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# Improving access to justice for older victims of crime by reimagining conceptions of vulnerability

Dr Kevin J. Brown, School of Law, Queen's University Belfast<sup>1</sup>

and

Dr Faith Gordon, Australia National University Law School

## Abstract

*This article investigates the implications of recent research findings that establish that older victims of crime are less likely to obtain procedural justice than other age groups. It explores original empirical data from the United Kingdom that finds evidence of a systemic failure amongst agencies to identify vulnerability in the older population and to put in place appropriate support mechanisms to allow older victims to participate fully in the justice system. The article discusses how the legally defined gateways to additional support, which are currently relied upon by many common law jurisdictions, disadvantage older victims and require reimagining. It argues that international protocols, especially the current European Union Directive on victims' rights, are valuable guides in this process of re-conceptualisation. To reduce further the inequitable treatment of older victims, the article advocates for jurisdictions to introduce a presumption in favour of special assistance for older people participating in the justice system.*

**Keywords:** crime; elder abuse; justice; special measures; victims; vulnerability

## Introduction

A commitment to a victim-centric justice system is a common totem of modern-day criminal justice policy (Walklate, 2016; Hall, 2017). The reality, however, is that despite reforms to reduce barriers to participation, significant numbers of victims continue to have a negative experience when interacting with the justice system (Criminal Justice Inspection of Northern Ireland (CJINI), 2015; Her Majesty's Inspectorate of Constabulary (HMIC), 2016; Fitz-Gibbon and Walklate, 2018). Contributing to the problem is that too often policy makers and criminal justice agencies have a monolithic view of an archetypal victim, which means that the system is not designed to properly support those who do not conform to this perceived norm (Christie, 1986; Burton et al., 2006). The experience of women, children, young people, those with disabilities, and ethnic and sexual minorities is often particularly problematic (Christie, 1986; Sharp and Atherton, 2007; Sherry, 2010; Hohl and Stanko, 2015; Fitz-Gibbon and Walklate, 2018). While previously an overlooked social group in the body of existing literature, academic attention is turning to explore the experiences of older victims of crime (Harbison, 2016; Bows, 2019; Nerenberg, 2019; Fraga Dominguez et al., in press). These insightful studies have primarily focused on the impact of crime on older people. Older people's experience of interacting with the justice system as victims has remained under-

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<sup>1</sup> Corresponding author: [k.brown@qub.ac.uk](mailto:k.brown@qub.ac.uk)

researched. The first studies of significance to explore this subject were recently completed independently in two neighbouring jurisdictions: (a) England and Wales (Her Majesty's Crown Prosecution Inspectorate (HMCPI) and Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS), 2019) and (b) Northern Ireland (Brown and Gordon, 2019a). The authors of this paper conducted the study in Northern Ireland. Both studies have provided extensive evidence that older victims of crime face systemic obstacles to participation in the justice process, leading ultimately in too many cases to a denial of justice. In response to these findings, law makers have called for significant policy changes to address these identified inequities (Northern Ireland Assembly, 2020).

The focus of this paper is on equitable access to procedural justice for older victims. Ultimately, procedural justice is achieved when an offender is identified, convicted and sanctioned by the justice authorities for the harm that they caused the victim. It includes access to the rights and privileges afforded to victims in their justice system in a manner that does not discriminate based on the characteristics of the victim. The full extent of victim rights and privileges varies between jurisdictions. Still, it typically includes being provided with appropriate support to participate in the justice system, whether in giving evidence to the police, testimony to a court or completing a victim impact statement outlining the harm caused to them. It also includes protection from future victimisation or retaliation for participating in the criminal process. The right of victims of crime to have equal access to procedural justice, irrespective of their age, is a right recognised in international legal instruments (United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985). The 2012 European Union (EU) Directive establishes minimum rights, support and protections for victims of crime across the 27 member states. In doing so, the Directive acknowledges that:

Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground. (para. 9)

The list of protected grounds, according to the Directive, includes age, disability and health (para. 9). The Directive goes on to state:

In all contacts with a competent authority operating within the context of criminal proceedings, and any service coming into contact with victims, such as victim support or restorative justice services, the personal situation and immediate needs, age, gender, possible disability and maturity of victims of crime should be taken into account while fully respecting their physical, mental and moral integrity. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice. (para. 9)

The EU and UN international instruments have been given legal effect in domestic jurisdictions, including in the two that have been the subject of the recent studies on the treatment of older victims of crime: England and Wales, and Northern Ireland. In England and Wales, the Code of Practice for Victims of Crime, introduced in 2015, provides all victims of crime with entitlements of service. These include enhanced entitlements for victims of the

most serious crime, persistently targeted victims, and vulnerable or intimidated victims. In Northern Ireland, a Charter for Victims of Crime was introduced in 2015, offering similar service entitlements to England and Wales. Both documents require that entitlements be provided in a non-discriminatory manner. These documents are applied in the light of equality legislation, in both jurisdictions, that provides legally enforceable protections against discrimination in the provisions of services, including those offered by the agencies of the respective criminal justice systems (Northern Ireland Act 1998, s75 and Equality Act 2010). Age discrimination is protected against in England and Wales (Equality Act 2010, s5) and Northern Ireland (Northern Ireland Act 1998, s75).

In investigating the extent to which older victims of crime do not have access to justice on a level that is equal to others, the authors of this paper explore the research findings from their study of Northern Ireland. This is supplemented with the conclusions of the subsequent research in England and Wales carried out by the criminal justice inspectorates (HMCPI and HMICFRS, 2019). Following a discussion of the methodology of the research project in Northern Ireland, the paper provides context on the levels of victimisation and its impact on the older population in the two jurisdictions. It then examines how older victims' increased vulnerability to the effects of crime makes it more challenging to participate in the justice system without support. The paper explores data that show that vulnerable older people are often not receiving the additional support necessary to participate on an equal footing compared to other victims. The article proposes that the gateway concepts of 'vulnerability' and 'intimidation' used in the United Kingdom (UK) and other jurisdictions, require re-imagining to encourage justice agencies, including the police, prosecution and the courts, to provide for the support needs of older victims appropriately. The article also argues that creating a legal presumption in favour of allowing older victims of crime to access appropriate support mechanisms, if they wish, would empower rather than diminish victim autonomy. Although the article focuses on the experience of two UK jurisdictions, it has relevance for other jurisdictions, which are likely to have as yet unidentified similar inequities to the UK when it comes to the treatment of older victims.

## **Methodology**

The Commissioner for Older People for Northern Ireland in 2016 commissioned the authors to research the experiences of older victims of crime in the jurisdiction with an emphasis on understanding the interactions between victims and the justice agencies. The Commissioner's office is a statutory body tasked with safeguarding and promoting the interests of older people (defined as those aged 60+). Northern Ireland is a small legal jurisdiction with a population of almost 1.9 million people. Its legal system is independent of but closely aligned with that of the much larger jurisdiction of England and Wales (a population of approximately 59.1 million people). The Northern Irish study applied a mix of quantitative and qualitative research methods, gaining access to many of the principal agencies in the justice system, including the police, prosecution service and victim support services. The research study was undertaken from January 2016 to March 2019, with a commissioned report published in 2019 (Brown and Gordon, 2019a). Ethical approval was obtained from Queen's University Belfast and the research was designed to cater for the diversity of the participants involved.

As part of the study, criminal justice data from the jurisdiction on levels of recorded crime and the outcomes of those crime reports were analysed via SPSS using standard statistical tests. Criminal justice data in Northern Ireland are unusual in that they include information on the age of the complainant/alleged victim. The researchers had access to over a decade's worth of such data (2007/2008–2017/2018) as part of their analysis. No other jurisdiction could provide similar data, making the findings from this study unique. Even the subsequent research in England and Wales did not have access to such data, relying instead on a more limited sample review of case files (HMCPI and HMICFRS, 2019).

Interviews and focus groups were used to gain insight into the views and experiences of relevant criminal justice practitioners. There was a focus group with members of the Police Service of Northern Ireland (PSNI). The PSNI is the single unitary police service for Northern Ireland. The focus group involved eight officers who had various relevant roles within the service, including a mix of response and community policing, all with experience of dealing with older victims of crime. The researchers conducted eight interviews with members of the Public Prosecution Service of Northern Ireland (PPS), the statutory authority tasked with prosecuting cases in the jurisdiction. The participants covered a range of roles and geographical localities in Northern Ireland. There were two interviews with co-ordinators from Victim Support Northern Ireland, a government-funded charity tasked with supporting victims of crime in the jurisdiction. The Victim Support staff worked in a range of geographical localities in Northern Ireland and had a wealth of relevant experience. Following the interviews and focus groups with frontline staff, meetings were held with high-level officials in the PSNI, PPS and Department of Justice to gain a better understanding of the higher-level perspective on the subject.

In order to better understand the experiences of those individuals directly affected, interviews and focus groups were conducted with older people who had been victims of crime, as well as family members of older victims of crime and older people who had been indirectly impacted by crime in their communities. Eleven interviews were conducted in total, eight with older victims, five women and three men, aged between 67 and 84, and three interviews were conducted with relatives (all adult children under 60). The relatives were interviewed on the request of the older person to provide further insight into their experience of being a victim. Following the interviews, two focus groups were conducted with older people who had been either directly or indirectly impacted by crime. This involved a total of 20 participants. The focus group participants were a range of ages over 60 with 13 women and seven men involved.

Given that the older participants are classed as 'a high-risk' group, specific measures were put in place. The research was compliant with the British Society of Criminology Statement of Ethics, which outlines that researchers have a duty 'to minimise personal harm to ... participants' (British Society of Criminology, 2015). Further, it outlines that research should be designed 'in a way such that the dignity and autonomy of research participants is protected and respected at all times' and researchers should 'strive to protect the rights of those they study, their interests, sensitivities and privacy' (British Society of Criminology, 2015). The researchers obtained informed consent to participation both in writing and orally. The researchers also provided the participants with relevant information on independent victim support providers in the jurisdiction.

David and Sutton (2011: 19) argue that research studies 'may adopt a combination of methods' to strengthen the overall empirical findings. Similarly, Noaks and Wincup (2004: 8) strongly advocate for combining research methods. The combined strength of the approach and research methods enabled this study to achieve a fully rounded examination of the issues from the decision makers', practitioners', advocates' and victims' perspectives, alongside an analysis of criminal justice statistical data. This paper is derived from the larger study, in which the statistics and qualitative empirical data were thematically analysed. The program NVivo was utilised to facilitate a qualitative data analysis using a standard thematic coding technique. For reasons of space, direct quotations from participants are not included in this paper, but these are available in the commissioned report (Brown and Gordon, 2019a). This paper draws out several prominent themes from the broader thematic analysis.

### **Crime and older victims**

Victimisation surveys and police recorded crime statistics reveal that older people are less likely to be victims of crime than other adult age groups within society. Figures from the Crime Survey of England and Wales (HMCPI and HMICFRS, 2019), for the year 2017/2018, estimate that 12 per cent of adults aged 65+ were victims of crime in that period, in comparison to a figure of 23 per cent of adults aged 16–64. Police records (PSNI, 2018) in Northern Ireland show the likelihood of recording a crime with the police was the highest for the 20–24 age group (68 per 1,000) and lowest for the 65+ age group (15 per 1,000) (PSNI, 2018). Both sets of statistics have shown a high level of consistency over the last decade.

The headline figures mask differences in the profile of the types of offences that the various age categories are reporting. Results from the Crime Survey for England and Wales (HMCPI and HMICFRS, 2019) and police data in Northern Ireland (PSNI, 2018) show that older people are more likely to be victims of crimes against their property than against their person. Even within offence categories, there is evidence of differences between older people and other adults. Older people are at low risk of random violent attacks by strangers. Instead, older people face the risk of elder abuse where someone known to them (usually a family member or carer) inflicts violence, often within a residential environment (Nerenberg, 2019). When it comes to crimes against property, older people are particularly at risk of distraction burglaries (where someone gains access to the older person's home under false pretences) (Andrews, 2015). As increasing numbers of older people access the digital world, research shows that there is a growing problem of online fraud against this demographic (Munanga, 2019).

Older victims of crime are more likely than other adult age groups to have an existing unbalanced power dynamic relationship between themselves and those who perpetrate the crime against them (Brown and Gordon, 2019a; HMCPI and HMICFRS, 2019). A typical example is elder abuse cases where the perpetrator is often a family member or carer (Nerenberg, 2019). The victims, in such cases, are vulnerable, as they are at risk of further victimisation during ongoing relationships and contact. They are also at risk of losing from their life a person upon whom they depend to support their quality of life (Pillemer and Wolf, 1986).

Despite the relatively low victimisation rates, older people are the group that surveys find are the most fearful of crime (Hale, 1996; Lee, 2013). In the interviews and focus groups

conducted as part of the Northern Ireland study, the fear of becoming a victim of crime ranked as one of the demographic's top concerns/worries. This recurring theme of 'lower risk/higher fear' has become known as 'the fear/risk paradox' (see Lee, 2013). There is a temptation to view this paradox as based on widely held irrational beliefs; however, by unpacking the relationship between fear, vulnerability and the impact of crime, the paradox can be explained. Hale observes that:

Any model trying to explain fear will include some notion of vulnerability. At a common-sense level people who feel unable to protect themselves, because they cannot run fast, or lack the physical prowess to ward off attackers, or because they cannot afford to defend their homes, or because it would take them longer than average to recover from material or physical injuries might be expected to 'fear' crime more than others. Three broad groups women, the elderly and the poor fall within this category. (Hale, 1996: 95)

Increased fear of crime may, therefore, be related to the fear of the impact of being a victim, as opposed to the risk of being a victim. In this sense, heightened fear of crime in the older population is entirely rational and is something likely to remain a feature of future victimisation surveys.

Older people may feel higher levels of fear because they are more vulnerable to the effects of crime. However, it is important to unpack what is meant by vulnerability in this context (Walklate, 2011; Walklate et al., 2014). One way of conceptualising vulnerability is to view those who are at the highest risk of harm from victimisation as vulnerable (Sparks, 1982; Green, 2007; Walklate, 2011). Related to this interpretation is the concept of resilience (Walklate et al., 2014). Schoon (2006) conceptualised resilience in three different ways. The first is the ability to have a positive outcome despite experiencing adversity. The second is a continued ability to function positively in adverse circumstances. The third is the ability to recover from trauma. Medical and psychological discourse recognises that factors that disproportionately impact on older people can reduce levels of resilience and therefore reduce the ability to recover from trauma, such as being a victim of crime. Ill-health, both physical and mental, has been shown to reduce levels of resilience, especially in older people (Wiles et al., 2012; Age UK, 2015). Other factors which may impact on resilience levels among older people include whether or not they live alone and the extent of any support networks they have available to them (Victor et al., 2000; Kharicha et al., 2007).

The impact crime can have on older victims varies depending on the individual, their levels of resilience, the nature and the circumstances of the crime, and its aftermath. The authors found in their research into Northern Ireland several types of impact that are particularly applicable to the older population. One is a heightened fear of future victimisation on the part of the victim, as well as an increased concern amongst other older people in that community about the risks of others being targeted (what might be labelled, respectively, individual and general increases in fear). This overall rise in anxiety was most likely when it appeared there was deliberate targeting of older people (e.g. distraction burglaries) or when the crime was particularly shocking (e.g. involving violence or the threat of violence committed by a stranger). Also prevalent amongst older victims was a fear of loss of independence following victimisation (e.g. being told they could no longer live in their home), because of a perception that the crime signified that they could no longer cope. Increased

social isolation is another common impact on older victims, because of fear of being victimised either outside their home or having their home targeted when they were away from it. For those older people with existing mental or physical health issues, being a victim of crime risked exacerbating their ill-health. There was also evidence that being a victim of crime reduced resilience to deal with other traumatic events (e.g. future ill-health, the death of a partner). It is important to emphasise that not all older victims of crime experience all or even some of these impacts, but rather, they are more prevalent amongst the older population.

### **Interactions with the criminal justice system of older victims of crime**

The fact that older people are more vulnerable to the impact of crime should not diminish their right to seek and obtain justice. Evidence of reduced access to justice on the grounds of the age of the victim would prima facie indicate that the criminal process is failing to abide by national and international legal obligations. One method of assessing access to justice is examining data on crime outcomes (referred to in other jurisdictions as detection rates or clear-up rates). Both Northern Ireland, and England and Wales publish data on what they label 'outcome rates', which is the rate at which recorded crimes achieve a successful police outcome. Unlike England and Wales, Northern Ireland gathers data on police outcome rates by the age of complainant/victim (PSNI, 2018). A successful police outcome is an accused person being identified for the crime and being either charged/summoned for the offence; cautioned; the offence being taken into consideration; a penalty notice issued; or the accused given a discretionary disposal such as a referral to restorative justice (PSNI, 2018). It should be noted the outcomes relate only to pre-court proceedings and decisions. An analysis of over ten years of outcome rate data in Northern Ireland established that older complainants/victims are less likely to have a successful outcome to their case than other adults.<sup>2</sup> The research identified that there are statistically significant differences in median outcome rate between age groups. The four categories below the median outcome rate for the 2007/08–2017/18 period are the 50–54, 55–59, 60–64 and 65+ groups, although the 50–54 category is very close to the median value.<sup>3</sup> The 65+ category had the lowest average outcome rate. For over a decade the statistics from across all policing districts in Northern Ireland have shown that crimes committed against older people are, on average, less likely to have a successful police outcome than crimes committed against other adults.

A plausible hypothesis for the differences in outcome rate between the age groups is that they are reporting different types of crime and those different types of crime have differing outcome rates. However, the authors' analysis of outcome rates in Northern Ireland within offence categories also shows a pattern of different rates depending on the age of the victim/complainant. Cases with older victims/complainants recorded lower outcome rates than for other adults for burglary, criminal damage, theft – vehicle offences, other thefts and violence without injury. Only in the violence with injury category did cases with older complainants/victims record, on average, a higher outcome rate than for other adults. It is therefore not the case that the variation in overall outcome rate between the ages is simply due to the differences in the categories of offences reported.

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<sup>2</sup> There is a strong negative correlation between age and outcome rate over the period 2007/08–2017/18. Spearman's correlation:  $rs(108) = -0.634$ ,  $p < 0.0005$ .

<sup>3</sup> For more in-depth exploration of the statistical data, see Brown and Gordon (2019b).



A consistent pattern of a lower crime outcome for older people for common offence categories is a cause for concern as it means older victims are less likely to obtain procedural justice in Northern Ireland than other age groups. The recent English research into the treatment of older victims of crime which involved a more limited analysis of a sample of case files suggests that the Northern Ireland statistics may well be replicated if such data was gathered elsewhere (HMCPI and HMICFRS, 2019). It is therefore important to understand why older victims were less likely to obtain justice in Northern Ireland.

#### *A failure to identify vulnerability in older victims*

A pervasive problem in Northern Ireland was a failure on the part of the relevant agencies to identify vulnerability amongst older victims and therefore put in place appropriate assistance. Without adequate support (discussed in detail later in the article), some vulnerable older victims can find it difficult, if not impossible, to participate in the justice system, whether that is providing a statement to the police, testimony in court or a victim impact statement. There are several reasons why agencies fail to recognise vulnerability and its impact on older people. The ability to recognise and respond to vulnerability is a well-documented failure of the criminal justice system in England and Wales, and Northern Ireland (Criminal Justice Inspection Northern Ireland, 2012, 2015; HMCPI and HMICFRS, 2019). The CJINI (2012, 2015) has spoken of a 'hierarchy of identification' of vulnerability that resonates with the concept of a hierarchy of victims of Burton et al. (2006). Child witnesses and victims of sexual offences are more likely to be identified as being vulnerable compared to adult victims of other crimes. A Home Office study conducted in England and Wales in 2006 identified 24 per cent of witnesses as being either vulnerable or intimidated in contrast to the 3–6 per cent identified as such by the criminal justice system at that time (Burton et al., 2006). Criminal justice inspectorate reports into Northern Ireland have found that practitioners identified fewer than half of those who were vulnerable and intimidated as such (HMIC, 2016). As older people are more likely to suffer from recognised vulnerabilities, any difficulties in identifying those in need of additional support risks having a disproportionate impact on this age group.

A one-size-fits-all approach to identifying vulnerability in adults is not appropriate as different groups within society are more likely to have a distinctive mix of vulnerabilities. Yet, there was little evidence in the studies in Northern Ireland or England and Wales of tailored strategies or of specific training of practitioners to provide adequate support services to older victims (HMCPI and HMICFRS, 2019). Indeed, practitioners in Northern Ireland tended to adopt unnecessarily an age-blind approach, where they were reluctant to treat older victims any differently than other adults for fear of being perceived to be acting in a discriminatory fashion. This has the perverse outcome of disadvantaging older victims as more common individual, contextual and social vulnerabilities in the demographic are overlooked.

#### *The phenomenon of burden and fear of loss of independence*

Another factor contributing to older people not receiving the support they need is the phenomenon of burden. Literature across several disciplines has found that older people have a tendency not to ask for assistance for fear of 'being a burden on others', whether that be family, other support networks, or charitable or statutory agencies (Cahill et al., 2009; Gorvin

and Brown, 2012). In Northern Ireland, a reluctance to ask for support played a critical role in reducing the likelihood that an older person would (a) wish to pursue a case through the justice system and (b) request the necessary additional support to allow them to participate. Connected to the phenomenon of burden is a common fear amongst older people of being perceived not to be coping the same as others do with traumatic or stressful events and therefore losing independence. Accepting an official designation of vulnerable by an agency can induce fear that this may ultimately lead to others, whether family or state agencies, deciding that the individual needs to give up some of their independence, such as living in their own home. Fear of being judged can be exacerbated if the older person feels foolish or embarrassed by how they became a victim (e.g. falling victim to an online scam or distraction burglary). Ultimately, this can cause older people not to report a crime, or, if they do, not to ask for additional support or to mask vulnerability when asked about it.

### *Delays in the justice system*

Compounding the issues above, especially in Northern Ireland, were lengthy delays in the criminal justice system, often twice the length of those found in England and Wales (Northern Ireland Audit Office, 2018). Such delays have a disproportionately negative impact on older, more vulnerable victims. Older people are more likely to have degenerative health conditions that worsen over time. Such deteriorations can impact victims directly, e.g. their health, or, indirectly, e.g. the health of a partner or carer. Lengthy delays also mean that those suffering elder abuse (Nerenberg, 2019), at the hands of someone known to them, are at increased risk of retaliation or intimidation if a court does not put in place an appropriate protective order. In Northern Ireland there is no formal mechanism for expediting cases involving older vulnerable victims and witnesses, meaning too often justice delayed is justice denied.

### **Reconceptualising the definitions of vulnerability and intimidation for access to additional support**

It is not that support for older victims is not available within the justice systems in England and Wales, and Northern Ireland, but rather that access to such support is too often not offered. In recognising that some victims will need additional support to access justice, a suite of special measures is available (Burton et al., 2006). These include having a registered intermediary who assists witnesses who have communication difficulties (e.g. a witness who has speech issues following a stroke) when engaging with the police investigation or during court proceedings (Cooper and Mattison, 2017). Another form of support is permitting a witness to pre-record their evidence before a trial (Burton et al., 2006). This form of support is particularly valuable to a witness with a degenerative condition such as dementia, which would make giving evidence at a trial some months or years later impossible. Witnesses may also be permitted to provide evidence to court via live video-link from outside the courtroom (Fairclough and Jones, 2017). An alternative to live video-link is for witnesses to give testimony in the courtroom while shielded from the defendant via a curtain or physical screen during their testimony (Fairclough and Jones, 2017). These measures and others can do much to increase victim participation in the justice system and reduce the number of cases that do not reach a successful outcome (Fairclough and Jones, 2017). However, none of these, or other forms of support are automatically offered to victims or other witnesses. For a victim or other witness to access most types of assistance, they must fall within the legal definition

of either a vulnerable or intimidated witness (Youth Justice and Criminal Evidence Act 1999, Part II, Chapter 1; The Criminal Evidence (Northern Ireland) Order 1999, Part II).

### *The vulnerability gateway*

The definition of 'vulnerability' most commonly relied upon in the criminal justice system in England and Wales, and Northern Ireland is that contained in legislation governing the use of special measures in court (Youth Justice and Criminal Evidence Act 1999, Part II, Chapter 1; The Criminal Evidence (Northern Ireland) Order 1999, Part II). The Northern Irish legislation is a copy of the English legislation. Significantly, the legislation in England and Wales on special measures has influenced the wording of statutes across significant parts of the common law world including Canada (Criminal Code 486.1), South Australia (Statutes Amendment (Evidence and Procedure) Act 2008, s12) and Scotland (Criminal Procedure (Scotland) Act 1995). Although the English and Northern Irish legislation does not make direct use of the word vulnerable, the associated guidance documents, including the 2015 Code of Practice for Victims of Crime, rely on the statutory wording found within the legislation to define vulnerability. The statute states that victims and witnesses will be considered for special measures if they are under 18 or the quality of their evidence is likely to be diminished because they fall into one of the following categories: they have a mental disorder, significant impairment of intelligence and social functioning; and/or physical disability or physical disorder (Youth Justice and Criminal Evidence Act 1999, s4). Accepting this status of vulnerability as defined in the legislation was understandably something that many older people were reluctant to do. This is because it uses stigmatising and out-dated language which questions the capacity and intellect of the older victim.

Furthermore, the definition of vulnerability for those over 18 excludes structural (e.g. the impact of poverty in old age), contextual (e.g. elder abuse scenarios – repeat victimisation, dependence on the perpetrator) and demographic (e.g. older age) factors. It also excludes the emotional aspect of vulnerability (e.g. heightened fear of crime amongst the older population). This narrow interpretation of vulnerability contradicts the understanding of the concept applied within disciplines other than law, including psychology and medicine (Walklate, 2011; Walklate et al., 2014). The research in Northern Ireland found that it also conflicts with common-sense understandings of vulnerability that older victims often hold. This leads older victims to not recognise themselves as vulnerable, even where they would benefit from additional support.

### *The intimidation gateway*

The legislative frameworks in England and Wales, and Northern Ireland attempt to compensate for the narrow conceptualisation of vulnerability, by applying a broad interpretation of the concept of 'intimidation'. Victims and witnesses are also eligible to be considered for 'special measures' if they are classified as 'intimidated'. To be classified as 'intimidated', the quality of evidence a victim or witness would likely be reduced because of fear or distress about giving evidence (Youth Justice and Criminal Evidence Act 1999, s17). The following factors should be taken into consideration in judging whether someone is intimidated (Youth Justice and Criminal Evidence Act 1999, s17):

- the nature and alleged circumstances of the offence to which the proceedings relate;

- the age of the witness;
- such of the following matters as appear to the court to be relevant, namely
- the social and cultural background and ethnic origins of the witness,
- the domestic and employment circumstances of the witness, and
- any religious beliefs or political opinions of the witness;
- any behaviour towards the witness on the part of: the accused, members of the family or associates of the accused, or any other person who is likely to be an accused or a witness in the proceedings.

Within the definition of intimidation forms of vulnerability, not recognised under the vulnerability category, are captured. This includes demographic (e.g. older age), crime-specific vulnerability (e.g. elder abuse) and structural vulnerability (e.g. an older person in poverty). These legal definitions are familiar to the courts but are not necessarily readily understandable to other criminal justice practitioners or the general public. The existing body of research has shown that front-line practitioners, such as the police, struggle to apply these statutory tests in practice (Ewin, 2015; HMCPI and HMICFRS, 2019). In the study of Northern Ireland, older people were often confused by the term ‘intimidation’, believing it to cover only those circumstances involving coercion of a victim into withdrawing evidence. The confusion was heightened in Northern Ireland by the continuing presence of illegal paramilitary forces in many working-class communities who routinely rely on intimidatory tactics to terrorise communities (Napier et al., 2017). This sets a very high bar in the minds of older people and police officers when judging whether the intimidation gateway has been satisfied, meaning too often it is not triggered and therefore support is not provided.

### *Reconceptualising the gateways*

Improving the training of frontline practitioners to recognise vulnerability and/or experiences of intimidation amongst older victims of crime may improve matters (HMCPI and HMICFRS, 2019); however, such reforms will still be based upon the flawed gateways to accessing additional support. A more fundamental change is required with a reconceptualisation of the gateways to obtain further assistance. This would involve replacing the current definitions of vulnerability and intimidation used in Northern Ireland, and England and Wales. The current division between the vulnerability and intimidated categories is artificial. Both concepts, as currently defined in legislation, contradict everyday understandings and applications of the terms. Deviating from common-sense understandings of these terms is problematic as it is a source of confusion to victims of crime and frontline practitioners (who are often not lawyers), leading to misapplication. There are several alternative approaches to improve matters. One would be to fold the two categories into one another and have one entitled ‘vulnerable and intimidated’. This seems perhaps a small change; however, it would remove the confusion currently caused by having demographic, structural, contextual and crime-specific vulnerability captured under the intimidation category. It would encourage practitioners and victims to adopt a more holistic understanding of the concepts.

A more radical alternative would be to abandon the current framework entirely and introduce new domestic legislation adopting the wording from the EU 2012 Victims Rights’ Directive. Article 22 of the Directive sets out the requirement on Member States to provide individual assessment of victims to identify specific needs and to determine whether and to what extent

victims would benefit from special measures. The article states that assessments should be based on identifying those victims with a 'particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation'. The article further states that 'the individual assessment shall, in particular, take into account: (a) the personal characteristics of the victim; (b) the type or nature of the crime; and (c) the circumstances of the crime'. The article then goes on to provide this additional direction for Member States:

In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

There are several potential advantages to adopting the wording of the EU Directive into domestic legislation. Such a reform would replace the overly medicalised language found within the UK legislation's definition of vulnerable, which relies on an assessment of capacity, with a more holistic assessment of the needs of the individual. Article 22 recognises that someone may have unimpaired capacity, both mental and physical, but still be vulnerable. The EU legislation also avoids stretching the meaning of intimidation beyond its ordinary meaning by making separate reference to secondary and repeat victimisation and retaliation. The wording of Article 22 provides more precise guidance than that currently found in domestic legislation for the frontline practitioners, who are responsible for identifying who might need special measures. It allows older victims and others to say they require additional support without being required to accept that they are lacking in full capacity or are intimidated.

### **Creating a presumption in favour of support for older victims**

Modernising the gateways to accessing special measures would decrease the risk of vulnerable older victims missing out on appropriate support, but one could go further in improving access to justice for this demographic. A more radical method of reducing the likelihood of special measures directions not being issued appropriately in cases involving older people is to introduce a legal presumption in favour of support. This presumption could be based on age, with those above a certain age automatically eligible for consideration for special measures or at least certain types of special measures. If such a presumption were in place, people above a certain age would be eligible to apply for special measures, but they could still, if they wish, choose to opt to give their evidence in court without the aid of such measures. Such an approach would not be 'about perpetuating an image of older people as being inherently weak and vulnerable. It is simply recognising the fact of increasing vulnerability as a function of age' (Action on Elder Abuse Northern Ireland, 2019).

A presumption (referred to as the primary rule) exists for those under the age of 18 in the UK, with the law in Northern Ireland stating that a court must give a special measures direction (video-link or pre-recorded statements) to such a witness (Criminal Evidence (Northern Ireland) Order 1999, Article 4). This primary rule is subject to some exceptions. One of the

exceptions is that the person under 18 wishes to give evidence in court and the court is satisfied that this would not diminish the quality of the witness' testimony. Another presumption applies to adults who are complainants in sexual offence, modern slavery or human trafficking cases (Article 5). In England and Wales, a presumption also applies to witnesses in cases involving gun and knife crime cases (Coroners and Justice Act 2009, s17). With the adult presumptions, courts are not required to offer special measures in such cases, but are required to consider their applicability in improving the quality of evidence given by the witness (Criminal Evidence (Northern Ireland) Order 1999, Article 7). The views of the witness should be sought in making any decision (Article 7). The witness can opt out of the special measures if they wish (Article 7).

If such a presumption were in place, older people meeting the threshold of the presumption would be entitled to be considered for special measures by a court without having to pass through the vulnerable or intimidation gateways. This would reduce the risk of a prosecutor or police officer overlooking their vulnerability earlier in the process. Aware of the courts' requirement to consider special measures in such cases, practitioners would be incentivised to engage in dialogue with older people, providing them with information on the relative merits of giving evidence, with, or without, additional support.

In the Northern Ireland study, police and Victim Support were mostly supportive of such a legislative reform. Prosecutors were less enthusiastic about such a change, in part because of a professional preconception that the best witness evidence is that delivered unaided in the courtroom (Bunting et al., 2013). Going beyond that generalist suspicion of special measures, the majority of prosecutors articulated their opposition to such a reform on the basis that they favoured an age-blind approach of avoiding assumptions of vulnerability based on age. However, the current age-blind approach has been shown to fail older victims.

Prosecutors also stated that to introduce such a presumption would be to treat older victims of crime in the same manner as children, which would be to infantilise them. It is, though, more appropriate to think of any presumption created for older people as being more akin to the other adult presumptions (i.e. those for victims of sexual, human trafficking or slavery offences and victims and witnesses in gun and knife crime cases).

Another criticism levelled at the idea of introducing a presumption for older victims is that an arbitrary decision would have to be made as to what age someone is defined as an older person for access to special measures. Such a classification could be based on criteria used in other areas of social policy where a particular age is designated as placing someone within the category of being an older person. The statutory remits of the Commissioner for Older People for Northern Ireland and the Commissioner for Older People in Wales both define older age as when someone reaches 60 (Commissioner for Older People (Wales) Act 2006; Commissioner for Older People Act (Northern Ireland) 2011). An alternative approach would be to base the criteria for the presumption on the crime being of a particular type that tends to leave older people especially vulnerable. The Crown Prosecution Service (2019) in England and Wales has a newly re-defined category of crime entitled 'crimes against older people' which it uses for policy guidance and monitoring purposes. This category covers cases where the complainant is aged 65 or over and 'the criminal offence is perceived by the victim or any other person, to be committed by reason of the victim's vulnerability through age or

presumed vulnerability through age' (Crown Prosecution Service, 2019). This presumption provides reassurance to those reluctant to see one based purely on the complainant's age. It is also in keeping with the other adult presumptions that seek to cover particular types of crime which leave complainants more vulnerable, at risk of intimidation or in greater distress.

## **Conclusion**

Older victims of crime are more likely to be vulnerable and to need additional support when engaging with the justice system. This paper's exploration of existing arrangements in Northern Ireland, and England and Wales finds that too often older victims' needs are not adequately assessed, meaning such victims are not receiving appropriate support. Ultimately, this leads to the denial of procedural justice for significant numbers of older victims. Avoiding such discriminatory outcomes should be a priority for justice systems throughout the world. A failure on the part of criminal justice agencies to recognise vulnerability when engaging with older victims is at the root of the problem. Older people are less likely to be victims of crime, particularly violent crimes, in comparison to other adults. However, individual, situational and offence-specific factors mean that older people are more likely to find being a victim of crime a traumatic experience, therefore making participation in the criminal justice process as a victim more difficult.

The definitions of vulnerability and the related concept of intimidation have become gateways to victims accessing additional support to help them journey through the justice system. This is problematic, as the definitions found within the governing statutes are antiquated and overly legalistic, using language that does not resonate with contemporary understandings of these terms. The legal definition of vulnerability narrowly focuses on the idea of a person being vulnerable based on physical or mental characteristics, using out-dated and often perceived as offensive language. It fails to capture structural factors, circumstances and experiences, as well as contextual vulnerability, such as a person lacking a support network or fearing the loss of independence. This flawed definition of vulnerability risks an older person rejecting the label, particularly given the negative connotations of an older person being labelled as such.

The intimidation category is more widely framed to capture characteristics such as age and frailty as well as circumstances such as abuse by a relative or carer. While a more holistic definition is welcome, the problem is that it is under a misleading heading of intimidation. This confuses frontline practitioners, who assess victims' needs, particularly the police. It also confuses victims. Victims, when asked if they feel intimidated, are likely to understand the term in its everyday usage of being at risk of direct intimidation by the alleged perpetrator. Practitioners have become familiar with these terms and are reluctant to see them change. In particular, prosecutors whose training inculcates within them a desire for precedent, appear wedded to the traditional way of understanding these concepts. It is crucial though that policy makers revisit the gateway concepts for access to special measures to create more contemporary, less offensive and more meaningful terms, which will avoid undue prejudice against older people and others who require additional support. The wording of the 2012 EU Directive provides an excellent starting point for a discussion on reform.

A lack of old age-specific training amongst practitioners compounds the problems associated with the use of the concepts of vulnerability and intimidation. Appropriate training and practice guidelines can improve matters. However, such changes are likely to bring incremental and patchy improvements at best. A presumption in favour of special measures should be put in place to provide swifter and more complete change. This switches the dynamic so that it is assumed that older victims are entitled to consideration for additional support mechanisms. This does not remove the autonomy of older people, as it does not require older victims to avail of such support, and many will choose not to do so. Still, it should drastically reduce the numbers of older victims who are denied appropriate support. The presumption could be age-based (e.g. it applies to all victims over the age of 60) or it could be based on a category of crimes that place older people in particularly vulnerable positions. There is a well-established precedent for creating a presumption to protect groups of young age. As initial qualitative research in Northern Ireland demonstrates, it is likely that legal practitioners, particularly prosecutors, will resist such changes on the basis that it undermines the principle that the best evidence is that given in open court without supportive mechanisms diluting it. However, history has shown that criminal justice practitioners, who tend to be conservative, have resisted many positive innovations and changes to working culture in the criminal justice system (Bunting et al., 2013; Smith, 2018). It is time to put the needs of older victims of crime ahead of professional conservatism and prejudice. Only through substantive reforms will older people gain improved access to justice.

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