of persons listed in cases and identified as a victim.

**The Convener:** Is there a concerted effort now always to ensure that that evidence is available in order to analyse the extent of the problem?

**Anthony McGeehan:** Again, we would need some certainty in relation to what definitions are being applied and what information has been requested. As indicated in the COPFS written submission, information is available, with appropriate caveats, in relation to the ages of persons reported to the COPFS and identified as victims.

**The Convener:** It would be helpful if the FOI request and the response could be provided to the committee.

**Anthony McGeehan:** Certainly.

**Chief Superintendent McKenzie:** As highlighted earlier, witnesses' and victims' ages are recorded. I was unclear about the parameters of the FOI request. However, if those are the parameters, I can now understand why Police Scotland could not answer the FOI request, as it did not define the age range that was being looked for and had a broader set of parameters. I am quite happy to go back and determine what the return for that FOI request was. However, if the core question is whether Police Scotland records the ages of victims and witnesses and whether those are retrievable, my answer is that they certainly are recorded. I would lean on the expertise of my analysis and performance unit colleagues to see whether they are retrievable, but I would anticipate that the answer would be yes.

**The Convener:** Would having that data and the ability to analyse it be helpful?

**Chief Superintendent McKenzie:** Yes, it would be helpful to understand the core breakdown of the numbers of individuals in certain age groups who have been victims of crime, and that might be helpful for this discussion, but the additional information that is required in order to have a wider discussion about elder abuse is whether those victims were vulnerable due to age. We would be able to understand that only through a manual check.

**The Convener:** Okay. It would be helpful if we could see that FOI question and answer.

I thank all the witnesses for attending. It has been a very useful evidence session.

I suspend the meeting for a minute to allow the witnesses to leave.

12:24

*Meeting suspended.*

12:25

*On resuming—*

## **European Union (Withdrawal) Act 2018**

### **Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc) Regulations 2019 [Draft]**

**The Convener:** Agenda item 2 is consideration of whether a Scottish statutory instrument made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 has been laid under the appropriate procedure. The instrument is the draft Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc) Regulations 2019. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. The instrument has been laid under the affirmative procedure and the committee will consider the instrument's policy content at a future meeting.

Members have no comments. Is the committee agreed that the affirmative procedure is the appropriate procedure for this instrument?

**Members indicated agreement.**

**The Convener:** The Scottish Government has categorised the instrument as being of medium importance. Are members content with that?

**Members indicated agreement.**

**The Convener:** That concludes the public part of the meeting. Our next meeting will be on 5 March 2019, when we will consider a number of items of subordinate legislation.

12:25

*Meeting continued in private until 12:37.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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