



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

Humza Yousaf MSP
Cabinet Secretary for Justice
Scottish Government

By e-mail

All correspondence c/o:

Justice Committee Clerks
Room T2.60
The Scottish Parliament
Edinburgh
EH99 1SP

Tel: 0131 348 5195

Textphone: 0800 092 7100
justicecommittee@parliament.scot

Friday 22 March, 2019

Dear Cabinet Secretary,

Prosecution of elder abuse

On Tuesday 26 February, the Justice Committee undertook an evidence-taking session on the issue of the prosecution of elder abuse. During this meeting, the Committee took evidence from representatives of Action on Elder Abuse Scotland, Age Scotland, the Care Inspectorate, the Crown Office and Procurator Fiscal Service, the Law Society of Scotland and Police Scotland.

In addition to the written submissions from those organisations who gave oral evidence, the Committee also received written evidence from Dr Hannah Bows of Durham University School of Law, Protect, Social Work Scotland and Paul Greenwood, former Deputy District Attorney of San Diego County, California, USA. The Official Report [transcript](#) of the Committee meeting of 26 February, along with the written evidence¹ received is available on the Committee's webpage.

The annex to this letter sets out the background to this work, along with a summary of the evidence we have received. The Committee has also set out a series of questions arising from the evidence.

¹ Prosecution of elder abuse, evidence received:
<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/111160.aspx>

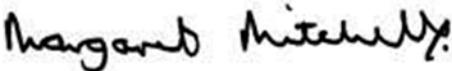
I write to bring this evidence session to your attention and to seek your views on the key issues which have arisen.

The Committee would welcome a response to its questions, along with any other views or observations you may wish to make on this subject, by Friday 17 May 2019.

In the meantime, if you require any further information, please contact the Justice Committee clerks.

I look forward to hearing from you.

Best wishes,

A handwritten signature in black ink that reads "Margaret Mitchell". The signature is written in a cursive style with a small flourish at the end.

Margaret Mitchell MSP
Convener, Justice Committee

Introduction

In 2017, the Justice Committee of the Scottish Parliament (the “Committee”) considered the issue of the prosecution of elder abuse in Scotland. This issue arose in the context of the Committee’s role as the lead committee for the scrutiny of the Domestic Abuse (Scotland) Bill. As part of the Stage 1 scrutiny of that Bill, evidence was received from stakeholders on the issue of elder abuse, and a suggestion was made that the provisions of that Bill could be extended to provide a mechanism to address the prosecution of elder abuse.

While the Committee did not agree at that stage with the suggestion that the provisions of that Bill should be expanded to cover the issue of elder abuse, there was agreement that this was an issue which merited further parliamentary attention. When we concluded our scrutiny of that Bill, we agreed to look again at the issue of elder abuse, when our timetable allowed.

Therefore, the Committee undertake a one-off oral evidence session on 26 February 2019 to explore themes around the possible need for a new offence, or statutory aggravator, in relation to elder abuse.

Current legislative situation

As you know, the [Domestic Abuse \(Scotland\) Act 2018](#) received Royal Assent on 9 March 2018 (the 2018 Act). The 2018 Act provides for a new statutory offence intended to support more effective prosecution of domestic abuse.

The Committee notes that on 21 December 2018, you announced that the relevant provisions of the 2018 Act would come into force on 1 April 2019.²

Furthermore, in his final [report](#) on his review into hate crime legislation in Scotland in May 2018, Lord Bracadale highlighted the issue of elder abuse. He stated-

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

“The Scottish Government should consider the introduction, outwith the hate crime scheme, of a general aggravation covering exploitation and vulnerability.”

² Scottish Government press release 21 December 2018: <https://news.gov.scot/news/tackling-domestic-abuse-3>

In light of these developments, the Committee felt the time was now appropriate to reconsider the themes around the prosecution of elder abuse and seek the views of the Scottish Government on this matter.

Key issues

Evidence taking

In considering the issue of the prosecution of elder abuse, the Committee explored a number of themes with witnesses, which were-

- The case for having a statutory offence of elder abuse, aimed at supporting the more effective prosecution of controlling and coercive behaviour in situations where there is an abuse of trust. The idea being that the offence might tackle some of the issues highlighted in relation to the new domestic abuse offence (set out in the 2018 Act) but apply in a range of relationships where that offence does not.
- The case for having a new statutory aggravator applying to situations where a more general offence involves elder abuse.
- The ability and willingness of victims to be able to report elder abuse.
- The specialist skills required within the police and prosecution system to adequately address elder abuse.
- Any parallels in the criminal protections extended to persons based on certain equality protected characteristics, (such as gender, race, disability, and those under a certain age etc.) and the lack of a specific aggravating factor in relation to offences targeted at those over a certain age.
- Whether the Scottish Government is fully meeting its international human rights commitments to older people in terms of addressing elder abuse.

Defining and recording of elder abuse

Some of the evidence received by the Committee suggested that Scotland's approach to addressing the issue of elder abuse would benefit from greater cohesion, and a more coordinated and holistic approach to the formulation of policy on elder abuse.

It is clear from the evidence received that that much positive work is underway by the Scottish Government, public sector bodies, enforcement and inspection agencies and the third sector to support and protect older people in Scotland, and ensure they have a good quality of life. However, some of the evidence received from key stakeholders contrasted what they see and a disjointed approach to tackling elder abuse with a more coordinated approach taken to addressing an issue like domestic abuse in Scotland.

The evidence received recognised some of the overlaps between the dynamic elements of domestic abuse, such as controlling or coercive behaviour by one partner towards another, and the dynamics of elder abuse. For example, where offences committed against older people occur in the context of a relationship where there is an expectation of trust, such as care by a family member.

While recognising these overlaps, organisations such as Action on Elder Abuse Scotland also pointed to some of the differences between the approach to domestic abuse and those around elder abuse. Lesley Carcary, of Action on Elder Abuse Scotland stated-

“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.³”

One explanation offered by witnesses for this difference was the mindset and general approach taken by the public sector, and investigation/inspection agencies, to the issue of elder abuse. Action on Elder Abuse pointed to the fact that, while Scotland has a very good care and support system in general, action on abuse against the elderly is often only taken forward in the context of adult support and protection services.

The Committee was told that the criminal aspects of such abuse is often not recognised, or is considered less of a priority to ensuring a care/support response by public sector agencies. This, it was felt, may go some way to explaining why there is a disjointed approach to tackling elder abuse in Scotland in the context of criminal offences.

One of the consequences of this position may be the lack of a clearly understood definition in Scotland of elder abuse, upon which agencies such as Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS) could formulate a policy approach.

Action for Elder Abuse Scotland set out its [preferred definition](#) and pointed to other jurisdictions where criminal legislation has been in place for many years in terms of defining, identifying and prosecuting elder abuse. Such laws, we were told, not only look to address the prosecution of such crimes but also play an important role in shaping mindsets to the approach to dealing with elder abuse.

³ Justice Committee, Official Report 26 February 2019 (Cols 3-4): <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

One such jurisdiction which was recommended to the Committee by Action on Elder Abuse Scotland was the system of prosecution of elder abuse operating in San Diego County in California.

Following the evidence session, the Committee received a [submission](#) from Mr Paul Greenwood, the former Deputy District Attorney of San Diego County. This submission highlighted the fact that California introduced a dedicated elder abuse law in 1986, which defined elder abuse and the penalties for offences (California Penal Code [section 368](#)). The submission also sets out how San Diego County prosecutes elder abuse under this law.

The evidence we have gathered suggests a marked contrast between the ability of the criminal justice system in Scotland to define and record instances of abuse against older people, in comparison to other forms of abuse, such as domestic violence. This may give rise to the question as to whether there is a gap in the law which may need to be addresses in terms of elder abuse? Witnesses recognised the difficulties which may arise in seeking to define elder abuse based on a specific age. However, consideration may need to be given to the difference between the framing of any statutory definition, and the application of a policy approach flowing from that definition.

For example, while a domestic abuse offence in Scotland is framed in gender neutral terms, this does not prevent a gendered approach being adopted to tackling domestic abuse, in recognition of the fact that the majority of victims are women. Such an approach may be applicable in terms of a response to elder abuse, say where any new statutory offence may be framed not around a specific age, but rather around controlling or coercive behaviour not already covered by domestic abuse legislation. The policy application and enforcement of such an offence, however, could be applied with age in mind.

The Committee would welcome the Scottish Governments views on the evidence received on the issues of defining elder abuse, in terms of the criminal justice system, and the overlaps with domestic abuse. The Committee would also welcome views on the approach taken in other jurisdictions to elder abuse, such as in California.

Witnesses pointed to a clear difficulty in gathering and assessing coherent and coordinated data on elder abuse from various agencies. This, in turn may hinder the ability to accurately calculate the prevalence and severity of elder abuse in Scotland.⁴ This presents a challenge to both policy makers, and those seeking to advocate for people suffering elder abuse, when attempting to make an assessment of the robustness of the existing legislative framework in dealing with such abuse.

⁴ Justice Committee, Official Report 26 February 2019 (Cols 22, 23, 31-32, 40): <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

The Committee specifically sought additional information from both COPFS and Police Scotland on the kind of data they record in terms of the age of victims of crime, and the types of offences committed against them.

Police Scotland informed us that the ages of “witnesses are recorded in Police Scotland’s systems, but the challenge relates to the searchability of that information”.⁵ In a follow up written submission, Police Scotland confirmed they were unable to provide any data to the Committee on offences against the elderly. This, they stated, was partly as a result of not having a clear definition of elder abuse, but also as a consequence of the disparate legacy ICT systems Police Scotland inherited from their predecessor police forces. In a written response, they stated-

“...although Police Scotland is moving towards the implementation of one system across the country, we currently operate with a number of different crime recording systems. Whilst there are significant high-level similarities between the systems, they are not designed to enable the retrieval of highly specific information, on a national basis. It is therefore not currently possible to search our records based upon the age of the victim, as there are no relevant markers which allow the automatic retrieval of this level of information”⁶

In a follow up submission, COPFS confirmed that reports submitted to them by Police Scotland include the date of birth of all civilian witnesses where known, including victims. This age data is then recorded on the COPFS Case Management database system. COPFS pointed out that this database is designed for managing cases, not for statistical purposes. Therefore, the data they could provide the Committee is, in part, dependent on information provided to COPFS by various reporting agencies. They also stressed that witnesses are recorded against a specific case on the system, and not against an offence. COPFS went on to state that-

“With these proper caveats, in order to provide an indicative profile of relevant offending dealt with by prosecutors, the COPFS database was examined to identify cases between April 2016 and December 2018 where it was recorded that a victim was aged 60 or over. This examination provided the number of individuals recorded as victims aged 60 or over and a broad categorisation of the most common charges in the cases involving those victims.

The information available from the COPFS database is that between 400 and 550 victims aged 60 or over are reported to COPFS each year. The profile of the principal charges in relevant cases is split between offences of violence (28%), sexual offences (25%), abusive behaviour (22%) and dishonesty (5%). The information available is that over 60% of the victims aged 60 or over are

⁵ Justice Committee, Official Report 26 February 2019 (Cols 32):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

⁶ Letter from Police Scotland, 11 March 2019: https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA_-_Police_Scotland_supplimentary.pdf

recorded as having been involved in a domestic abuse incident (i.e. an incident involving a partner or ex-partner)".⁷

At present, the Committee is of the view that the extent of elder abuse is unclear as we are not able to receive reliable data from bodies such as COPFS and Police Scotland in relation to age-related offences. The Committee would therefore welcome the views of the Scottish Government in relation to the provision of data on the detection and prosecution of elder abuse, under the existing criminal legislative framework in Scotland, and how this can be improved.

Witnesses who gave evidence to the Committee also drew comparisons between the new domestic abuse offence in the 2018 Act and the offence, applying in England and Wales, of controlling or coercive behaviour in an intimate or family relationship, set out in the Serious Crime Act 2015. It was noted that the latter could cover instances of elder abuse which are not caught by the Scottish domestic abuse offence.

Information from witnesses such as COPFS suggests that the largest proportion of elder abuse takes place within the domestic setting, as partner/ex-partner domestic violence, or violence and abuse by other close family members on whom an elderly relative may depend for care. While the provisions of the 2018 Act extend to all persons in a partner/ex-partner relationship over 16, irrespective of age, it does not cover wider family/caring relationships.

The Committee recognises the complex dynamics involved in addressing elder abuse. From issues like fraud and doorstep crime, to offences of domestic abuse involving elderly people, whether by a partner/ex-partner or other close family member or carer.

The Committee would welcome information on any plans the Government has for evaluating the operation of Domestic Abuse (Scotland) Act 2018. Furthermore, the Committee would welcome information on whether there are any plans to monitor the effectiveness of the new offence in terms of supporting the more effective prosecution of controlling and coercive behaviour, and whether any evaluation would include consideration of any lessons for the prosecution of such behaviour outwith domestic abuse.

Vulnerability and reporting elder abuse

The Committee sought to understand whether age was a key component in motivating crime against the elderly. While some felt that age was an important aspect in understanding the level and types of crimes committed, many we heard from pointed to the vulnerability and social isolation which older people often face, as an aggravating factor in crimes involving the elderly.

Many witnesses reflected on the potential difficulty of identifying an age at which a statutory offence may take effect. Both Action on Elder Abuse Scotland and Age

⁷ Letter from the Crown Office and Procurator Fiscal Service, 8 March 2019: https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA_-_COPFS_supplimentary.pdf

Scotland set out the main demographic range of people their work covers. This can cover people aged 50 and over. There was also an acknowledgement that different ages are set down in law in terms of the provision of various public services.

In terms of the prosecution of elder abuse offences, many of the witnesses recognised that characteristic which most exposed the elderly to abuse or crime was not necessarily their age, but rather the vulnerability and social isolation which may become more prevalent as a person ages. Witnesses such as Age Scotland and the Care Inspectorate suggested that framing a statutory offence, or an aggravator, around the concept of vulnerability, may be a more effective way to address the prosecutions of crimes against the elderly.

A possible template for this, it was suggested,⁸ was the provisions of the Adult Support and Protection (Scotland) Act 2007. While recognising that this Act does not use the term vulnerability, Action on Elder Abuse stated that that Act “is clearly intended to describe vulnerable people. It covers any person over the age of 16.”⁹

In his report, Lord Bracadale also recommended the creation of a new statutory general aggravation covering exploitation and vulnerability, which courts could take into account when sentencing someone convicted of an offence.

Other witnesses pointed to the difficulty of progressing cases to the point of prosecution, given the difficulties highlighted in terms of identifying instances of elder abuse, and their investigation by the police.

The Committee would welcome the views of the Scottish Government to the calls by Lord Bracadale in his report on the review of hate crimes legislation of the need for a statutory aggravator based on age hostility.

The Committee would also welcome the views of the Government on the use of exploitation or vulnerability as a basis for framing either a statutory offence, or a statutory aggravation of elder abuse.

Awareness and training on elder abuse

Another theme emerging from the evidence the Committee received centred around the perceptions of elder abuse. Concerns were expressed as to whether statutory authorities are giving due recognition to the potential criminal aspects of elder abuse, as opposed to responding instances of abuse solely on the bases of a failure in care and protection standards.

Both Action of Elder Abuse Scotland and Age Scotland pointed to the need to improve training in recognising and reporting elder abuse for public sector workers in local authorities, health boards and the care service.

⁸ Justice Committee, Official Report 26 February 2019 (Cols 12, 29):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

⁹ Justice Committee, Official Report 26 February 2019 (Col 12):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

Action of Elder Abuse Scotland highlighted the evidence they have collected on the need for victims of elder abuse, or those advocating for them, to having to “badger” the police to investigate cases of such abuse.¹⁰ Police Scotland pointed to the range of actions they undertake to tackle crime and abuse aimed at the elderly, and stressed the seriousness with which they take abuse against the elderly and all other categories of vulnerable witnesses.¹¹

COPFS also highlighted their procedure of referring all witnesses aged over 60 to its victim information and advice service. Other witnesses stressed the need to ensure that the police and prosecution system has the necessary skills and procedures to collect and investigate information from victims of elder abuse, many of whom may be vulnerable, or, be in a relationship of dependency with their abuser.

In its written evidence, Social Work Scotland set out its views on how guidance could be used to support the recognition of elder abuse, and how vulnerable victims could be supported in giving evidence to police. There was also a recognition¹² that the provisions of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill, which is currently being considered by the Parliament, may provide a basis for how evidence could be collected from vulnerable elderly witnesses. COPFS commented on this suggesting stating that-

“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”.¹³

The Committee notes the ongoing development of the Scottish Government’s National Strategy for Older People¹⁴ in terms of the policy objectives of ensuring secure independent living for Scotland’s ageing population.

Also, on 29 January 2019, the Scottish Parliament debated the Government’s latest strategy on addressing social isolation and loneliness: *A Connected Scotland: tackling social isolation and loneliness and building stronger communities*.¹⁵ As such, the Committee recognises these developments in terms of the Government’s commitment to improving the lives of older people in Scotland.

The Committee would welcome the Scottish Government’s views on how issues around the identification, reporting and prosecution of elder abuse

¹⁰ Justice Committee, Official Report 26 February 2019 (Cols 9-10):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

¹¹ Justice Committee, Official Report 26 February 2019 (Cols 34-35):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

¹² Justice Committee, Official Report 26 February 2019 (Cols 27-28):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

¹³ Justice Committee, Official Report 26 February 2019 (Col 35):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

¹⁴ The National Strategy for Older People: <https://www.gov.scot/policies/housing-and-independent-living/national-strategy-for-older-people/>

¹⁵ Scottish Parliament, Official Report, 29 January 2019 (Cols 18 – 65):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11917&mode=pdf>

could be address by way of improved training for police officers, carers, local government staff and other public-sector workers who come into contact with older people in a regular basis.

Furthermore, in light of the Scottish Government’s ongoing strategies to support older people in Scottish society, the Committee would welcome information on how the National Strategy for Older People seeks to address issues of elder abuse. Additionally, the Committee would welcome information on any plans the Government has to increase public understanding and awareness of how to recognise elder abuse, and how to report it to the police.

Other issues

Civil and family law issues

The evidence the Committee has received highlighted specific areas where elder abuse may be exacerbated by way of civil and family law issues, either as a result of a lack of recognition of the potential criminal behaviour of individuals, or by the increase risk of abuse vulnerable elderly people may face.

In particular, concerns were raised around issues such as powers of attorney, probate law and guardianship. For example, where family members with access to an older relative’s bank accounts or savings may use money for their own purposes, believing that their relative would not object, or believing that such actions were not abusive or criminal.

Responding to question on the complex problems of addressing elder abuse in terms of abuses of powers of attorney or guardianship, Lesley Carcary of Action on Elder Abuse Scotland told the Committee-

“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 make the issue unique.”¹⁶

While the majority of the Committee’s focus has been on the aspects of elder abuse under criminal law, such as domestic abuse or violence towards the elderly, we recognise that various provisions of civil and family law also provide opportunities where vulnerable elderly people may be, intentionally or unintentionally, the victims of abusive behaviours.

¹⁶ Justice Committee, Official Report 26 February 2019 (Cols 19-21):
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

The Committee would welcome information from the Scottish Government on any plans it has to review the operation of areas of civil and family law, such as powers of attorney, probate law and guardianship, in terms of addressing abusive behaviour towards older people. The Committee would welcome the Government’s view of how such a review could contribute to the development of a coordinated and holistic policy response to the issue of elder abuse in Scotland.

Human rights and ageing

The evidence received by the Committee also highlighted Scotland’s domestic obligations under the Equality Act 2010, and human rights commitments under international human rights obligations. These obligations seek to protect the rights of people not to suffer discrimination based on various characteristics, such as age.

Furthermore, the Scottish Government has committed to ensuring the formulation of policy, and the delivery of public services in Scotland, meets certain equalities and human rights standards. This was recently reflected in the inclusion of a human rights Outcome in the latest revision of the National Performance Framework.

Several witnesses highlighted the ageing demographic profile of Scotland’s population and the need to ensure public expenditure and policy deliver on the equality and human right outcomes set by the Government. Commenting on the need to ensure the criminal justice system in Scotland meets these objectives in terms of older people, Action on Elder Abuse Scotland stated-

“We are therefore concerned that failure to reform Scotland’s criminal justice system to take account of elder abuse will be a breach of our human rights obligations towards older people.”¹⁷

Other witnesses, such as Police Scotland and the COPFS also highlighted the seriousness with which they take the protection of equality, and the upholding of human right obligations, in the discharge of their functions.

The Law Society of Scotland pointed out that the protection of human rights “does not necessarily mean prosecuting offences under criminal law once they have occurred”. It was argued that seeking to prevent offences from occurring, especially through means like “training, education and the provision of multi-agency support in the community” is a more effective means of seeking to uphold and protect the human rights of older people in Scotland.¹⁸

We recognise the evolving landscape of equalities and human rights-based legislation and policy delivery in Scotland. Therefore, the Committee would welcome the views of the Scottish Government on how it sees its policies and strategies on older people delivering on the rights of older people in a joined-up manner. The Committee would welcome a view on how outcomes from

¹⁷ Action of Elder Abuse Scotland, written submission, pages 11 – 12.

https://www.parliament.scot/S5_JusticeCommittee/Inquiries/EA-Action.pdf

¹⁸ Scottish Parliament, Official Report, 29 January 2019 (Cols 44 – 45):

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11961&mode=pdf>

such strategies, like Scotland's National Action Plan on Human Rights (SNAP), or the National Performance Framework, deliver on objectives, such as seeking to prevent offences against older people.

Conclusion

One of the measures of a civilised society is how well it looks after the most vulnerable members of its society. The Committee is of the view that a more coherent and systematic focus is now required to address the complex issues around elder abuse in Scotland. The Committee is aware of the recent demographic trends in Scotland that see our population age, as an increasing number of people in Scotland live into their 80s and beyond. In our view, the issue of preventing, detecting and prosecuting elder abuse will become an ever-increasing factor for Scotland's criminal justice system.

The Committee considers elder abuse to be an increasingly important and concerning issue. We note the potential gap in the legislative framework in addressing this matter in Scotland.

We look forward to the Scottish Government's views on the issues we have identified in our initial investigation into this issue. The Committee will, where appropriate, continue to scrutinise action in this area.

Justice Committee
22 March 2019