



**Inspectorate of Prosecution in Scotland**

# **Thematic Report on the Prosecution of Young People**

November 2018

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**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

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Produced and Published by the Inspectorate of Prosecution in Scotland (IPS)

ISBN: 978-1-78781-401-1

**<http://www.gov.scot/about/public-bodies/ipis>**

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# INTRODUCTION

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The approach to youth justice in Scotland builds on the key principles and ethos of the highly influential Kilbrandon Report published in 1964.<sup>1</sup> Concerned with legal provisions and systems to treat “children in trouble”,<sup>2</sup> it concluded that there was little distinction between those who commit offences and those in need of care and protection<sup>3</sup> and advocated, for both, a welfare-based approach.

Its visionary recommendations led to the establishment of the Children’s Hearing System,<sup>4</sup> a distinct system with the responsibility of making decisions in the best interests of the child and where, for all but the most serious offences, children and young people who commit offences and those in need of care and protection are dealt with in the same forum, in the same way.

Over 50 years later research, underpinned by scientific evidence, has established a strong association between young people who have experienced some form of Adverse Childhood Experiences (ACEs)<sup>5</sup> and other adversities and those engaging in harmful or risk-taking behaviours bringing them into contact with the criminal justice system, whether as a perpetrator or as a victim. The recognition of the impact of prolonged exposure to stress and trauma in childhood resonates with the central premise of the Kilbrandon Report; that many young people who present a high risk of offending are often highly vulnerable, with complex needs.

The focus on early intervention and a welfare-centred approach to children and young people is at the heart of the current approach to Youth Justice in Scotland – Getting it Right for Every Child (GIRFEC)<sup>6</sup> – offering the right help at the right time. It is a child-centred, welfare-focused approach promoting, in a multi-agency context, early interventions to respond to the first signs of harmful behaviour.

Tackling the cause and impact of offending behaviour through addressing the wider needs of the young person and keeping young people out of the formal criminal justice system, wherever possible, is a key objective of the Scottish Government’s Youth Justice Strategy.<sup>7</sup>

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<sup>1</sup> Scottish Government, [The Kilbrandon Report, Children and Young Persons Scotland](#), April 1964.

<sup>2</sup> British Journal of Criminology: V1, Children in Trouble, p112-122, 1966. Shaw, Lord Kilbrandon.

<sup>3</sup> Paragraph 252.

<sup>4</sup> Discussed at paragraph 7.

<sup>5</sup> Scottish Government, [The 10 most commonly measured ACEs; Abuse – physical, verbal and sexual, Household Adversities – mental illness, incarcerated relative, domestic violence, parental separation, substance abuse, Neglect – physical and emotional](#), 31 July 2018.

<sup>6</sup> GIRFEC was first introduced as a concept in 2004 and following consultation, proposals known as GIRFEC were published in April 2005.

<sup>7</sup> Scottish Government, [Youth Justice Strategy: progress report](#), 21 June 2017.



There have been some notable reductions in the number of offence referrals to the Children's Reporter and of 16/17 year olds being detained in a Young Offenders Institution (YOI):

- 3,060 children were referred to the Reporter on offence grounds in 2017/18, a 78% decrease since 2007-08 but a 2.2% increase from 2016/17.<sup>8</sup>
- 2,203 young people were prosecuted in Scotland's courts in 2015/16,<sup>9</sup> a 78% reduction since 2006/07.
- 51 under 18 year olds were detained in custody in 2016/17, a 77% reduction since 2006-07.<sup>10</sup>

While the reductions are encouraging, the substantial number of young people that continue to be prosecuted and a higher imprisonment rate than most other European countries,<sup>11</sup> including a disproportionate number of looked after or formerly looked after children or young people,<sup>12</sup> remains a source of concern.

## Children and Young People

In Scotland, the definition of a child or young person differs depending on the context. In this report, aligned with the definition of a "child" as any person under 18 in recent legislative provisions<sup>13</sup> and the UN Convention on the Rights of the Child,<sup>14</sup> we have used the terms "young person" or "offender" to include all children and young people under the age of 18.

## Aim

In the Scottish Government 'Year of Young People' – "Bliadhna na h-oigridh",<sup>15</sup> it is timely to review and assess the effectiveness of Crown Office and Procurator Fiscal Service (COPFS) processes and procedures for prosecuting offenders up to the age of 18 in the Justice of the Peace and Sheriff Courts and the use of alternative actions having particular regard to:

- Compliance with the Lord Advocate's guidelines for offences alleged to have been committed by young people<sup>16</sup> and COPFS policies.
- The effectiveness of procedures, processes and systems to ensure that cases with young offenders are progressed expeditiously and in a proportionate and effective manner.
- The effective use of early intervention and diversion.
- Whether there is scope to further reduce the number of young people being prosecuted.

<sup>8</sup> Scottish Children's Reporter Administration (SCRA) [Statistical Analysis, 2017/18](#).

<sup>9</sup> Children and Young People in Custody in Scotland: [Looking Behind the Data](#), October 2017.

<sup>10</sup> Children and Young People in Custody in Scotland: [Looking Behind the Data](#), October 2017.

<sup>11</sup> Spice Briefing 'Children and the Scottish Criminal Justice System' published 14/06/16, CYCJ 'A Guide to Youth Justice in Scotland: Policy, Practice and Legislation' (2017), CYCJ 'Just a Wee Boy Not Cut Out for Prison' (Nolan, Dyer and Vaswani, 2017).

<sup>12</sup> Children in the care of the Local Authority – sometimes referred to as a "corporate parent".

<sup>13</sup> Section 108 Criminal Justice (Scotland) Act 2016.

<sup>14</sup> Article 1 of the UN Convention on the Rights of the Child, ratified by the UK Government in 1991.

<sup>15</sup> A year long programme of events providing young people with an opportunity to be heard and listened to on social issues and to showcase their talents.

<sup>16</sup> [Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurator Fiscals of offences alleged to have been committed by children](#), March 2014.



In doing so we examined:

- Liaison arrangements with Police Scotland and other relevant criminal justice and social work agencies, including the Scottish Children's Reporter Administration (SCRA);
- The use of all available alternatives to prosecution, including diversion;
- The impact of the legislative framework for different categories of young people;
- Communication with young offenders; and
- Outcomes of decisions taken by prosecutors.

## Objectives/Outcomes

We seek to identify:

- Any weaknesses in the procedures, processes and systems aimed at dealing with young people who offend and make recommendations for improvement;
- Any barriers/impediments/gaps in service provision for alternatives to prosecution, specifically the use of diversion, and make recommendations for improvement; and
- Good practice.

## Scope of Review

There is a wealth of research and expertise on the influences and drivers of youth offending, the challenges it provides and the legislative and policy approaches<sup>17</sup> that have been implemented to improve outcomes for children and young people.

The focus of this inspection is what happens to young people reported by the police and other reporting agencies to COPFS. It aims to provide evidence to inform policy, practices and procedures that may further reduce the number of young people entering the criminal justice system.

While the review is concerned with decisions taken by COPFS, in the context of prosecuting young people and use of alternative actions, other criminal justice partners including the Centre for Youth and Criminal Justice (CYJC), Community Justice Scotland (CJS), Local Authority Criminal Justice Social Work (CJSW), Police Scotland, Scottish Children's Reporter Administration (SCRA), Scottish Courts and Tribunals Service (SCTS) and the Scottish Government Youth Justice Improvement Board (YJIB) all have a role in supporting the priorities of the Youth Justice Strategy and, in particular, reducing the number of young people in the criminal justice system.

While our recommendations are directed to COPFS, our findings in some areas go beyond the remit of COPFS recognising that system-wide solutions are required to address offending by children and young people.

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<sup>17</sup> See the CYCJ: [A Guide to Youth Justice in Scotland: policy, practice and legislation – a comprehensive account of the approach to Youth Justice in Scotland](#). CYCJ provides support and guidance to practitioners and managers involved in the delivery of youth justice services.



## Methodology

We adopted a mixed-method approach which combined the following evidence gathering methods:

**Interviews** with personnel, organisations and parties involved in the prosecution of young people and the delivery of services including:

- Key personnel involved with the policy and prosecution of young offenders in COPFS;
- Audit Scotland, Children's Commissioner for Scotland, CJS, CYCJ, a legal representative for offenders, the Governor of Her Majesty's Young Offenders Institution (HMYOI) Polmont, One Glasgow,<sup>18</sup> Police Scotland, including Youth Justice Management teams, SCRA and relevant Scottish Government Directorates.
- Representatives from voluntary sector groups and service providers including Barnardo's, Criminal Justice Social Work (CJSW) and Sacro.

**Observation:** The Problem Solving Court in Aberdeen and the Structured Deferred Sentencing Court in Hamilton.

**Document Review:** A review of COPFS departmental protocols, policies and guidance, management information; current statistics and academic research/reports.

**File reviews:** We collated the actions taken and outcome of all cases where the offender was under 18 and reported to COPFS in 2016/17.<sup>19</sup> It included cases where proceedings were discontinued or charges were conjoined<sup>20</sup> into another case and excluded any offenders prosecuted in the High Court.

Using this data, we conducted five reviews.

- We examined a significant sample<sup>21</sup> of 95 reports of offenders under 18. **(Case Review)** The review considered prosecutorial actions and outcomes, the reporting of offenders in custody, provision of information on the individual and family circumstances of the offender, communication with the Reporter, timescales, compliance with COPFS policies and procedures and comparative justice for different age groups of offenders.
- We examined a significant sample<sup>22</sup> of 86 offenders who were offered the opportunity of diversion. **(Diversion review)** The review considered decision-making, compliance with COPFS policies and procedures, timescales, communication with offenders and outcomes.
- We examined a significant sample<sup>23</sup> of 72 reports involving 76 offenders where there was a decision to prosecute under solemn procedure. **(Solemn Review)** The

<sup>18</sup> A multi-agency partnership set up to coordinate and support the Whole Systems Approach (WSA) and to reduce youth offending.

<sup>19</sup> Source: COPFS Management Information Unit (MIU).

<sup>20</sup> Combining cases relating to different incidents alleged to have been committed by one accused person into a single case, enabling all the charges to be dealt with at one trial. This is commonly referred to as "conjoining" or "rolling up".

<sup>21</sup> Source: COPFS MIU – 95 subjects.

<sup>22</sup> Source: COPFS MIU – 86 subjects.

<sup>23</sup> Source: COPFS MIU – 72 subjects.



review considered decision-making, compliance with COPFS policies and procedures and outcomes.

- To assess whether the current framework for dealing with young people raised any issues of comparative justice, we examined a significant sample<sup>24</sup> of 93 cases of young offenders, including any co-accused, totalling 141 offenders, where there was a prosecution in the Justice of the Peace or Sheriff Courts. **(Comparative Review)**.
- We examined a significant sample<sup>25</sup> of 76 cases involving road traffic offences and a further 28 cases diverted to the Driver Improvement Scheme.<sup>26</sup> **(Road Traffic Review)** The review considered decision-making, compliance with COPFS policies and procedures, timescales and outcomes.
- To assess the impact of the COPFS prosecution policy review in 2017 and the introduction of dedicated prosecutors to deal with cases involving children and young people, we reviewed a significant sample of 83 offenders reported to COPFS in April 2018.<sup>27</sup> **(2018 Review)**.

## ACKNOWLEDGEMENT

We wish to extend thanks to all who facilitated our visits and shared their experience and knowledge. We found many committed and dedicated professionals and examples of excellent partnership working, including One Glasgow and the Police Scotland Youth Management Unit at Aberdeen, who through collaborative efforts seek to achieve the best outcome for victims and young offenders.

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<sup>24</sup> Source: COPFS MIU – 141 subjects.

<sup>25</sup> Source: COPFS MIU – 83 subjects.

<sup>26</sup> Source: COPFS MIU – 28 subjects.

<sup>27</sup> Source: COPFS MIU – 83 subjects.





## KEY TERMS

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**Advocates Deputes:** Advocates Deputes are prosecutors appointed by the Lord Advocate. Advocates Deputes prosecute all cases in the High Court.

**Appear on Petition/Committal for Further Examination (CFE):** First appearance of an offender at court for more serious offences.

**Bail:** The release from custody of an offender until the trial or next court hearing.

**Bail Conditions:** Conditions imposed by the court on the offender usually designed to protect victims and the public.

**Community Payback Orders:** An order of the Court imposing one or more requirements of: supervision by a social worker; unpaid work; attendance at a programme; residence; mental health, drug or alcohol treatment; or conduct.<sup>28</sup>

**Compulsory Supervision Order:** An order made by a Children's Hearing placing responsibility for looking after and helping the young person with the Local Authority. It may contain conditions specifying where they are to live and other measures.<sup>29</sup>

**Crown Counsel:** Collective term for the Law Officers (Lord Advocate and Solicitor General) and Advocates Deputes.

**Crown Counsel's Instructions (CCI):** Instruction by Crown Counsel to Prosecutors.

**Crown Office and Procurator Fiscal Service (COPFS):** The independent public prosecution service in Scotland. It is responsible for the investigation and prosecution of crime in Scotland. It is also responsible for the investigation of sudden, unexplained or suspicious deaths and the investigation of allegations of criminal conduct against police officers.

**Indictment:** Document setting out the charges the offender faces at trial in solemn proceedings.

**Jointly Reported Cases:** A criminal case reported by the police to both COPFS and SCRA

**Lord Advocate:** The Ministerial Head of COPFS. The senior of the two Law Officers, the other being the Solicitor General.

**Law Officers:** The Lord Advocate and the Solicitor General for Scotland.

**No Action decision:** A decision made by a prosecutor not to prosecute or take any action for an offence reported by the police or other reporting agency.

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<sup>28</sup> Section 227A-Section 227ZO of the 1995 Act.

<sup>29</sup> Section 83 Children's Hearings (Scotland) Act 2011.



**Open Referral:** A 16/17 year old subject to a Compulsory Supervision Order or referred to the Reporter before 16 years of age and the referral is still ongoing after their 16th birthday.

**Outstanding Cases:** Cases being investigated by the police or reported to COPFS where no decision on what action to take has been made.

**Place on Petition:** Decision by prosecutor to commence solemn criminal proceedings.

**Petition:** Formal document served on an offender in solemn proceedings. It gives notice of charges being considered by the Procurator Fiscal.

**Procurators Fiscal (PFs):** Legally qualified prosecutors who receive reports about crimes from the police and other agencies and make decisions on what action to take in the public interest and, where appropriate, prosecute cases.

**Solemn Procedure:** Prosecution of serious criminal cases before a judge and jury in the High Court or Sheriff Court.

**Summary Proceedings:** Prosecutions held in the Sheriff or Justice of the Peace Court before a judge without a jury.

**Universal Services:** Services that are provided to, or are routinely available to, all children and their families designed to meet their needs. (Also referred to as mainstream services.)

### **List of abbreviations:**

1995 Act: The Criminal Procedure (Scotland) Act 1995

2011 Act: The Children's Hearings (Scotland) Act 2011



## KEY FINDINGS

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- ❖ 16/17 year olds were twice as likely to be prosecuted as 16/17 year old offenders subject to a Compulsory Supervision Order (CSO). 53% were prosecuted in comparison to 23% of the offenders subject to a CSO.
- ❖ Of those prosecuted in the sheriff summary and Justice of the Peace courts the sentence imposed in 41% of cases could have been achieved by an alternative to prosecution.
- ❖ Compared to the police reports for the categories of offenders under 16 or 16/17 year olds subject to a CSO, there was a significantly higher percentage of reports where no information was provided on the offender's individual or family circumstances or vulnerabilities for those in the 16/17 year olds category.
- ❖ Delays in reporting or taking decisions when an offender is approaching 16 or has an intervening birthday has the potential to create a different outcome for young people who are older by a few days or weeks.
- ❖ There is a disconnect between the emerging consensus that young people aged under 18 should be treated as a child or young person in the criminal justice context and the current legal framework where, for many, 16 still represents the transition from a child to an adult.
- ❖ There was a high success rate (80%) for the 16/17 year olds diverted as an alternative to prosecution.
- ❖ Diversion only failed in three cases (3.5%) due to a lack of co-operation or further offending.
- ❖ Of the 69 offenders where diversion was completed successfully almost two thirds (43) did not re-offend.
- ❖ For those with complex needs more than one intervention may be necessary to address the causes of the offending behaviour.
- ❖ In 56% of cases, it took more than four weeks to implement the decision to divert the offender.
- ❖ Close proximity between the offence and the commencement of engagement with Criminal Justice Social Work (CJSW) is essential for diversion to be effective and relevant for the offender.
- ❖ The average time between receipt of the police report and the completion of diversion was seven months.



- ❖ Updates on progress from CJSW need to be obtained in a timely manner to ensure final decisions can be taken as swiftly as possible to minimise any adverse impact on the young person.
- ❖ Communication with offenders during the diversion process was inconsistent and often at variance with COPFS guidance.
- ❖ Letters sent to offenders were overly complex and contained legal jargon.
- ❖ Communication was not tailored to offenders' needs taking account of, any known, equality issues.



# RECOMMENDATIONS

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## **Recommendation 1**

COPFS should guard against “net-widening”<sup>30</sup> by dealing with jointly reported offenders who do not fall within the Lord Advocate’s Guidelines and those who have not yet turned 16 where the presumption is that they should be dealt with by the Reporter.

## **Recommendation 2**

COPFS should prioritise consideration of the review that offenders aged 16/17 subject to a CSO are presumed to be dealt with by the prosecutor.

## **Recommendation 3**

COPFS should liaise with Police Scotland to standardise the provision of information on any known vulnerabilities or individual and/or family circumstances that may have a bearing on the appropriate prosecutorial action. The report should specify if there are none identified or whether the offender refused to divulge such information.

## **Recommendation 4**

COPFS should ensure that there is a written record of discussion with the Reporter, in all jointly reported cases, including the factors taken into account in determining who should deal with the young person.

## **Recommendation 5**

COPFS should facilitate the maximum use of diversion (or a lesser form of alternative action) for all young people under 18 years. Where there are compelling reasons in the public interest to prosecute they should be clearly recorded by prosecutors.

## **Recommendation 6**

COPFS should improve the timeline of cases involving young people where diversion is offered.

## **Recommendation 7**

COPFS should introduce a national streamlined process for communicating with social work departments and offenders to support the effective operation of diversion.

## **Recommendation 8**

COPFS should review and simplify all correspondence issued to young people being offered diversion.

## **Recommendation 9**

COPFS should tailor communication to the individual needs and vulnerabilities of young offenders taking account of, any known, equality issues.

## **Recommendation 10**

COPFS should, on completion of diversion, confirm in writing what action, if any, is to be taken.

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<sup>30</sup> Net-widening is the name given to a process or practical change that results in a greater number of people being included in the Criminal Justice System.



### **Recommendation 11**

COPFS should clarify whether the applicable age requiring CCI, prior to any proceedings being commenced for children aged 13, 14 or 15 years, is the age of the child at the date of the offence, when the police report is submitted or when there is a decision to prosecute.

### **Recommendation 12**

COPFS should explore the possibility of expanding the scope of the Driver Improvement Scheme and/or the feasibility of introducing a new road safety programme to address low-level road traffic offences.



# CHAPTER 1 – CRIMINAL JUSTICE RESPONSE TO YOUTH OFFENDING

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“The key to reducing offending may lie in minimal intervention and maximum diversion”.<sup>31</sup>

## Background

1. In recent years, through the prism of GIRFEC and the Whole Systems Approach (WSA), there has been a drive to reduce and, where possible, prevent offending by young people, to improve outcomes not only for the individual involved but the wider community.
2. The WSA was introduced nationally in 2011 and is a key component of the Youth Justice Strategy: Preventing Offending, launched in 2015.<sup>32</sup> WSA promotes a multi-agency, multi-disciplinary approach to youth offending with an ethos that young people who offend could and should be diverted through early intervention, diversion and use of robust community alternatives to keep them out of the criminal justice system. This co-ordinated approach is known as Early and Effective Intervention (EEI).
3. EEI aims to divert young people from referral to the Reporter or COPFS and prevent future offending by providing timely and proportionate interventions, including counselling and drug/ alcohol support.
4. The police have a range of options to respond to offending. They can use direct measures including verbal, restorative justice<sup>33</sup> or written warnings; referral to partners for local interventions (EEI), Recorded Police Warnings (RPWs) and sending reports to SCRA and/or COPFS where compulsory measures may be required.
5. Recorded Police Warnings may be used for some low-level offending by 16/17 year olds. There is a **presumption against reporting** offences considered suitable for RPWs to the prosecutor. To achieve the maximum impact the warning should, wherever possible, be issued within seven days of the commission of the offence.
6. All police interventions should be accompanied by a recording of any wellbeing concerns regarding the young person<sup>34</sup> which should be shared with relevant partners.

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<sup>31</sup> McAra, L., and McVie, S., (2007), ‘Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending’. European Journal of Criminology 4 (3) 315-345.

<sup>32</sup> Discussed in the Scottish Government, [Preventing offending: getting it right for children and young people progress report](#), 17 June 2017.

<sup>33</sup> A system of criminal justice which focuses on the rehabilitation of offenders through reconciliation with victims and the community.

<sup>34</sup> Wellbeing is defined using the SHANARRI wellbeing indicators – Safe, Healthy, Achieving, Nurtured, Respected, Responsible and Included.



## The Children's Hearings System

7. Children and Young people aged eight to 16 (or if over 16, subject to a referral already under consideration, children's hearing proceedings or a Compulsory Supervision Order) can be referred to the Principal Reporter<sup>35</sup> (the Reporter) where it is considered that they are in need of protection, guidance, treatment or control through compulsory measures.
8. Where the Reporter considers that the child or young person may require to be made subject to a Compulsory Supervision Order (CSO) a children's hearing will be arranged.
9. If the grounds for referral are accepted or established at the children's hearing,<sup>36</sup> the panel members will consider making the child subject to a CSO. Where a case is not referred to a children's hearing, the Reporter may refer the child to the local authority to work with them on a voluntary basis or take no further action.
10. In taking decisions, the children's hearings must have the need to safeguard and promote the welfare of the child as their paramount consideration.<sup>37</sup>
11. Most young people involved in offending behaviour are dealt with by EEI or within the children's hearings system.

## Legal Framework

- No child **under the age of 12** can be prosecuted.<sup>38</sup> Any offending behaviour is dealt with through the application of EEI, police direct measures or the children's hearings system should compulsory measures be required.
- Children aged **between 12 and below the age of 16** can be prosecuted in accordance with the Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children (LA Guidelines).<sup>39</sup> They provide:
  - Children should only be **jointly reported** to the Procurator Fiscal and the Reporter if the offence(s) is so serious it will normally give rise to solemn proceedings or for 15 year olds and above in cases that may result in disqualification from driving;
  - Children in this age group can be prosecuted only on the instructions of the Lord Advocate or at his instance.<sup>40</sup>

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<sup>35</sup> The Chief Officer of the Scottish Children's Reporter Administration (SCRA).

<sup>36</sup> The Children's Hearing is comprised of a panel of volunteers from the local community.

<sup>37</sup> Section 25(2) of the 2011 Act.

<sup>38</sup> Section 41A of the 1995 Act.

<sup>39</sup> Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurator Fiscals of offences alleged to have been committed by children, March 2014.

<sup>40</sup> Section 42(1) of the 1995 Act: The Lord Advocate can delegate the authority on his behalf.





If not within the above criteria the police may use direct measures, EEI or submit a report to the Reporter.

- **Young People aged 16 and 17** can be **jointly reported** to the Procurator Fiscal and Reporter where:<sup>41</sup>
  - They are subject to a Compulsory Supervision Order or
  - They were referred to the Reporter before their 16th birthday, but a decision has **not yet** been made either to make them subject to a CSO, or to refer them to a children's hearing or to discharge the referral (referred to in the report as open referral).

**There are two categories of 16/17 year olds subject to a CSO or open referral:**

**1)** 16/17 year olds who commit certain low-level offences: For such offenders the police have discretion to use direct measures, EEI or send a report **only** to the Reporter.

**2)** For 16/17 year olds **jointly reported** cases:

- The offender can continue to have their offending managed within the hearing system or (following discussion with the Prosecutor and Reporter) can be dealt with in the criminal justice system.
- If prosecuted, following any conviction, the court is **required** to request the Reporter to arrange a children's hearing for the purpose of obtaining their advice as to the treatment of the child, and following that advice it may dispose of the case or remit it to the Reporter.<sup>42</sup>

- **Other 16 and 17 year olds:**

- Are dealt with through the use of RPWs, local EEI arrangements or by a report to the Procurator Fiscal.
- Following any conviction at summary level for any person aged between 16 and 17½, the court may request the Reporter to arrange a children's hearing for the purpose of obtaining their advice as to the treatment of the person.<sup>43</sup>

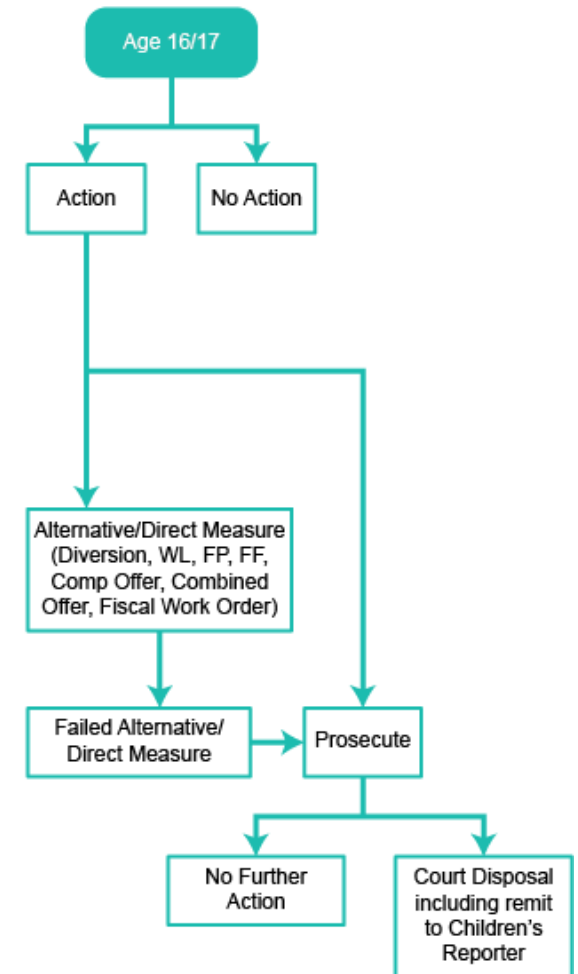
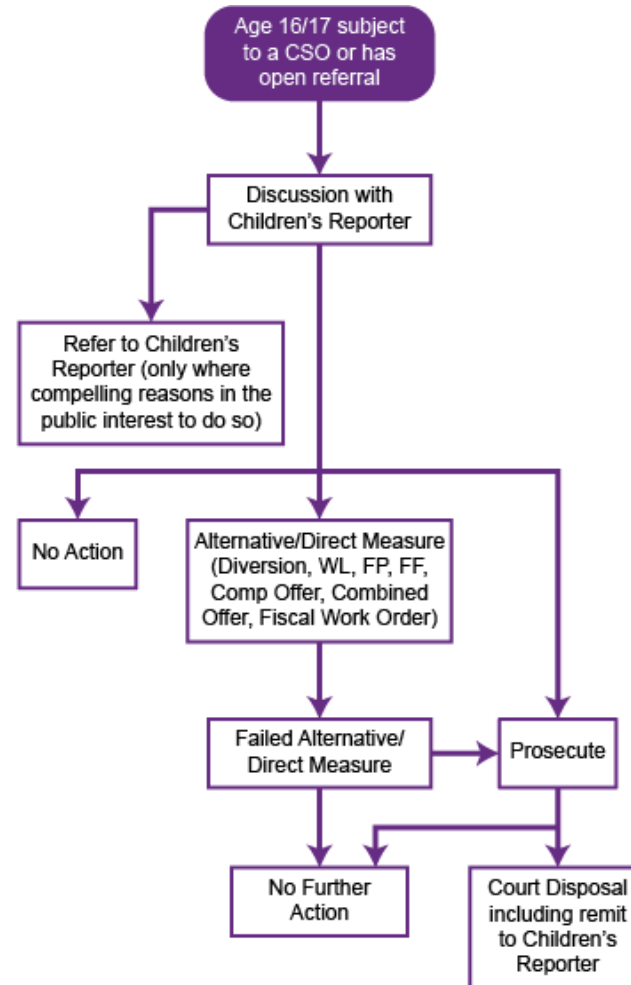
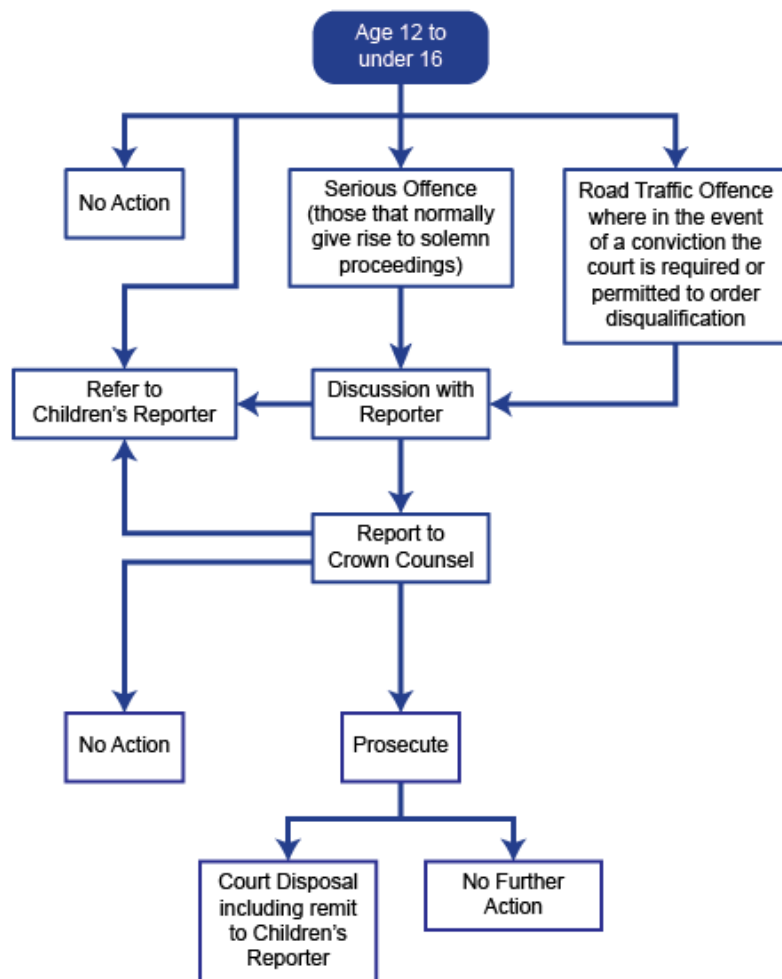
12. The current legislative framework precludes recourse to the Children's Hearing System for many 16/17 year olds who offend. Contrary to the definition of a child in the UN Convention, for many young people, 16 represents the age at which they are considered an adult within the criminal justice system.

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<sup>41</sup> In accordance with the definition of a child in Section 199 in the 2011 Act.

<sup>42</sup> Section 49(3) of the 1995 Act.

<sup>43</sup> Section 49(6) of the 1995 Act.



# Governance

## Youth Justice Strategy

13. The primary role of the Youth Justice Improvement Board (YJIB),<sup>44</sup> of which COPFS is a key member, is to support the Youth Justice Strategy. It reports to the Justice Board, comprising of Scottish Government Directors and heads of justice organisations, including the Crown Agent, Chief Executive of COPFS. The Justice Board seeks to deliver the Visions and Priorities for Justice in Scotland.<sup>45</sup>
14. The Youth Justice Strategy focuses on prevention, diversion and managing and supporting children and young people to change their behaviour.
15. Taking account of the age and capacity of the offender, their background and personal circumstances, the nature/seriousness of the offence and the impact of the offence on any victim and the wider community, the approach taken should seek to use the minimal intervention necessary to address the offending behaviour and escalate actions in a proportionate and targeted manner.<sup>46</sup>
16. Wherever possible, it aims to keep young people out of the criminal justice system.<sup>47</sup>

## Local Court and National Initial Case Processing Unit (NICP)

17. Summary business is delivered by the Local Court Function of COPFS through a geographical structure aligned with six Sheriffdoms.<sup>48</sup> Local Court also incorporates the National Initial Case Processing Unit (NICP) which has responsibility for the initial decision taken for most cases likely to be prosecuted in the summary courts. Local Court is headed by a Deputy Crown Agent<sup>49</sup> and NICP by a Senior Civil Servant.
18. Prosecutions in the Justice of the Peace or Sheriff Courts are conducted by local prosecutors.

## Standard Prosecution Report (SPR)

19. Cases are reported by the police or other reporting agencies by way of a Standard Prosecution Report. The SPR includes information on: the offence(s); the circumstances of the offence(s); an analysis of the evidence; and information on the background of the offender and, where appropriate, victims. For young people, it should provide information on their background, including whether they are subject to a CSO and any offending history.
20. An offender may be reported in custody or liberated on an undertaking<sup>50</sup> or for report.<sup>51</sup>

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<sup>44</sup> Set up by the Scottish Government to drive forward the implementation of the Strategy and includes representation from Police Scotland, the Convention of Scottish Local Authorities (COSLA), Scottish Children's Reporter Administration (SCRA) and Crown Office and Procurator Fiscal Service (COPFS), together with education, health and third sector.

<sup>45</sup> Scottish Government, *Justice in Scotland: vision and priorities*, 11 July 2017.

<sup>46</sup> Key findings from the 'Edinburgh Study of Youth Transition and Crime' (McAra and McVie 2007, 2010).

<sup>47</sup> Youth Justice Strategy.

<sup>48</sup> There are six Sheriff Court Districts comprising the various courts in their area.

<sup>49</sup> A senior member of the civil service who sits on the COPFS Executive Board.

<sup>50</sup> Release on condition to appear at court on a certain date.

<sup>51</sup> Submission of a Standard Police Report to COPFS.



## Initial Decision-Making

21. There are four possible options available to prosecutors on receipt of a SPR:
- To prosecute;
  - To instruct investigation prior to deciding the appropriate action;
  - To use an alternative to prosecution, for example, to refer to the Reporter and;
  - To take no action.

## Prosecution Policy

22. In deciding whether to prosecute a young person, the overriding consideration for prosecutors, as in all cases, is whether it is in the public interest (if there is sufficient evidence) to do so. In assessing the public interest, the prosecutor will take account of competing interests, including those of the victim, the offender and the wider community. A relevant consideration is the age, background and personal circumstances of the offender. Age may, depending on other circumstances, be a factor which influences the prosecutor in favour of action other than prosecution.

23. COPFS prosecution policy was revised in 2017. Of relevance, it emphasises:

An outcome focussed approach is to be adopted – taking the lowest competent form of prosecutorial action that can achieve the key sentencing objective and the appropriate outcome unless there is a specific instruction requiring a particular form of action.

## Public Policy Considerations

24. For public policy reasons, there are some offences where there is a presumption in favour of prosecution. They include offences of domestic abuse, wilful fire-raising, theft by housebreaking and hate crimes. In exceptional circumstances, the presumption may be rebutted and alternative action taken. A mandatory prosecution policy applies to offences of being in possession of a knife in certain locations or circumstances, including licensed premises, a railway or bus station or in a town/city centre – other than for offenders under 16 – all such offences **must** be commenced in the sheriff solemn court. Such cases can subsequently be prosecuted in the sheriff summary court if there are exceptional circumstances.

## Alternatives to Prosecution

25. There are a number of actions that should be considered before a decision is taken to prosecute a young person, with all of the consequences that flow from that decision, including the stigma and potential to impact on the person's future life chances by having a criminal record. These include:
- Referral to the Reporter – to refer a person to the Children's Hearing System.
  - Warning Letters – to issue a warning.
  - Fixed Penalty – to issue a monetary penalty for less serious road traffic/motor vehicle offences<sup>52</sup> and the imposition of penalty points.

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<sup>52</sup> Section 75 of the Road Traffic Offenders Act 1988.



- Fiscal Fines – to issue a monetary fine ranging between £50 and £300.
- Compensation Order – to issue a monetary compensation order, to the maximum value of £3,000, to victims who have suffered monetary or personal loss or alarm or distress.
- Combined Order – to issue a combination of a fiscal fine and a compensation order.
- Diversion – to refer a person to a social work criminal justice team for the purpose of receiving support, treatment or other action designed to deal with the underlying cause of the offending or, for road traffic offences, to the Driver Improvement Scheme.
- Fiscal Work Order (FWO) – to offer a period of unpaid work of between 10 and 50 hours.<sup>53</sup>

26. Taking an outcome focussed approach prosecutors should utilise the lowest competent alternative necessary to address the offending behaviour. Of these, FWOs and diversion have traditionally been regarded as higher tariff alternatives.

### **A Young Person's Journey through the Criminal Justice System**

27. A young person's journey through the criminal justice system can differ greatly. For some, there may be contact with the police resulting in use of direct measures, early interventions or Recorded Police Warnings. This may graduate to interventions through the Children's Hearing System and some may receive an alternative to prosecution such as a warning, fiscal fine or diversion. Further offending may result in prosecution and criminal convictions.
28. For others, aged 16/17, who have no history with the Children's Hearing System or have not come to the attention of the police, their offending can take them directly into the adult criminal justice system.
29. We tracked the journey of 95 young people reported to COPFS in 2016/17 and their outcomes. Our findings are reported in the next Chapter.

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<sup>53</sup> Section 303ZA(2) of the 1995 Act.



## CHAPTER 2 – YOUNG PEOPLE IN THE CRIMINAL JUSTICE SYSTEM IN 2016/17

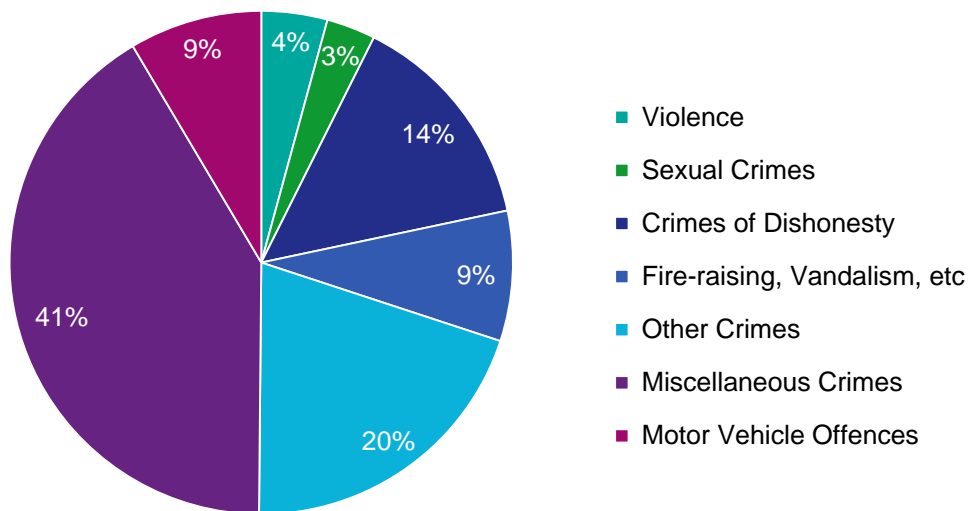
### Overview of Cases for Young People Reported to COPFS in 2016/17

30. There were 7,539 cases involving 8,043 young people (age 12 to 17 inclusive) reported to COPFS in 2016/17.<sup>54</sup>

### Nature of Offences

31. Chart 1 provides an overview of the offences reported for the 8,043 young people.<sup>55</sup>

Chart 1



\* **Miscellaneous Crimes** category includes offences of public disorder, assaults, stalking and a wide range of low-level and statutory offences.

\* The **Other Crimes** group includes drugs offences, possession of offensive weapons and crimes against public justice, including breach of court orders.

<sup>54</sup> Source: COPFS MIU: (1 April 2016 to 31 March 2017 inclusive) – includes all jointly reported cases.

<sup>55</sup> Using the Scottish Government crime and offence classification.

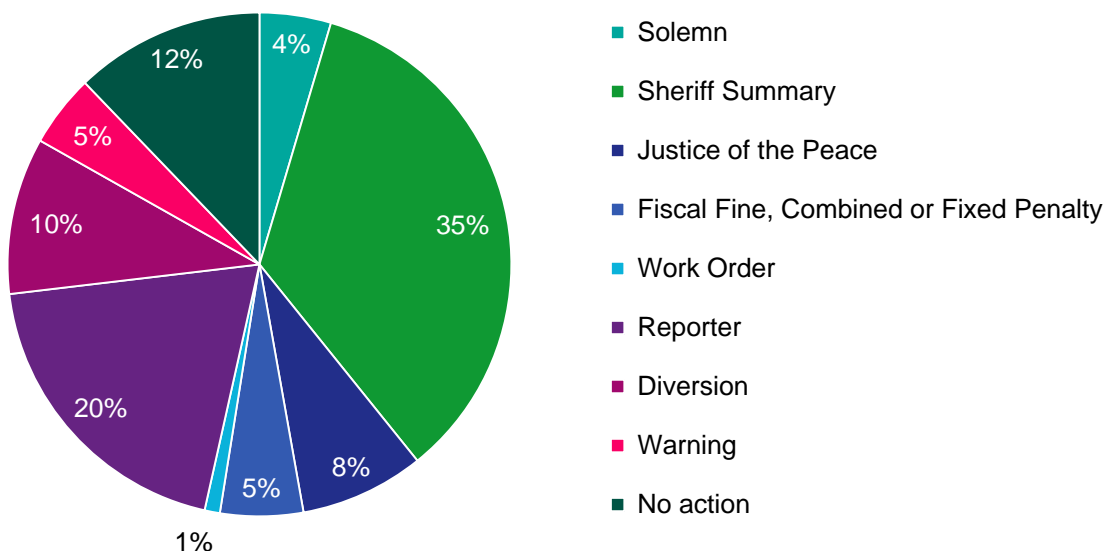


## Action Taken<sup>56</sup>

32. Chart 2 provides a breakdown of the prosecutorial action taken.<sup>57</sup>

- 47% were prosecuted: 35% in the sheriff summary court; 8% in the Justice of the Peace Court and 4% in the sheriff solemn court;<sup>58</sup>
- 20% were referred to the Reporter;
- 21% were offered an alternative to prosecution:
  - 10% were offered diversion;
  - 5% received a written warning;
  - 5% were offered a fiscal fine, a compensation order, a combination of a fiscal fine and a compensation order or a fixed penalty;
  - 1% were offered a Fiscal Work Order.
- In 12% no action was taken.

Chart 2



<sup>56</sup> Totals do not add up as no decision was recorded for 19 offenders.

<sup>57</sup> Excludes any case prosecuted in the High Court.

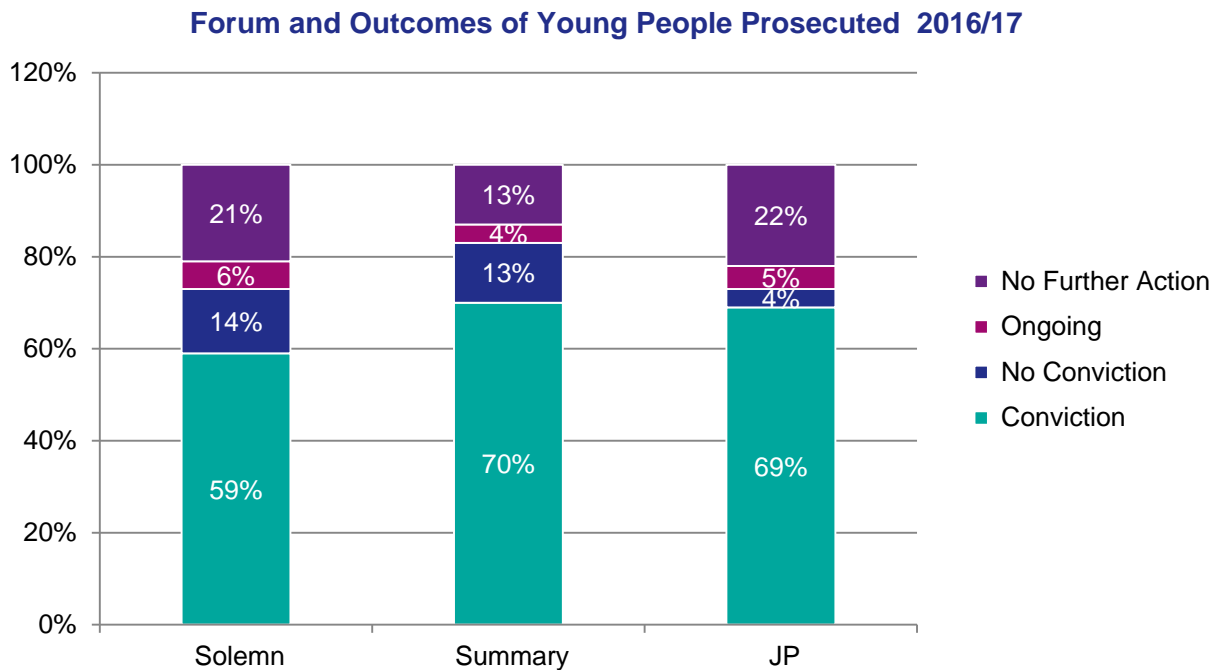
<sup>58</sup> Includes cases discontinued during the court proceedings.



## Outcomes

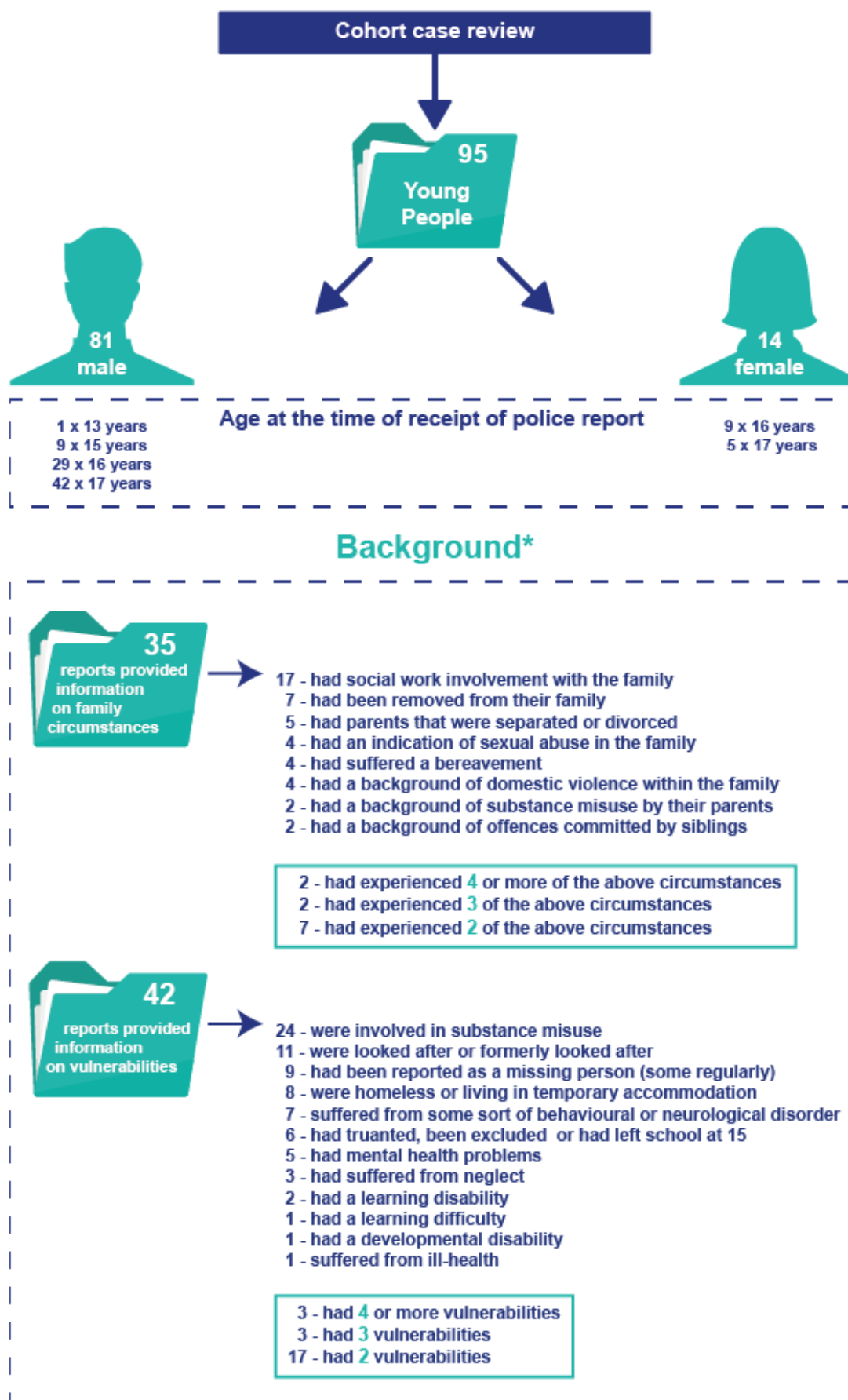
33. Chart 3 provides a breakdown of the forum and outcome for all young people prosecuted.

Chart 3



- Of those prosecuted in the sheriff solemn court, there was a finding or plea of guilty in 59%, a finding of not guilty or a not guilty plea was accepted in 14%, 21% of cases were discontinued and in 6% proceedings were still ongoing.
- Of those prosecuted in the sheriff summary court there was a finding or plea of guilty in 70%, a finding of not guilty or a not guilty plea was accepted in 13%, 13% of cases were discontinued and in 4% the proceedings were still ongoing.
- Of those prosecuted in the Justice of the Peace court there was a finding or plea of guilty in 69%, a finding of not guilty or a not guilty plea was accepted in 4%, 22% of cases were discontinued and in 5% the proceedings were still ongoing.





\* In one case the SPR provided information on family circumstances and the Reporter provided the information regarding the vulnerabilities



## CASE REVIEW

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### Cohort Review

34. We examined 95 cases of young people reported to COPFS in 2016/17. There were three categories of offenders: under 16 years, 16/17 year olds subject to a CSO or open referral (referred to in the report as 16/17 year olds subject to a CSO) and all other 16/17 year olds. We examined the action taken by the prosecutor, the nature of the offences and the outcomes for each category.

### Under 16

35. There is a **presumption** that jointly reported cases for young people under 16 are dealt with by the Reporter.<sup>59</sup> Criminal proceedings should only be taken where there are compelling reasons in the public interest to do so and only on the instructions of the Lord Advocate or Crown Counsel.<sup>60</sup>
36. There were 10 offenders under the age of 16. Nine were jointly reported. One was initially reported by the police, in error, only to the prosecutor resulting in the offender being prosecuted.<sup>61</sup> A plea of not guilty was ultimately accepted.



<sup>59</sup> Joint agreement between COPFS and SCRA: [Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter](#), Revised: November 2015.

<sup>60</sup> For certain road traffic offences, the Lord Advocate has delegated authority to make such decisions to Procurators Fiscal.

<sup>61</sup> See case study at page 41.



## Outcomes

### Prosecution

37. Two were prosecuted; one in the sheriff solemn court and one in the sheriff summary court.
- For the offender prosecuted by solemn procedure the gravity of the offences, assaults with weapons resulting in severe injury, overruled the presumption for those under 16 to be referred to the Reporter. Contrary to COPFS policy, however, an instruction from Crown Counsel (CCI) was not obtained prior to submitting a request for a petition warrant for the 15 year old offender.<sup>62</sup> The offender pled guilty and received a CPO with a requirement to complete 250 hours of unpaid work.
  - In the case prosecuted in the sheriff summary court for an offence of attempting to break into a garden shed, a plea of not guilty was accepted. This case is discussed in the section on comparative justice below.<sup>63</sup>

### Diversion

38. One was diverted.
- This concerned an assault with a baseball bat. After being advised that the Reporter would not accept a referral, as the offender was approaching his 16th birthday, the prosecutor successfully diverted the offender, achieving a comparable outcome.

### Reporter

39. Five were referred to the Reporter:
- Five cases, involving offences of breach of the peace, culpable and reckless conduct, an assault of a police officer, possession of a knife and road traffic offences, were all referred to the Reporter in line with the presumption that those under 16 years old should be dealt with by the Reporter.

### No Action

40. No action was taken in two cases:
- In one, relating to an offence of vandalism, there was insufficient evidence.
  - In the other, concerning an offence of sexual assault,<sup>64</sup> the offender had returned to his home abroad which meant it was no longer possible to take action.

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<sup>62</sup> Discussed at paragraph 206.

<sup>63</sup> See case study at page 41.

<sup>64</sup> Section 3 of the Sexual Offences (Scotland) Act 2009.



## Compliance with Lord Advocate's Guidelines

41. To avoid the inclusion of young people, who should be dealt with in the Children's Hearings System entering the criminal justice system, it is important that only cases that fall within the Lord Advocate's Guidelines are jointly reported.
42. Of the **10** cases of offenders under the age of 16 we found:
  - **Five** cases clearly fell within the Guidelines:
    - **Four** concerned serious offences that will normally give rise to solemn proceedings.
    - **One** involved dangerous driving along with other offences for which the offender would potentially be liable to disqualification.
  - **Five** cases did not involve offences that would normally give rise to solemn proceedings or for which the offender would be liable to disqualification and consequently should not have been reported to the prosecutor. They included:
    - An assault of a police officer by a 13 year old with no serious injury.
    - Two relatively low-level offences of a breach of the peace and vandalism.
    - The attempted housebreaking of a garden shed by a 15 year old which was sent to the prosecutor in error.
    - An assault where there was no serious injury and the offender had no criminal history.
43. Jointly reporting cases that do not fall within the Lord Advocate's Guidelines increases the risk of young offenders being prosecuted rather than being dealt with by the Reporter. In two cases, in this category, where the 15 year olds were approaching their 16<sup>th</sup> birthday, the Reporter declined to accept a referral for one and had to be persuaded by the prosecutor to accept the other.

### Recommendation 1

COPFS should guard against "net-widening" by dealing with jointly reported offenders who do not fall within the Lord Advocate's Guidelines and those who have not yet turned 16 where the presumption is that they should be dealt with by the Reporter.



## Offenders over 16 years subject to a Compulsory Supervision Order (CSO)

44. There is a **presumption** that offenders aged 16 or 17 who are subject to a CSO are dealt with by the prosecutor and only referred to the Reporter where there are compelling reasons in the public interest to do so.<sup>65</sup>
45. The presumption is currently under review by COPFS.
46. There were 13 offenders over the age of 16 subject to a CSO. Eleven were jointly reported and two were reported, in error, only to the prosecutor – in the latter two cases the prosecutor took account of the Reporter's views prior to making a decision on the best course of action.



## Outcomes

### Prosecution

47. **Three** were prosecuted in the sheriff summary court:
  - All three were **persistent offenders** with criminal convictions, outstanding cases and were reported for breach of curfew conditions:<sup>66</sup>
    - In one, following a period of deferral for the offender to demonstrate he would not further offend, he was admonished.
    - In one a not guilty plea was accepted after enquiries provided a complete defence to the charges.
    - In the remaining case a plea of not guilty was accepted after the offender pled guilty to more serious offences.

<sup>65</sup> Joint agreement between COPFS and SCRA: [Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter](#), Revised: November 2015.

<sup>66</sup> The bail order provides conditions that the offender remain within an address between certain hours, usually 7pm at night until 7am and that they will present themselves to the police, if they attend, to check they are complying.



## Reporter

48. **Eight** were referred to the Reporter overriding the presumption in favour of the prosecutor dealing with offenders aged 16 or over subject to a CSO.
49. All involved low-level offences. For one offender, in accordance with good practice, the prosecutor collated and referred all outstanding cases to the Reporter.

## No Action

50. No action was taken in **two** cases:
  - In one the prosecutor decided to take no action due to the delay by the police submitting the report – over six months had elapsed since the offence.
  - In the other the offender was remanded in custody for more serious offences and it was decided that further action would be disproportionate.
51. Of the 11 cases where action was taken, the presumption that the prosecutor should retain 16/17 year olds subject to a CSO was applied in the three cases involving persistent offenders who had acquired criminal convictions and were subject to bail conditions. It was, however, overridden in eight cases (73%).
52. For cases of low-level offending, where there is ongoing engagement with the Reporter, continuing to deal with young people, often with complex needs and vulnerabilities, within the welfare orientated Children's Hearing System is preferable to the alternative of entering the adult criminal justice system. The eight cases demonstrate that this approach is being taken in practice
53. We welcome the on-going review by COPFS on the continuing applicability of the presumption for offenders in this category to be dealt with by the prosecutor.

### Recommendation 2

COPFS should prioritise consideration of the review that offenders aged 16/17 subject to a CSO are presumed to be dealt with by the prosecutor.



## 16/17 year olds

54. 16 or 17 year olds with no prior/ongoing contact with the Reporter are effectively dealt with as adults.
55. 72 offenders fell into this category.



## Outcomes

### Prosecution

56. **38** (53%) of the 16/17 year olds were prosecuted.
- 6 (16%) were prosecuted in the sheriff solemn court.
  - 26 (68%) were prosecuted in the sheriff summary court.
  - 6 (16%) were prosecuted in the Justice of the Peace Court.

### Solemn Cases

57. For the **six** prosecuted by solemn procedure:
- Three involved serious assault/robbery offences: two pled guilty, one received a sentence of detention and the other was given a CPO; in one a plea of not guilty was accepted following a plea of guilty by a co-accused.
  - One involved possession of a knife: the offender pled guilty and sentence has been deferred for the offender to demonstrate he will not further offend.<sup>67</sup>
  - In one, the original offence of being concerned in the supply of class A drugs was subsequently amended to an offence of being in possession of the drugs which was prosecuted in the sheriff summary court. The offender pled guilty and was fined £675.
  - Due to insufficient evidence, proceedings concerning an offence of introducing a proscribed article into prison were discontinued.

<sup>67</sup> As at 20/09/2018.



## Sheriff Summary Cases

58. For the **26** prosecuted in the sheriff summary court:
59. **18** pled guilty with the following sentences being imposed:
- Eight were given a CPO – three concerned offences of assault and five involved offences of breach of bail, supply of class B drugs, theft, wilful fire-raising and police assault;
  - Three were admonished for offences of theft, police assault and assault;
  - One was made subject of a restriction of liberty order (RLO)<sup>68</sup> for an offence of supplying class A drugs;
  - One was disqualified from driving for an offence of driving whilst disqualified;
  - One was fined for possession of class A drugs;
  - In one a compensation order was imposed for an offence of vandalism;
  - One was remitted to the Reporter for an offence of theft by housebreaking;
  - One was given an absolute discharge for possession of an offensive weapon; and;
  - In one, for an offence of being concerned in the supply of class B drugs, sentence has been deferred for the offender to demonstrate he will not further offend.
60. **Five** were discontinued: four due to insufficient evidence and one because the offender was not fit to stand trial;
61. In **one** there was a finding of not proven;<sup>69</sup>
62. In **one** a not guilty plea was accepted; and
63. **One** case is ongoing.<sup>70</sup>

## Justice of the Peace Cases

64. For the **six** prosecuted in the Justice of the Peace court:
- **Four** pled guilty and were admonished for offences of theft, assault, housebreaking with intent and being within the garden area of residential premises with intent to steal; and
  - **Two** pled guilty and were fined – one for an offence of vandalism and the other for road traffic offences.

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<sup>68</sup> A court order imposed as an alternative to imprisonment or detention requiring an offender to be in a certain place (or alternatively not in such a place) for specific periods of the day or week monitored by electronic equipment: Section 245A to Section 245J of the 1995 Act.

<sup>69</sup> A verdict of acquittal.

<sup>70</sup> As at 20/09/2018.





## Diversion

65. 18 (25%) of the 72 offenders were diverted (two were diverted to the driver improvement scheme). All 18 had no criminal convictions.
66. 12 of the 18 diverted were recorded as successful. Of the six where diversion failed: one was due to process or system issues<sup>71</sup> and three offenders were assessed as unsuitable. Only two failed due to the attitude of the offender; one denied responsibility for the offending behaviour and one failed to co-operate. A separate in-depth review of cases where the prosecutor used diversion as an alternative to prosecution is discussed in Chapter 3.

## Direct Measures

67. **Eight** were given a direct measure – all for low-level offences.
- **Six** were given a fiscal fine;
  - **One** was given a compensation order; and
  - **One** was given a warning letter.

## Reporter

68. **Two** were referred to the Reporter as they were already engaging with social work services.<sup>72</sup>

## No Action

69. **Six** were marked no action:
- In **three** there was insufficient evidence;
  - In **two** the prosecutor decided to take no action due to the delay by the police submitting the report; and
  - In the **remaining** case, where there was a counter-allegation of serious assault, proceedings were discontinued as the offender was required as a witness for the more serious assault case.

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<sup>71</sup> A breakdown in communication between CJSW and COPFS resulting in substantial delays.

<sup>72</sup> There was no record of the offenders being subject to a CSO.



## Analysis of Outcomes

### Fiscal Work Orders

70. Of note, no Fiscal Work Orders (FWO) were issued. A FWO is an alternative to prosecution which allows the prosecutor to offer an offender the opportunity of completing between 10 to 50 hours of unpaid work in the community.<sup>73</sup> Of all cases reported in 2016/17, only 79 (1%) FWOs were issued in cases involving young people.<sup>74</sup> As a disposal designed to make reparation for offending behaviour with the aim of encouraging social responsibility, it is disappointing that more use is not being made of FWOs as an alternative to prosecution.

### Remitted to the Reporter

71. Following the advice of the Reporter, in only one of the 32 cases prosecuted in the sheriff summary and Justice of the Peace courts did the court remit the offender to the Reporter. There were **no** cases where the Sheriff or Justice of the Peace requested the Reporter to arrange a hearing for the purpose of obtaining advice on the treatment of the offender. Given that 20 offenders had no criminal convictions, it may have been anticipated that the court would have sought the advice of the Reporter in more cases.

### Disposals

72. Of the 32 cases prosecuted in the sheriff summary and Justice of the Peace courts, looking through the lens of an outcome focused approach and having regard to the sentence imposed, there were 13 (41%) disposals that could have been achieved through the use of alternatives to prosecution. Seven were admonished; three were fined; for one a compensation order was imposed; and for one sentence has been deferred to allow the offender to demonstrate they will not further offend. The remaining case was remitted to the Children's Hearing System by the court. A similar outcome may have been achieved through diverting the offender rather than prosecution.

#### Key Findings

- 16/17 year olds were twice as likely to be prosecuted as 16/17 year old offenders subject to a Compulsory Supervision Order (CSO). 53% were prosecuted in comparison to 23% of the offenders subject to a CSO.
- Of those prosecuted in the sheriff summary and Justice of the Peace courts the sentence imposed in 41% of cases could have been achieved by an alternative to prosecution.

<sup>73</sup> Section 303ZA(2) of the 1995 Act.

<sup>74</sup> See Chart 2, page 22.



## Thematic Analysis

73. We examined all cases to assess: why some offenders were reported in custody, the approach of the prosecutor to opposition of bail and the decision of the court; whether the police report disclosed relevant information on the individual and family circumstances of the offender; communication with the Reporter; the timeliness of decision-making; and whether there were any comparative justice issues between the three categories of young people.

### Reporting of Young People in Custody

“Any form of deprivation of liberty of children should be a measure of last resort.”<sup>75</sup>

74. 17 (18%) of the 95 cases were reported with the offender in custody. All were 16/17 year olds not subject to a CSO.
75. Of the **17** cases, reasons for reporting the offender in custody were provided in **15** police reports:
- Eight were assessed as being likely to re-offend, with 3 of the 8 likely to cause public disorder and one posing a risk to public safety;
  - For six, it was to prevent the offender contacting witnesses and to seek special conditions of bail; and
  - One was assessed as being likely to cause public disorder.
76. For the remaining **two** no reasons were provided although both were for relatively serious offences of being concerned in the supply of drugs.
77. Five cases had a bail aggravation and/or a bail contravention charge in addition to the main charge.

### Opposition to Bail

78. The risk of re-offending which could **cause harm** to others is the critical assessment to be undertaken by the prosecutor when considering whether or not to oppose bail or seek special conditions, including curfew conditions. In assessing the risk prosecutors have regard to: public/personal safety of victims and witnesses; public protection – offences that might impact on the public and communities, including economic crimes; and propensity to re-offend and breach court orders.
79. The court, in determining a question of bail, will consider the extent to which the public interest could, if bail was granted, be safeguarded by the imposition of bail conditions.<sup>76</sup>

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<sup>75</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice.

<sup>76</sup> Section 23B(2) of the 1995 Act.



80. Of the 17 cases reported in custody where there was a decision to prosecute in the sheriff summary or Justice of the Peace courts (11 cases), the prosecutor only opposed bail in two cases (18%). In both, the police had reported there was a likelihood of re-offending; the offenders had criminal convictions for similar offences and were on bail when the offence was committed. The court granted bail in both cases, one subject to curfew conditions.
81. Of the four cases where the offender was reported in custody and placed on petition the prosecutor opposed bail in one case where the police had reported that the offender posed a risk to public safety. The court remanded the offender.
82. In the remaining two cases, the prosecutor diverted one and took no action in the other.
83. In the **comparative justice** case review of 93 cases, where all offenders were prosecuted, 35 (38%) offenders were reported in custody. All were 16/17 year olds. The prosecutor opposed bail in 11 (31%) of cases. Of the **11**:
- **Four** pled guilty;
  - **Two** were remanded by the court; and
  - **Five** were liberated: two with conditions to protect the victim; two subject to a curfew and one on standard bail conditions.
84. In four of the five cases where the offender was liberated by the court, the prosecutor opposed bail due to previous offending and/or the offender being subject to bail orders. In one, the basis of opposition was the nature of the offence and the likelihood of re-offending.
85. Overall, the grounds for opposing bail by prosecutors were in accordance with COPFS policy and the relevant considerations provided by statute.<sup>77</sup>
86. The lack of opposition to bail by prosecutors in almost 70% of cases where the offender was reported in custody and the low proportion of offenders being remanded in custody by courts indicates that there is scope for more cases being reported by an undertaking where the police can attach conditions to protect victims and witnesses.
87. The Lord Advocate's Guidelines on liberation have recently been revised to emphasise the presumption of the right to liberty in accordance with Article 5 of the European Convention on Human Rights<sup>78</sup> and to curtail liberty only where there are substantial risks that cannot be mitigated through the use of conditions attached to undertakings.
88. The introduction of investigative liberation,<sup>79</sup> which allows the police to release a person arrested, but not charged, and impose conditions, similar to bail conditions, for a maximum period of 28 days, while they complete their investigation provides the

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<sup>77</sup> Sections 23B-23C of the 1995 Act.

<sup>78</sup> Provides that everyone has the right to liberty and security of person and no one shall be deprived of his liberty save in specified circumstances and in accordance with procedures prescribed by law.

<sup>79</sup> Criminal Justice (Scotland) Act 2016, Sections 16-19.



police with scope to release more young offenders, particularly for more serious offences, while managing the risk.

89. The implementation of the revised Guidelines emphasising the presumption of the right to liberty and the use of investigative liberation should further reduce the number of young people reported from custody.

## Provision of Information

“On purely practical grounds it would seem essential to provide for preventive measures at the earliest possible stage. Such measures cannot ... operate with any reasonable expectation of success unless under a procedure which from the outset seeks to establish the individual child's needs in the light of the fullest information about his personal and family circumstances.”<sup>80</sup>

90. Information on the individual and family circumstances and/or vulnerabilities of the ten offenders aged under **16 years** was provided in five (50%) police reports, and in one information on the offender's family circumstances was provided by the Reporter. Five (50%) of the offenders had an open referral with the Children's Hearing System or were subject to a CSO and/or had social work involvement with the family.
91. For the **13** offenders aged **16/17 years subject to a CSO** information on the individual and family circumstances and/or vulnerabilities was provided in 12 (92%) reports. Five (38%) of the offenders were looked after or formerly looked after young people.
92. For the largest group of offenders – **the 72 aged 16/17 not subject to a CSO** – information on the individual and family circumstances and/or vulnerabilities of the offenders was provided in only 24 (33%) reports. Nine of the 24 (38%) offenders were looked after or formerly looked after young people and/or had social work involvement with their family. No information on the individual circumstances of the offender was provided in 48 (67%) police reports. In the main this category of offenders was reported in the same manner as adults.
93. The disproportionate number of offenders who were looked after or formerly looked after or have been involved with the Children's Hearing System correlates with the third (33%) of those detained in HMYOI Polmont who have experienced being looked after as a child<sup>81</sup> or have indicated that their family had involvement with the Children's Hearing System.<sup>82</sup>

### Key Finding

Compared to the police reports for the categories of offenders under 16 or 16/17 year olds subject to a CSO, there was a significantly higher percentage of reports where no information was provided on the offender's individual or family circumstances or vulnerabilities for those in the 16/17 year olds category.

<sup>80</sup> Kilbrandon report, page 80, key finding 16.

<sup>81</sup> Children and Young People in Custody in Scotland: Looking Behind the Data: (Broderick and Carnie).

<sup>82</sup> Children and Young People in Custody in Scotland: Looking Behind the Data: (Cesaroni).



94. We are aware of the intention of CJS and CYCJ to deliver training to police officers to raise awareness of the impact of trauma on young people, with a view to the police providing more information on any known vulnerabilities or individual or family circumstances, that may assist prosecutors to make more informed decisions as demonstrated by the following case study.

A 17 year old was reported for a breach of the peace and assaulting a police officer.

The police report advised that the offender was currently homeless, making poor choices of associates and regularly consuming alcohol leading to his life spiralling downwards. It recommended a social work intervention may avoid further offending.

The prosecutor diverted the case. A programme of work was undertaken incorporating elements of:

- Offending behaviour
- Peer relationships
- Safe/Positive decision making
- Alcohol misuse
- Anger management

The intervention had a positive outcome with the offender distancing himself from the disruptive peer group, securing full time employment and planning to return to college.

### **Recommendation 3**

COPFS should liaise with Police Scotland to standardise the provision of information on any known vulnerabilities or individual and/or family circumstances that may have a bearing on the appropriate prosecutorial action. The report should specify if there are none identified or whether the offender refused to divulge such information.

## **Communication with the Reporter**

95. On receipt of a joint report, in most cases, the Reporter sends the prosecutor a template form containing information on the young person, including whether they are currently subject to a CSO and their view on whether the needs and behaviour of the young person can be best addressed within the Children's Hearing System or in the criminal justice system. It indicates if a telephone discussion would be beneficial. In custody cases, due to time constraints, the discussion tends to take place by telephone.
96. Of the 20 cases jointly reported for those aged under 16 or subject to a CSO, there was a record of a discussion between the prosecutor and the Reporter in 16 (80%) cases. In 4 (20%), there was no record of any discussion. In 13 (65%) cases, the Reporter submitted the template form outlining their views, providing a clear audit trail of the contact between the Reporter and the prosecutor.



97. In only 7 (35%) was information on the individual or family circumstances of the offender provided on the template form from the Reporter. Three concerned offenders under 16 and four were subject to a CSO. Given the likely knowledge of the Reporter of the background of the offender, it is disappointing that more information of this nature is not routinely provided. It may be that such information is exchanged through discussion by telephone. If so, good practice dictates a written record of such discussions should be retained.
98. In late 2017, NICP refined existing arrangements to enable a dedicated prosecutor to deal with the majority of jointly reported cases.<sup>83</sup> In the **2018 review**, we found a notable improvement in the extent of communication and exchange of information between COPFS and the Reporter, including feedback from the prosecutor providing reasons for decisions. A dedicated prosecutor has the benefit of providing a single point of contact for Reporters.
99. In March 2018, a specialist prosecutor was assigned to specifically consider cases involving 16/17 year olds. This has also provided more consistency and a point of contact for CJSW and Youth Justice teams to discuss cases.

#### Recommendation 4

COPFS should ensure that there is a written record of discussion with the Reporter, in all jointly reported cases, including the factors taken into account in determining who should deal with the young person.

### Timeliness of Decision-making

“In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child.”<sup>84</sup>

100. COPFS has an agreement with SCRA to make an initial decision, following discussion with the Reporter, within 10 working days, for jointly reported cases. Recognising the importance of prioritising such cases, there is an escalation process to bring any case not resolved within 45 working days to the attention of senior management in COPFS.
101. There is also a target to take and implement decisions in at least 75% of all cases within four weeks of the date on which the report is received.
102. Exposure to the criminal justice system is traumatic for adults but even more so for young people who have a different perception of time. In accordance with the Council of Europe Guidelines on Child-friendly Justice, any formal proceedings should be commenced as speedily as possible.
103. There were 37 (39%) cases where the time taken to make an initial decision took longer than the four week target. On average it took seven weeks.

<sup>83</sup> Some custody reports and undertakings are dealt with in local procurator fiscal offices. More serious cases are dealt with by specialist prosecutors or in local procurator fiscal offices.

<sup>84</sup> Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice.





104. We examined the timeline of decisions taken in the **2018 review**. We found timelines had significantly improved with decisions being taken on average 3.2 weeks after receipt of the police report. There were, however, 27 cases (33%) where decisions still took more than four weeks.
105. For the 43 offenders prosecuted in the case review, the average time from receipt of the police report to the conclusion of the court proceedings was 7.6 months.
106. While there has been a significant improvement on the time taken to make prosecutorial decisions, there is scope for further improvement.

## Comparative Justice

107. In addition to this review we examined cases across the 2018, comparative justice, and solemn reviews to identify the impact, if any, of the current legislative landscape and, in particular, the arbitrary cut-off age of 16, for many young people, where the Reporter can deal with offenders.

## Delays in Reporting Cases

108. To avoid inclusion of young people, who should be dealt with in the Children's Hearing System entering the criminal justice system, it is important that delays in submitting reports and taking decisions are minimised.

## Offenders aged 15 at Date of Offence and 16 on Receipt of the Police Report

109. **Seven** of the 95 cases in the case review fell into this category.
110. In **five** delays in submitting the police report was a factor:
- In **two**, involving offences of possession of cannabis and coercing a person to view sexual images<sup>85</sup> a period of four months elapsed between the offence and the police report being submitted. The offenders had their 16th birthday two and three months into that period. The prosecutor diverted both offenders with successful outcomes.
  - In **one**, involving an offence of breach of the peace, a period of almost six months elapsed between the offence and the police report being submitted. The offender had their 16th birthday three months into that period. The prosecutor issued a written warning.
  - In **two**, involving offences of theft and vandalism, periods of over seven and 11 months elapsed between the offence and the police report being submitted. The offenders had their 16th birthday four months into that period. Given the delay in receiving the report the prosecutor decided it was no longer in the public interest to take any action.

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<sup>85</sup> Section 6 of the Sexual Offences (Scotland) Act 2009.





111. In **two** the offenders had their 16th birthday a matter of days after the offence was committed.

- **One** involving an offence of vandalism was referred to the Reporter as, although the offender was 16 and not subject to a CSO, they were receiving assistance from social work services on a voluntary basis.
- **One** involving an offence of assault was diverted with a successful outcome.

112. The decision to divert three of the offenders achieved a comparable outcome to being referred to the Reporter.

113. While none of the offenders in our review were adversely prejudiced by delays in reporting there is a risk that such delays may result in offenders, who should have been referred to the Reporter, being prosecuted.

### Key Finding

Delays in reporting or taking decisions when an offender is approaching 16 or has an intervening birthday has the potential to create a different outcome for young people who are older by a few days or weeks.

114. The following case studies demonstrate the potential for different outcomes for offenders depending on how swiftly their cases are progressed and where they fall within the legal framework.



A police report was submitted for three offenders, two aged 15 and one aged 16 with offences of being in a garden area of residential premises without lawful authority so it could reasonably be inferred that they intended to commit theft. Offenders 2 and 3 were also charged with attempting to break into a shed at another address. None had any criminal convictions.

- Offender 1, one of the 15 year olds, was referred to the Reporter.
- Offender 2, the 16 year old, who was not subject to a CSO and had no contact with the Reporter at the time the report was sent to the prosecutor, was prosecuted in the sheriff summary court.
- The police initially sent the report for offender 3, aged 15, to the prosecutor in error. By the time it was referred to the Reporter the offender had turned 16 and, as he was not subject to a CSO and had no open referral, the Reporter had no jurisdiction resulting in the offender being dealt with in the criminal justice system.

A decision was taken to prosecute offender 3 with the 16 year old. At court, offender 2 pled guilty and a plea of not guilty was accepted from offender 3. As a result, neither of the offenders who were 15 when the report was sent to the prosecutor has a criminal conviction.

The delay in reporting the case to the Reporter and the eight month age difference between offenders 1 and 3 did, however, result in them being dealt with in different systems with the possibility of offender 3 obtaining a criminal record.

From a comparative justice perspective offender 3 was disadvantaged in relation to the 15 year old co-offender.



Three offenders were jointly reported for a number of offences including assaults on a number of 13 year old victims.

**Offender 1** was 15 years old when the offences were committed but 16 when the report was submitted. He was well known to the police for anti-social behaviour but had no criminal convictions or outstanding cases. His initial behaviour in committing a breach of the peace and assaulting an unknown male was the catalyst for the assaults on the children committed with his co-offenders.

**Offender 2** was 2 months older than offender 1 and had just turned 16 at the time of the offences. He was also known to the police for anti-social behaviour and had previously received a warning for an assault.

**Offender 3** was 15 at the time the offences were committed and at the time of report. He was also known for anti-social behaviour, had outstanding cases and had received police warnings including one for an offence of assault.

Following discussion between the prosecutor and the Reporter, offenders 1 and 3 were referred to the Reporter. As offender 1 was 16 years old, it is assumed that he had ongoing contact with the Reporter.

Offender 2 was prosecuted in the sheriff summary court. He pled guilty to two assault charges and the court remitted him to the Children's Hearing System.

From a comparative justice perspective offender 1, as the main instigator of the offences, was dealt with by the Reporter in contrast to offender 2 who was prosecuted in the criminal justice system and while remitted to the Children's Hearing System, he now has a criminal conviction.



## 16/17 year olds

115. The distinction between those aged 16/17 who are subject to a CSO and those aged 16 or 17 with no prior/ongoing contact with the Reporter within the current legal framework and the presumptions that apply result in different pathways for some young people, as demonstrated by the following case studies:

Two young people were reported for charges of theft by shoplifting and vandalism. One offender was 15 at the time of the offence but had turned 16 by the time the police report was submitted over three months later. He had no criminal convictions but had two outstanding cases. He was not subject to a CSO.

The other offender was 17 at the time of offence and when the case was reported. He had five criminal convictions, 14 outstanding cases and was subject to two bail orders and a CSO.

The 17 year old was referred to the Reporter. The younger offender with no criminal convictions was dealt with by the prosecutor, as the Reporter had no jurisdiction.

Ultimately, it was decided that there was insufficient evidence for the 16 year old and no action was taken. If there had been sufficient evidence, however, the 16 year old, if convicted, would have acquired a criminal record in contrast to the older offender, with a criminal history, who was dealt with in the Children's Hearing System.

Two offenders aged 17 were jointly reported for an offence of theft.

Offender 1 had previous involvement with the Children's Hearing System but was no longer subject to a CSO. Offender 2 was subject to a CSO.

Both were described in the police report as regularly being reported as missing persons and being involved in offending and anti-social behaviour.

Offender 1 was prosecuted in the sheriff summary court and pled guilty. Following a period to allow him to demonstrate that he would not further offend, he was admonished. He now has a criminal conviction.

Offender 2 was referred to the Reporter and did not obtain a criminal record.



116. The consequences of public policy considerations and the cut-off age for the Reporter to deal with offenders are demonstrated by the following case studies.

A young person, who turned 16, 22 days prior to the offence, was arrested for having a knife at a railway station. He was held in custody over the weekend and appeared on petition at Glasgow Sheriff Court. He had no previous involvement with the police or the criminal justice system. He pled guilty and was sentenced to a CPO for 12 months with a requirement to undertake 100 hours of unpaid work.

If the offence had occurred 23 days earlier, it is highly likely, in absence of any criminal record that he would have been referred to the Reporter and would not have acquired a criminal conviction.

117. In contrast:

A young person aged 15, who was engaging with social work, was jointly reported for an offence of having possession of a knife at a railway station. The police report was submitted only one month before his 16th birthday. One week before his birthday the prosecutor contacted the Reporter to discuss who was best placed to deal with the offender. After discussion the Reporter agreed to continue to work with the young person.

118. The case studies illustrate the potential of different outcomes for young people aged 16/17 who are unable to access the support and assistance available to those who are subject to a CSO.

### Key Finding

There is a disconnect between the emerging consensus that young people aged under 18 should be treated as a child or young person in the criminal justice context and the current legal framework where, for many, 16 still represents the transition from a child to an adult.

119. In March 2017 the independently chaired Child Protection Systems Review submitted their report entitled 'Protecting Scotland's Children and Young People: It is Still Everyone's Job', to the Scottish Government.<sup>86</sup> The report stated that:
120. *"We still see too many 16 and 17 year olds (where there are offence concerns) being dealt with through the court system rather than the CHS. The experiences and outcomes for these young people would be better if they were treated as children first and foremost, whether the presenting issues are care and protection or offending, and they received the required support and services via a child-centred system."*

<sup>86</sup> Scottish Government, [Protecting Scotland's children and young people: it is still everyone's job](#), 2 March 2017.



121. It made the following recommendation:
122. *“The Scottish Government should review both the measures available to protect 16 and 17 year olds and whether the Children's Hearings (Scotland) Act 2011 should be amended to allow any young person aged 16 and 17 years old to be referred to the Principal Reporter where there is a need for compulsory measures.”*
123. We understand that the implications and consequences of such an approach are currently being considered.
124. Taking account of the established body of evidence, highlighting links between vulnerability, victimisation and offending for young people, this would apply a level playing field for all young people aged between 16 and 18 and avoid the different outcomes that can apply from the current cut-off age of 16 that catapults some young people into the criminal justice system. It would also align the framework with the policy objective of treating all young people under 18 as a child and provide many young people, who may have fallen through the net, with an opportunity of support and assistance in a welfare-orientated system and go some way to further reducing the number of young people in the criminal justice system.
125. It would, however, represent a significant cultural shift and to retain public confidence and address serious offending, the common law power of the Lord Advocate, to direct the prosecution of cases where there are compelling reasons in the public interest to do so, as exists at present, would require to be retained.



## CHAPTER 3 – DIVERSION

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126. Diversion refers to decisions by prosecutors, as an alternative to prosecution, to refer a person to a Local Authority for the purpose of receiving support, treatment or to undertake a programme of action designed to deal with the underlying causes of their offending behaviour.<sup>87</sup> The Local Authority delivers diversion by criminal justice social work (CJSW) teams or through commissioning services from third sector organisations, such as Barnardo's.
127. Diversion is an important and necessary tool in the armoury of prosecutors to tackle the causes of offending behaviour and keep young people out of the criminal justice system.

### COPFS Policy

128. COPFS guidance explains that:
- The objective of diversion is to obtain, **in a case in which prosecution would otherwise be justified**, a disposal that, having regard to the personal circumstances of the offender, is more satisfactory on humanitarian grounds than prosecution or which may prevent the re-occurrence of offending conduct through early or intensive intervention;
  - People rather than cases are diverted;
  - Diversion should not be restricted to an exhaustive list of types of offences but would, generally, be suitable for low-level offending conduct which does not present a risk of serious violence or danger to the community; and
  - As a general rule the more serious the criminal conduct, the more likely prosecution, rather than diversion, should take place.
  - Other than in exceptional circumstances, there is a **presumption** against diversion from prosecution for offenders aged 16 or 17 subject to a CSO. The assumption is that in deciding to deal with the case the prosecutor considers that it is necessary to prosecute the case in the public interest.
129. The guidance signposts prosecutors to a Diversion from Prosecution Toolkit<sup>88</sup> (the toolkit), of which COPFS was a key contributor. The toolkit was published in 2011 to assist prosecutors and practitioners providing diversion services and reflects a historical approach to delivering diversion through schemes. The presumption against diversion from prosecution for offenders aged 16 or 17 subject to a CSO and the principles that underpin the delivery of diversion are currently under review by COPFS, CYCJ, CJS and social work practitioners.

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<sup>87</sup> Diversion to the Driver's Improvement Scheme for road traffic offences is considered separately at Chapter 5.

<sup>88</sup> Scottish Government, [Diverting young people from prosecution: toolkit](#), 22 June 2011.



130. All interventions should be proportionate to need. As one of the higher tariff alternatives to prosecution, young people should not be diverted unless their offending behaviour is sufficiently serious to justify a prosecution or there is an identifiable need that requires to be addressed. For many young people other alternatives, such as a warning or a Fiscal Fine, should be considered. Such an approach avoids net-widening and unnecessary use of resources.
131. This chimes with the outcome focused prosecution policy, issued following a review by COPFS in 2017, where prosecutors are instructed to take the lowest competent form of action to address the offending behaviour.

## **Diversion Models**

132. There are three types of diversion models:
- Waiver – where the option of prosecution is relinquished in favour of diversion once the individual is assessed and accepted as suitable.
  - Deferred Prosecution – the decision whether to prosecute is deferred until the conclusion of engagement with CJSW services.
  - Dual Approach – the decision not to prosecute is taken before diversion is concluded on the basis of a positive assessment/progress report.
133. The Deferred Prosecution model is the favoured approach. In determining whether to prosecute considerable weight is given to the social worker's assessment of their engagement with the young person, including an update on progress made in addressing the problems/difficulties which diversion was intended to remedy and their assessment of the risk of further offending.

## **Diversion Case Review**

134. We examined 86 cases referred for diversion by the prosecutor in 2016/17. Contrary to the presumption there were two offenders who were subject to a CSO. The review considered: outcomes; the availability of diversion; compliance with COPFS policy; communication with offenders; timeliness of decision-making; and whether there was any scope for streamlining or improving processes.
135. The waiver model was only applied in two cases. Eighty four used the deferred prosecution model or the dual approach. Referrals were made to CJSW or youth justice teams who engaged directly with the young person or, where necessary, commissioned services from third sector organisations, such as Sacro.

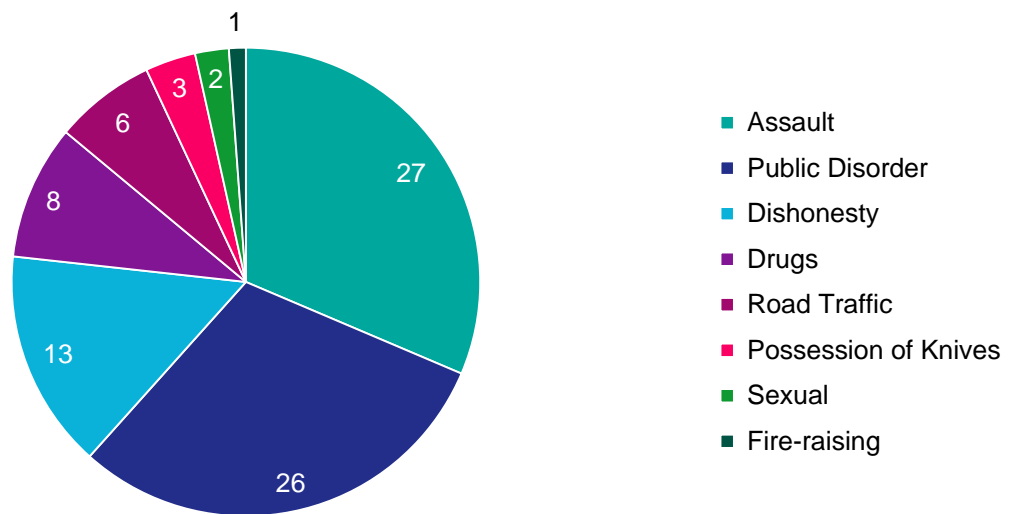




## Nature of Offences

136. Chart 4 illustrates the type of offences where diversion was offered.

Chart 4



## Outcome of Cases

137. We found a high success rate for those offered diversion as an alternative to prosecution.

138. Of the **86** cases:

- In **69** (80%), based on receipt of a report from CJSW, diversion was recorded as successful.
- In **13** (15%) diversion was recorded as unsuccessful.
- In **three**, a change in the personal circumstances of the offender meant diversion was no longer appropriate.
- **One** was ongoing.<sup>89</sup>

<sup>89</sup> As at 20/09/2018.



## Successful Outcomes

139. Through proportionate, timely and targeted interventions diversion was instrumental in achieving positive outcomes as demonstrated by the case studies below:

A 16 year old, following a heated family argument, took the family car without the owner's permission or a valid driving licence or insurance.

The offender had been experiencing difficulties as a result of his parents separating. He was referred for diversion.

The social work team put the offender in touch with Skills Development Scotland who provided advice on obtaining references, helped draft a CV and letters to potential employers and formulated a career development plan.

A mediation service worked with the offender and his family, in individual and group sessions, all of which had a positive impact.

Following completion of the diversion process there have been no further reports of offending.<sup>90</sup>

140. While diversion is more commonly used for low-level offences, it can be an effective disposal for more serious offences as shown by the following case study.

A 17 year old was reported for offences of theft, vandalism and possession of a knife in a public place.<sup>91</sup> On seeking advice from the social work team on the suitability of the offender for diversion the prosecutor was advised that the offender had a background of sexual abuse, which had affected her mental health, but had demonstrated a commitment to address the circumstances that had led to the offending.

The programme included:

- one-to-one sessions on anger management;
- work on understanding the consequences of actions; and
- providing assistance in accessing welfare benefits.

During diversion the offender was referred by her GP to psychiatric services and on becoming homeless, social work arranged temporary accommodation. Following completion of the diversion programme there have been no further reports of offending.

141. In many cases information provided by the police, on the individual circumstances of the young person and their attitude to the offending, was pivotal in the prosecutor offering diversion.

<sup>90</sup> All references to no further reports of offending are as at 10/08/2018.

<sup>91</sup> The circumstances of the offence did not fall within the mandatory criteria to prosecute by solemn procedure.



In a case involving an offence of possession of cannabis in the vicinity of a school where drugs had been a problem, a police officer, who was also a youth engagement officer, took time to speak to the school and established that the offender had been seeking help for drug addiction. In the police report, he advised that the offender was remorseful and was being referred to a local addiction team and recommended that an intervention may steer him away from offending.

The social work completion report advised that the offender had engaged throughout and had started college. He has not subsequently re-offended.

142. Such favourable outcomes demonstrate the benefit of a targeted approach to addressing the underlying reasons for offending behaviour and the potential for life changing outcomes for the young person, their family, and the wider community.

### Unsuccessful Outcomes

143. We examined the **13** cases where diversion was recorded as unsuccessful. We found:

- **Seven** were due to process or system issues<sup>92</sup> rather than the attitude or behaviour of the young person;
- **One** was assessed as unsuitable due to the unavailability of interpreting services; and
- **Five** were due to the attitude/behaviour of the young person:
  - **Three** failed to co-operate;
  - **One** did not accept responsibility for the offending behaviour; and
  - **One** could not proceed due to the offender being remanded in custody for other offences.

144. The failure of diversion in only three cases due to the offender not co-operating or committing further offences is extremely positive.

145. Of the **13** cases, where diversion was recorded as unsuccessful, none were prosecuted:

- In **eight**, where the failure was due to system issues or the unavailability of interpreting services, there being no fault on the part of the young person, prosecution was not in the public interest;
- In **one** due to the time that had elapsed since the offence, it was no longer in the public interest to prosecute;
- In **one** where the offender was remanded, the low-level nature of the offence was unlikely to have impacted on any sentence, if convicted;
- In **three** it was not possible to ascertain the reason for not prosecuting from the case files.

<sup>92</sup> A breakdown in communication between CJSW and COPFS resulting in substantial delays.



## Re-offending

146. We examined the 69 cases where diversion was recorded as a success to assess the impact of diversion and, in particular, whether the young person had re-offended following completion of the diversion process.
147. For **43** offenders, almost two thirds, a year after the end of diversion, no further police reports had been received.<sup>93</sup> Where a prolonged period of time has elapsed (a year or more) and there has been no further offending behaviour, an inference can be drawn, at least in part, that diversion has had a positive impact.
148. For the remaining **26** offenders, further reports of offending were received. Eleven had one further report, three had a further two, two had a further three and 10 had persistently offended with more than three reports being received.
149. Of the **26**:
- **16** were subsequently prosecuted, with five being placed on petition. For three, proceedings were subsequently discontinued.
  - **Eight** involved low-level offences where an alternative to prosecution was offered including, for one offender, a further opportunity of diversion as discussed in the case study below.
  - For **one** no action was taken; and
  - For **one** no decision has been made on whether to take action.<sup>94</sup>
150. Looking at re-offending in isolation does not provide a complete picture. For those from more chaotic backgrounds or who have experienced trauma and adversities in their childhood, lapses in their behaviour during the maturation process are not surprising and a one-off intervention is unlikely to suffice. Exposure to preventative interventions for low-level offending is more likely to change behaviours than entering the criminal system.

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<sup>93</sup> As at 10/08/2018.

<sup>94</sup> As at 20/09/2018.



A 16 year old was reported for a breach of the peace involving fighting in the street with others.

The offender was diverted. CJSW focused on:

- victim awareness;
- alcohol and drug awareness; and
- the consequences of anti-social behaviour.

Following diversion there was a positive completion report.

Six months later, the offender was reported for another breach of the peace and offences involving obstructing police officers engaged in their duties.

The prosecutor opted to divert the offender yet again. The social work team tailored a further programme to deal with his needs, emphasising the likely consequence of prosecution, if he re-offended.

He successfully completed the programme and, over a year later, there have been no further reports of offending.

## Persistent Offenders

151. While diversion is generally not regarded as an option for persistent offenders, for some young people, it may be premature to discount it and prosecute.
152. The internationally renowned longitudinal Edinburgh Study of Youth Transitions and Crime found that those involved in persistent offending are amongst the most vulnerable group of people in our society and justice cannot be delivered unless their broader needs are addressed in ways that are not stigmatising and criminalising.<sup>95</sup>
153. Of the ten persistent offenders, where more than three further police reports were received, the SPR identified a range of needs in four of the reports, including learning disabilities, mental health problems and behavioural disorders. No information was provided on the individual circumstances of the other six offenders. For those identified as having deep seated needs, a one-off intervention is unlikely to resolve the underlying issues responsible for the offending behaviour. The following case study demonstrates the value, in some cases, of persisting with diversion.

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<sup>95</sup> <http://www.esytc.ed.ac.uk/>



A 16 year old was reported for a breach of the peace and conduct associated with self-harming/suicidal behaviour.

The offender was diverted. On completion, the social worker reported that the offender was receiving ongoing support from CAMHS (Child and Adolescent Mental Health Services), was engaging and performing well academically.

However, within three months of diversion being completed, the police submitted another report for a breach of the peace. Subsequently, another five reports were received all involving offences associated with self-harming behaviour and, at times, harmful behaviours to others, including allegations of assaulting police officers who were called to assist. All of the offences were associated with the offender's mental health problems.

Due to evidential difficulties no action was taken regarding the breach of the peace offence. Four of the reports, concerning offences associated with mental health problems, in accordance with good practice, were dealt with together and the prosecutor opted to divert the offender again.

On completion, the social work report confirmed the offending was associated with the offender's mental health problems, occurring mostly at acute times of distress. The report advised that the offender had been given a medical diagnosis; was receiving ongoing access to mental health support; had left school after performing well and no other support was required.

Following the positive outcome no action was taken regarding the remaining report and the offender has not subsequently offended.

154. The case study demonstrates that for those with vulnerabilities or underlying issues there are no "quick or easy solutions" to prevent re-offending. Prosecution is a blunt tool which, in the main, is unlikely to resolve the underlying cause of the offending and result in the offender having the stigma of a criminal record, impacting on their life chances, including their ability to secure employment. For many, intensive support from health, social work and other professionals over a prolonged period, perhaps on repeated occasions, is likely to achieve a better, more targeted outcome.
155. For offenders, with challenging needs, some Local Authorities have commissioned services from third sector organisations to provide intensive interventions. One example is the Assertive Outreach Service delivered by Sacro.



The Assertive Outreach Service aims to assist persistent young offenders or those involved in anti-social behaviour who have disengaged with services.

A key worker tailors support to the individual's needs within the family dynamic. By working with the young person and their family, barriers are broken down, trust is gained, routines are established and over time the young person is encouraged to re-engage with services and get their life back on track.

Such preventative inputs are resource intensive but for some more problematic young people, more intensive and constant support is essential to disrupt their offending.

### Key Findings

- There was a high success rate (80%) for the 16/17 year olds diverted as an alternative to prosecution.
- Diversion only failed in three cases (3.5%) due to a lack of co-operation or further offending.
- Of the 69 offenders where diversion was completed successfully almost two thirds (43) did not re-offend.
- For those with complex needs more than one intervention may be necessary to address the causes of the offending behaviour.

156. Our findings should enhance confidence in the use of diversion as an effective disposal. They support a more flexible approach including consideration of diversion on more than one occasion for some offenders.

### Recommendation 5

COPFS should facilitate the maximum use of diversion (or a lesser form of alternative action) for all young people under 18 years. Where there are compelling reasons in the public interest to prosecute they should be clearly recorded by prosecutors.

### Outcome Focused Approach

157. Diversion is resource intensive often involving social work engagement over a number of weeks and, at times, multiple sessions with input from a variety of professionals. For low-level offending the prosecutor has lower tariff disposals available, including issuing a warning letter or, depending on the circumstances of the offender, a compensation order or fiscal fine, which could address the offending in a shorter timescale with the option of graduating to diversion if there is any further offending.



158. We identified **10** cases where a disposal other than diversion may have sufficiently addressed the offending behaviour.

- In **five**, where the offender was successfully diverted, the offences were low-level; three of the offenders had no criminal record and two were already engaging with social work.
- In **five**, where no vulnerabilities were identified, other alternatives could have achieved a proportionate and speedier resolution:
  - **Three** involved offences of assault; two were minor in nature and in the other, where the offender and victim had resolved their differences, the victim did not wish any criminal proceedings. While diversion was successful, one took six months to complete and the other two took a year, involving considerable social work resource.
  - In **two**, involving minor disorder offences, diversion was ultimately unsuccessful due to system failures; the consequential delay contributed to the decision to take no action.

159. Taking an outcome focused approach prosecutors should remain alert to the risk of up-tariffing.

### Timeliness of Decision-making and Implementation

160. Prosecutors must be mindful that when dealing with young people, cases should be progressed with urgency to provide a speedy response.<sup>96</sup>

161. As discussed in chapter two, COPFS should make an initial decision within 10 working days for all jointly reported cases. It also has a target to take and implement decisions in at least 75% of all cases within four weeks of the date on which the report is received.

162. We found:

- 37 cases (43%) took more than four weeks for an initial decision to be taken. On average it took just over seven weeks.
- 48 cases (56%) took more than four weeks to implement the decision (the prosecutor writing to social work referring the offender) from the date the report was received.
- On average, it took nine weeks for initial decisions to be taken and implemented with 18 (21%), taking over three months and five taking over nine months.

163. To alleviate anxiety, it is important to minimise exposure to the criminal justice system. Delays in offering and completing diversion, while retaining the potential for prosecution, could adversely affect a young person, detracting from the positive aspects of diversion.

164. To provide effective and meaningful support/intervention in a young person's life diversion should occur in close proximity to the offending behaviour.

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<sup>96</sup> The Council of Europe Guidelines on Child-friendly Justice.





165. In three cases, the time taken to refer the offenders for diversion, one year after the offence took place, diluted the effectiveness of diversion as demonstrated by the case study below:

A case involving a low-level assault and property damage using knives was committed by the offender within the family home, whilst drunk.

While the circumstances of the offending indicated the offender was experiencing difficulties and may benefit from diversion, a year had elapsed since the commission of the offence. No consideration was given to ascertaining whether circumstances may have changed since the report was submitted and whether diversion was still the best option.

A programme of work was undertaken with the offender over seven months before being closed as a success. The social work report acknowledged that by the time they made contact with the offender, her life was back on track – she was about to go to university and doing voluntary work.

Being aware that the decision on whether or not to prosecute was dependent on the successful completion of the diversion programme, she would have had this hanging over her during the seven months of the diversion programme and in excess of 18 months since the commission of the offence.

166. On average, it took seven months from the date of receipt of the police report to the completion of the diversion process, with the longest taking 18.4 months.
167. Following a decision to offer diversion, we found a lack of rigour in the implementation processes. There were frequent delays in issuing letters to offenders and social work teams and on receiving updates of the offender's progress.
168. In seven cases, ten months or more had elapsed before the prosecutor requested a progress report.
169. While there are some problematic cases where social work will require an extended period to undertake a prolonged programme of engagement with the offender, there is considerable scope to improve the timelines for decision-making, implementation and completion of the diversion process.

### Key Findings

- In 56% of cases, it took more than four weeks to implement the decision to divert the offender.
- Close proximity between the offence and the commencement of engagement with Criminal Justice Social Work (CJSW) is essential for diversion to be effective and relevant for the offender.
- The average time between receipt of the police report and the completion of diversion was seven months.
- Updates on progress from CJSW need to be obtained in a timely manner to ensure final decisions can be taken as swiftly as possible to minimise any adverse impact on the young person.



## Recommendation 6

COPFS should improve the timeline of cases involving young people where diversion is offered.

### Evaluation of Diversion

170. We note that in response to a query from the Justice Committee on what monitoring exists to evaluate the effectiveness of diversion,<sup>97</sup> COPFS responded that they would seek to secure agreement within the Community Justice partnership to monitor and evaluate diversion. We commend the commissioning of such evaluation to better inform where diversion should be targeted to make the most difference.

## Communication

171. While COPFS guidance provides a national process for communicating with Local Authority CJSW teams and offenders, in practice, different processes, reflecting the preferences of the Local Authorities, are being applied. Some prefer COPFS not to communicate with the offender until a suitability assessment has been conducted whereas others prefer the prosecutor to write to the offender prior to any interview. This creates inconsistencies in the manner of communication between COPFS and offenders and introduces unnecessary complication and delay.

### Communication with Offenders

172. In **five** cases there was no correspondence with the offender.

### Initial Contact

173. In the remaining **81** cases:

- In **69** the prosecutor wrote to the offender prior to social work making contact.
- In **10** the initial letter to the offender was sent **after** the social worker had made contact and assessed them as suitable. In two, the letter from COPFS explained the deferred prosecution model, advised that social work would be in contact and that, if they chose to, they could opt-out - given that they had already been interviewed and agreed to participate - the letter was likely to cause confusion.
- In **two**, following receipt of a successful completion report, the first contact by the prosecutor was to advise there would be no prosecution.

<sup>97</sup> Paragraph 209 of the Report of Justice Committee on the Role and purpose of COPFS and COPFS reply:  
[http://www.parliament.scot/S5\\_JusticeCommittee/Reports/JS052017R09Rev.pdf](http://www.parliament.scot/S5_JusticeCommittee/Reports/JS052017R09Rev.pdf)  
[http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170530COPFSresponsetoReport.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170530COPFSresponsetoReport.pdf)



## Contact Following Completion of Diversion

- In **51**, contrary to COPFS guidance, there was no correspondence to advise the offender of the outcome.
- In **29** the prosecutor wrote advising there would be no further action. In six the letter advised that a decision had been taken not to prosecute but went on to state that they should be of good behaviour and co-operate with the social work department. As the social work team had already provided a report indicating no further engagement was necessary, the correspondence was contradictory.
- **One** is ongoing.<sup>98</sup>

174. We heard from members of the CYCJ, who chair a practitioners forum on the delivery of diversion, that failure to provide information on whether or not there would be a prosecution caused anxiety for many young people. It also contravenes the Council of Europe Guidelines on Child-friendly Justice which promote the provision of information on the general progress and outcomes of proceedings or interventions.

A police report containing allegations of vandalism by a 17 year old foreign national highlighted that, if convicted of an offence punishable by imprisonment, the court may be asked to recommend his deportation.

The prosecutor wrote to the offender using a template letter. The explanatory note in the letter advised that:

“if the offender accepted the proposal the prosecutor may decide either not to prosecute or to wait and see how they co-operated before finally deciding whether to prosecute”

The prosecutor subsequently sought an update from the social work team but, despite contacting the team on a number of occasions, no completion report was provided. Due to the time that had elapsed since the offence no further action was taken.

There was no correspondence advising the offender of the decision.

It is unknown whether the offender had been informed of the potential for deportation, if convicted, but, if so, the uncertainty of what had happened with his case is likely to have caused considerable anxiety.

175. In addition to the inconsistencies in the manner of contact, the content of the letters, sent to offenders differed. Some letters were overly complex with unnecessary jargon and legal terms that would be difficult for a young person to understand as demonstrated by the following extracts:

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<sup>98</sup> As at 20/09/2018.



176. Extract from initial letters:

- *“If you accept the proposal and the Procurator Fiscal considers that you would benefit from this assistance, the Procurator Fiscal may decide either not to prosecute you for the alleged offence or to wait to see how you have co-operated before finally deciding whether to prosecute you. If you are prosecuted, the content of the discussions you have had with the Social Work Department will not be referred to at your trial. If you are convicted, mention may be made to the court of this proposal”.*

177. Extract from correspondence following completion of diversion:

- *“Please be advised that should you re-offend, it is likely that you will not be offered the opportunity of Social Work assistance as a direct alternative to prosecution.”*

178. In contrast to the extracts above we found examples of good practice where more straightforward language was used:

- *“Following your participation in the diversion from prosecution scheme, I can advise that social work have now provided me with a completion report. Accordingly, I can confirm that I do not intend to take any further proceedings in this matter.”*

## Equality Considerations

179. It is acknowledged that communicating with offenders, many of whom have their own legal representative, is not a primary consideration for prosecutors. However, at the stage that diversion is being offered the offender is unlikely to have a legal representative and, given the vulnerabilities that are often encountered by this group, correspondence must be clear and straightforward. Contrary to COPFS’ plain English guide and guidance on accessible information, none of the correspondence sent by the prosecutor was tailored to the individual. Standard letters were sent without consideration of the needs and vulnerabilities of the offender. We identified equality issues in **nine** cases:

- In **eight**, where the offenders were written to prior to any contact with the social work team, standard letters were issued despite the police report highlighting the offenders had mental health problems, learning disabilities, learning difficulties, behavioural or development disorders or poor cognitive function. For some, it is extremely doubtful that the content of the letter would be understood.
- In **one**, the police report advised that the offender required an interpreter indicating that there were language barriers which may have impeded the offender’s understanding of the content of the letter.

180. Communication with children and young people should be adapted to their age and maturity and in a language they understand.<sup>99</sup>

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<sup>99</sup> Council of Europe Guidelines on Child-friendly Justice.



A police report containing allegations of a 16 year old assaulting police officers was sent to the prosecutor.

The offender was autistic with mental health problems and the mental capacity of a 12 year old.

The prosecutor wrote to the offender using a template letter. The explanatory note in the letter advised that:

“if the offender accepted the proposal the prosecutor may decide either not to prosecute or to wait and see how they co-operated before finally deciding whether to prosecute”

Given the mental capacity of the offender it is unlikely that she would be able to understand the content and it may have caused confusion or even distress.

After being assessed as suitable for diversion, no letter was sent advising the offender of the decision to divert the case.

Within three months, a progress report was sent to the prosecutor advising that the offender had co-operated and that there had been no further offending. The case was closed but, contrary to COPFS guidance, no letter was sent to advise the offender of the decision to take no further action.

181. A more appropriate approach would have been to enquire whether the offender had a legal guardian or for social work to make initial contact by phone or in person.

### Key Findings

- Communication with offenders during the diversion process was inconsistent and often at variance with COPFS guidance.
- Letters sent to offenders were overly complex and contained legal jargon.
- Communication was not tailored to offenders' needs taking account of, any known, equality issues.

### Recommendations 7, 8, 9 and 10

- COPFS should introduce a national streamlined process for communicating with social work departments and offenders to support the effective operation of diversion.
- COPFS should review and simplify all correspondence issued to young people being offered diversion.
- COPFS should tailor communication to the individual needs and vulnerabilities of young offenders taking account of, any known, equality issues.
- COPFS should, on completion of diversion, confirm in writing what action, if any, is to be taken.



## Barriers to Diversion

### Acceptance of Offending Behaviour

182. Only one offender was assessed as unsuitable because they denied any involvement in the commission of the offence.
183. Criminal justice social workers advise that it is relatively common for a young person to acknowledge they have difficulties but to minimise or not accept the full extent of their offending behaviour. However, unless there is an element of restorative justice, this does not necessarily preclude them from diversion. If they are willing to engage with CJSW, the team can provide the appropriate support, ranging from tackling drug or alcohol misuse, resolving an acute crisis such as homelessness or referring the young person for specialist treatment. Very often, at the conclusion of the diversion process, those diverted accept they were responsible, at least in part, for the conduct that triggered the referral.
184. It is only where the offender denies responsibility and is unwilling to co-operate that diversion should be ruled out as an appropriate disposal.

### Availability of Diversion

185. Historically, diversion was delivered through “diversion schemes”. The schemes were often tailored to the offending conduct rather than the offender’s needs resulting in those who did not meet the criteria of the available scheme(s) being assessed as unsuitable. During our review, we heard references to diversion not being suitable for certain offences and unavailable due to the absence of specific type of programmes.
186. This approach is out of step with the WSA ethos and the needs-led approach to dealing with young people.
187. COPFS and CJSW have different responsibilities and roles in the delivery of diversion. It is for the prosecutor to assess whether it is in the public interest to offer diversion, having regard to the competing interests of any victim, the offender and the community. An assessment of risk is factored into such decisions.
188. Thereafter, it is the responsibility of CJSW to assess the individual needs of the offender and address these through the universal services available in the Local Authority, or through commissioning the appropriate services.
189. Based on this shared understanding of approach we were reassured by senior representatives from CJSW and practitioners, who deliver diversion, that any offence referred by the prosecutor can be considered and that their overriding objective is to engage with young people in a welfare-based system and to keep them out of the criminal justice system.
190. The dual approach of tailoring diversion to the individual offender’s needs through a range of universal services and dedicated prosecutors, within the national marking unit (NICP), making decisions in the majority of summary cases should provide greater accessibility to, and consistency in the use of diversion.



## Capacity of Services

191. Other than the case declined due to the unavailability of an interpreter, there were no cases, in our review, not accepted by CJSW due to lack of availability of services or capacity.
192. We are aware, however, that capacity to deliver diversion has been an issue in some Local Authorities. One Local Authority has a backlog of cases – some from April this year<sup>100</sup> – awaiting assessment for suitability by CJSW. We were told that measures have been taken to remedy the situation.
193. Delays of this nature have the potential to undermine confidence in diversion and dilute the impact of the intervention on the young person. The closer the intervention to the offending, the greater the likelihood of a positive outcome.
194. All Local Authorities have the necessary skills and expertise to work with young offenders subject to a CPO. Diversion requires similar skills and provides the young person with the appropriate support but at an earlier stage and crucially before the offender enters the adult criminal system. It is, undoubtedly, more cost effective than prosecution with the possibility of the offender being made subject to a CPO or a period of detention.
195. We recognise that fluctuations in the number of referrals for diversion by COPFS have historically created difficulties for some Local Authorities to deliver a consistent service. The combination of a dedicated prosecutor dealing with cases involving 16/17 year olds and an approach by COPFS to maximise the use of diversion for all young people under 18 years should provide greater consistency in the number of young people being referred.
196. With that in mind, to secure the objective of keeping as many young people out of the formal justice system, consideration should be given to re-aligning the current funding streams for CJSW to better resource a preventative, earlier intervention approach through diversion.

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<sup>100</sup> As at 16/10/2018.





## Court-based Initiatives

197. We observed two court-based initiatives, combining the authority of the court with the use of rehabilitative services, employing a holistic approach to dealing with young people convicted and at risk of custody.

- The Problem-Solving Court in Aberdeen.
- The Structured Deferred Sentencing Court for Young People in Hamilton.

Both models aim to address the complex and multiple needs of offenders through the use of collaborative intervention and supervision. Each offender has a dedicated social worker. The Structured Deferred Sentencing Court is available to young offenders aged 16-21 years resident in North or South Lanarkshire. The Problem-Solving Court is currently available to prolific low-level offenders over 16 years, for women, and between 16-25 years for young men in Aberdeen City.<sup>101</sup>

Participants attend court reviews on a regular basis. Both initiatives offer a flexible approach to interactions between the offender and social work. For example, in Hamilton, social workers will offer to meet with the offender in convenient venues rather than insist they attend at social work offices. They are proactive in assisting the young person to turn up at appointments, prepare them for court appearances and dealing with practical matters such as obtaining benefits.

There are a number of key elements to both schemes:

- To encourage more open dialogue a less formal court environment is adopted – cases in Aberdeen are held in private and only those on the deferred sentence scheme are present at the court hearing in Hamilton.
- Dedicated Sheriffs deal with the reviews providing the opportunity to develop a rapport.
- The most striking feature is the candid exchanges between the young person and the Sheriff –in a more personal and interactive fashion than the usual court hearings. We observed the young person explain why things had gone off track and how they were seeking to turn things around and the Sheriffs taking an empathetic, straight talking approach to dealing with the difficulties in the young person's life.

*"You sit back and feel comfortable to say how you feel... It's a hundred times better than going to a normal court room [where I'd be] a bit more fazed about what other people are thinking – if I said I'd stay away from drinking, people would laugh (Male PSA participant)"*

*"...I tended to tell them that the next time I would be asking them to consider where they were now, compared with where they were when they started and then, on the final review, I asked them to reflect back on the progress made, and actually celebrated it with them saying 'look what's happened: you've got your tenancy, you had four custodial sentences in 2015, you've had none in 2016...'".<sup>102</sup> (Sheriff)*

- The interest shown by the sheriff is seen as a motivating factor for some young people to make an effort to change their lives.

Such initiatives demand more social work resource and court time to administer but, if they manage to break the cycle of re-offending, the long term benefits have the potential to offset such costs.

<sup>101</sup> Eligible candidates are screened by social work to assess if they meet criteria for this court.

<sup>102</sup> Scottish Government, [Review of the Aberdeen Problem Solving Approach: report](#), 5 September 2018.





## CHAPTER 4 – SOLEMN PROCEEDINGS

“The more serious the deeds the more deep-seated the needs.”<sup>103</sup>

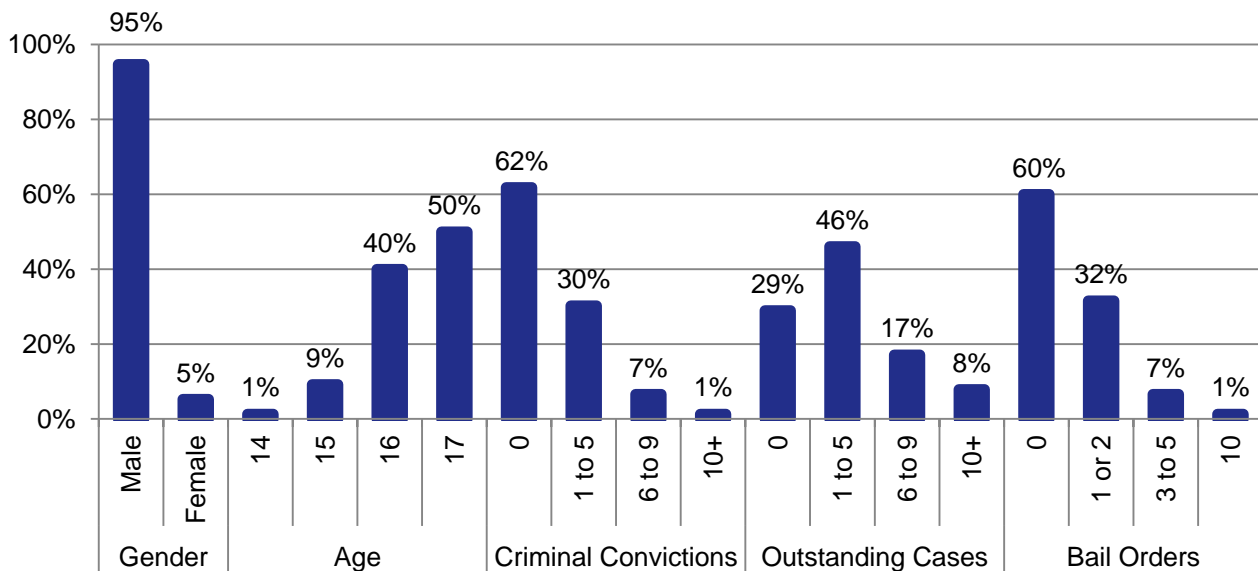
198. In accordance with the Lord Advocate’s Guidelines, all offences which require to be prosecuted on indictment<sup>104</sup> or are so serious they will normally give rise to solemn proceedings (in the Sheriff or High Court before a jury) should be jointly reported.

199. In 2016/17, 369 young people were placed on petition.<sup>105</sup> We examined 72 cases involving 76 offenders. Four were female and 72 were male.

### Profile of Young People

200. Chart 5 provides a profile of young people placed on petition by gender, age, criminal convictions, outstanding cases and whether they were subject to bail orders.

Chart 5



### Characteristics<sup>106</sup>

- 95% (72) of young people placed on petition were **male**
- 90% (68) were aged **16 or 17**
- 62% (47) had no **criminal convictions**
- 71% (54) had at least one **outstanding criminal case**
- 25% (19) had more than five **outstanding cases**
- 40% (30) were subject to a **bail order**

<sup>103</sup> The University of Edinburgh, [Delivering Justice for Children and Young People: Key Messages from the Edinburgh Study of Youth Transitions and Crime](#). McAra, L. & McVie, S. (2013).

<sup>104</sup> Offences such as murder and rape require to be prosecuted on indictment.

<sup>105</sup> Data pre-dates COPFS prosecution policy review on 01/09/2017.

<sup>106</sup> Number of criminal convictions and outstanding cases are taken from the criminal record of the offender in the police report.



- 8% (6) were subject to more than two bail orders. In three of the six cases, the offender was subject to 4, 5 and 10 bail orders respectively.

201. There were only seven (9%) offenders that had no criminal convictions, outstanding cases or any previous involvement with the Children's Hearing System and/or the police/COPFS.

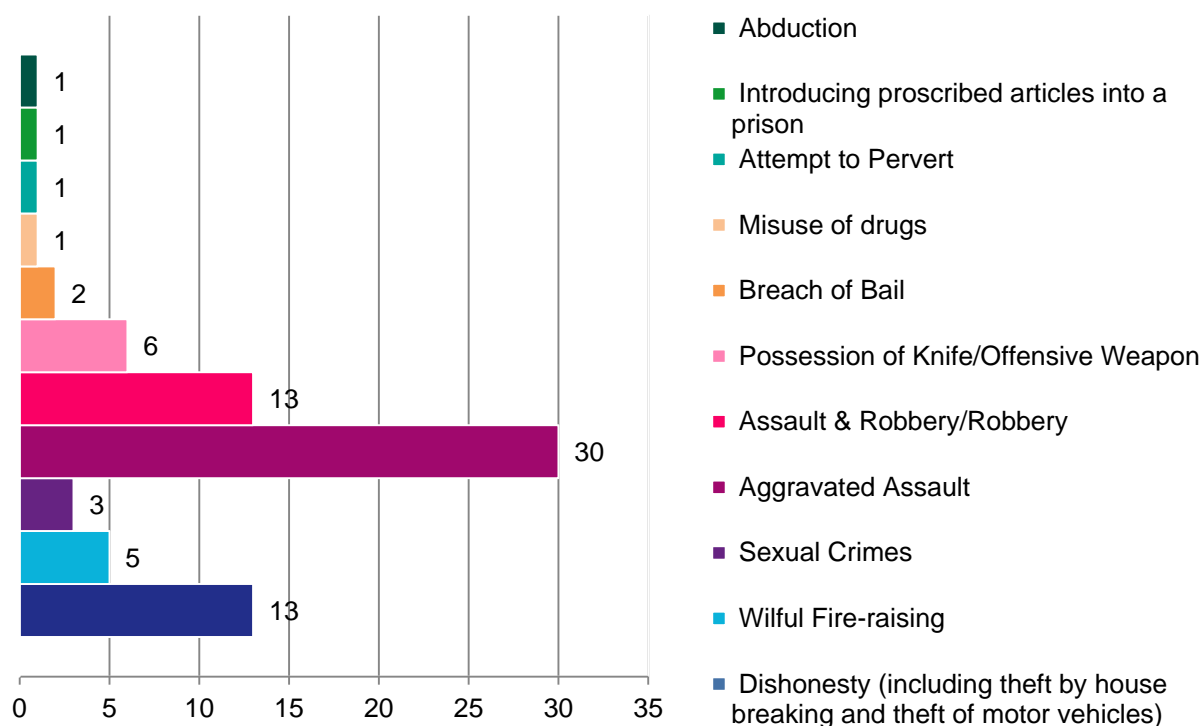
202. Of the 76 offenders:<sup>107</sup>

- 20% (15) had offence **grounds accepted or established** with the Reporter.
- 15% (11) were subject to a **CSO** or had an **open referral** with the Reporter.
- 36% (27) had been given one or more alternative disposal by the prosecutor or **police warnings or fixed penalties**.<sup>108</sup>

## Nature of Offences

203. Chart 6 provides a breakdown of the offences where young people were placed on petition:

Chart 6



204. The offences fall into the following categories:

- Offences so serious they will normally give rise to solemn proceedings, including abduction, assault and robbery, aggravated assaults, sexual crimes, offences of being concerned in the supply of Class A drugs, wilful fire-raising,

<sup>107</sup> Figures do not add up to 76 as some offenders fall within more than one category.

<sup>108</sup> An alternative disposal or police direct measures does not form part of a criminal record. It includes police warnings or fixed penalty notices and COPFS alternatives to prosecution.



attempting to pervert the course of justice through witness intimidation and introducing proscribed articles into a prison;

- Offences where, for public policy reasons, there is a presumption that they will be prosecuted by solemn procedure, including housebreaking of residential premises, possession of a knife in certain circumstances or locations and wilful fire-raising; and
- Breaches of bail conditions where the bail order was imposed in relation to a solemn matter and/or associated with the original offence.

### Crown Counsel's Instructions (CCI)

205. No proceedings may be commenced against a child aged 12 years or more and under 16 years without the instruction of the Lord Advocate or Crown Counsel.<sup>109</sup>

206. Of the eight cases involving young people under 16 years, CCI was not obtained in three:

- In one, involving a 15 year old offender, contrary to COPFS guidance, CCI was not obtained before the decision to seek a petition warrant. By the time the offender was arrested and appeared in court, a month later, he had turned 16.
- In two cases, where CCI was not obtained, the offenders were 15 when the police reports were submitted. Both had intervening 16th birthdays – 13 and 33 days after receipt of the police report – prior to the cases being considered. Decisions to prosecute were taken approximately five and seven months after receipt of the report.

207. Whereas COPFS guidance provides that CCI must be obtained for any child under the age of 13 at the **time of the offence**, it is silent on **when** it should be obtained for a child aged 13, 14 or 15.

208. We found a lack of clarity on whether the age requiring CCI relates to the age of the child at the date of the offence (excluding historical crimes); when the police report is submitted; or when the initial decision to prosecute is taken.

#### Recommendation 11

COPFS should clarify whether the applicable age requiring CCI, prior to any proceedings being commenced for children aged 13, 14 or 15 years, is the age of the child at the date of the offence, when the police report is submitted or when there is a decision to prosecute.

209. Regardless of when CCI is required, cases involving children need to be prioritised. Otherwise delays at the reporting and decision-making stage, particularly for those aged 15 at the time of the offence but who may turn 16 by the time a decision on how to proceed is taken, has the potential to frustrate the intention of the statutory safeguard.<sup>110</sup>

<sup>109</sup> For certain road traffic offences, the Lord Advocate has delegated authority to make such decisions to Procurators Fiscal.

<sup>110</sup> Section 42(1) of the 1995 Act.



“Serious offending is associated with victimisation and social adversity.”<sup>111</sup>

## Information on Vulnerabilities or Family Circumstances

210. The Edinburgh Study of Youth Transitions concluded that justice for victims and communities cannot be delivered unless the broader needs of young people are addressed. Many young offenders who have committed serious crimes have experienced trauma in their formative years and/or have complex needs and present a risk to themselves and to others.
211. Of the 76 offenders, information on vulnerabilities or family circumstances was provided in 27 (36%) police reports.
212. Of the eight offenders **under 16 years**, vulnerabilities were recorded in five (63%) police reports – three had extensive involvement with social work services, one was a looked after child and two had issues with drug or alcohol misuse.
213. There were four offenders **aged 16/17 years subject to a CSO**. None of the police reports disclosed any vulnerabilities.
214. For the 64 offenders **aged 16/17 years**, 22 reports (34%) disclosed a range of problematic behaviours including drug use, regular alcohol consumption; dysfunctional family backgrounds; learning difficulties and disabilities and mental health problems. Many had experienced extensive contact with social work services and seven came from a looked after background.
215. For those aged 16/17, the provision of less information on individual or family circumstances is consistent with the key finding in the main case review.<sup>112</sup> Given the serious repercussions for any young person appearing on petition, including the potential to be subject to a bail order for 12 months, the recommendation to liaise with Police Scotland to standardise the provision of information, where known, should apply equally to those who commit serious offences.

## Outcome of Cases

216. We examined the outcome for those placed on petition.<sup>113</sup>
217. Of the 76 offenders:
- In 67% (**51**) there was a plea or finding of guilt;
  - In 12% (**9**) there was a finding of not guilty or a not guilty plea was accepted.
  - 20% (**15**) were discontinued. The main reasons were: insufficient admissible evidence; no realistic prospect of a conviction following the evidence of the victim; pleas of guilty accepted in relation to other outstanding offences; and the prosecution was no longer in the public interest.
  - 1% (**1**) is ongoing.<sup>114</sup>

<sup>111</sup> A key finding of the Edinburgh Study of Youth Transitions and Crime.

<sup>112</sup> See key finding at page 36.

<sup>113</sup> The charges on the petition may differ from those for which the offender is convicted.

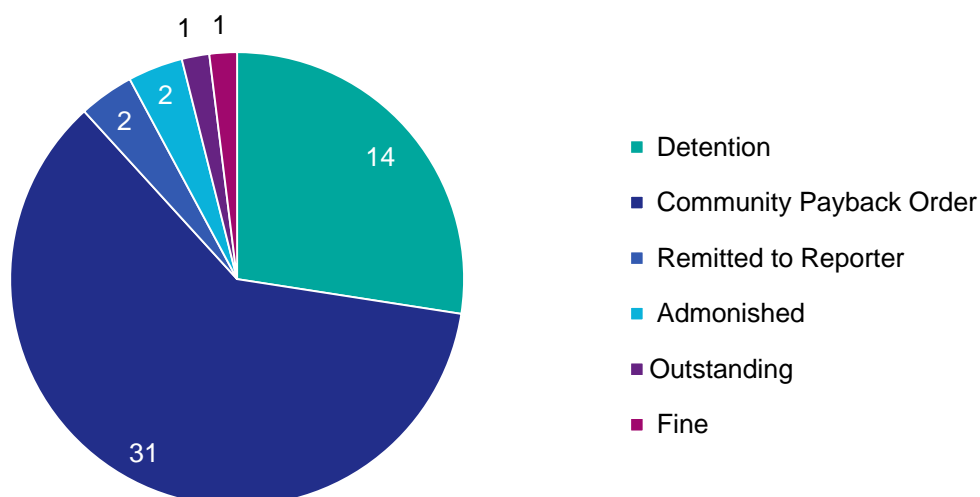
<sup>114</sup> As at 20/09/2018.



## Sentence

218. Chart 7 provides the sentence imposed in the 51 cases where there was a conviction.<sup>115</sup>

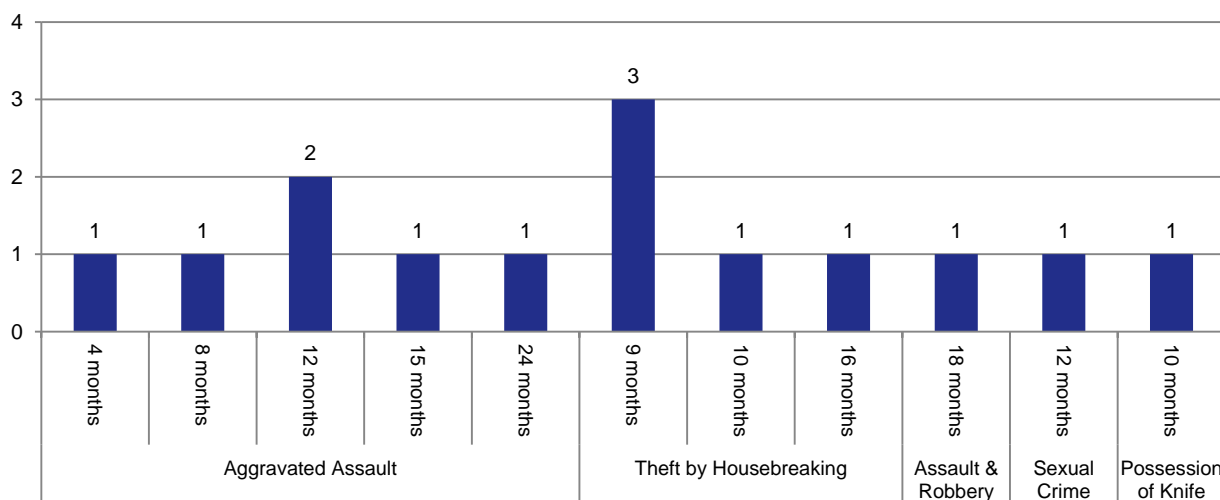
Chart 7



## Detention

219. Fourteen offenders were sentenced to a period of detention, ranging from four to 24 months.

Chart 8



\* The period of four months detention was to run consecutively with the remainder of a previous sentence.

\* In the case involving a sexual crime, the court also imposed a Sexual Offences Protection Order (SOPO) for six years and placed the offender on the sex offenders register for five years.

<sup>115</sup> Outstanding case – as at 20/09/2018.



## Community Payback Order (CPO)

220. The CPO<sup>116</sup> is available as an alternative to custody or at level 1 as an alternative to a fine.

221. Of the **31** cases where the court imposed a CPO:

- In 94% (**29**) the CPO was imposed as a direct alternative to custody.
- In 6% (**2**) the CPO was imposed as an alternative to a fine. Pleas were taken to amended or alternative charges in both cases.
- In 32% (**10**) the court also imposed a Restriction of Liberty Order (RLO).

## Other Disposals

222. In the remaining **six** cases:

- **Two** were **admonished**:
  - One involved an assault using weapons with two adult co-accused. Following trial, the offender was found guilty of being in possession of an offensive weapon. After a period of deferral for the offender to demonstrate he would not further offend, he was admonished.
  - In the other the offender was prosecuted, with a co-accused, for an assault and robbery and a breach of bail. Following a plea of guilty to the assault and robbery by the co-accused, a plea to the breach of bail offence was accepted and the offender was admonished.
- **One** was **fined**:
  - The offender was prosecuted with a co-accused on three charges of aggravated assault, including the use of weapons. At trial, a plea to an amended offence of a breach of the peace was accepted. The offender was fined £200.
- **Two** were remitted to the **Reporter**:
  - One involved offences of robbery and culpable and reckless conduct with a co-accused. The offender pled guilty. He resided at a residential school and was subject to an interim compulsory supervision order. The court remitted the offender to the Children's Hearing System.
  - In the other, the 14 year old offender was prosecuted with two co-accused for an assault to severe injury and permanent disfigurement. He was found guilty of an amended charge and the court remitted him to the Children's Hearing System.
- In **one** a warrant for the arrest of the offender remains outstanding.<sup>117</sup>

223. Given the serious nature of the offences while solemn proceedings were appropriate, from an outcome focused perspective, with the exception of four cases, the sentences of detention could have been competently imposed in the sheriff summary court.

<sup>116</sup> There are two levels available for the unpaid work requirement of a Community Payback Order: Level 1 – imposes between 20-100 hours and Level 2 – imposes between 101-300 hours.

<sup>117</sup> As at 20/09/2018.



## Public Policy Considerations

224. As discussed, for public policy reasons, there is a presumption of prosecution in the sheriff solemn court for some offences. The presumption can be rebutted if there are mitigating and extenuating circumstances.
225. For offences of possession of a knife in certain locations or circumstances, including a railway or bus station and city centres, there is a mandatory policy requiring proceedings to be commenced in the sheriff solemn court.
226. Such policies apply to young people aged between 16 and 18 and adults equally.
227. Twenty of the 76 (26%) offenders were placed on petition for such offences: five for an offence of being in possession of a knife, five for wilful fire-raising and 10 for theft by housebreaking.
228. Of the five placed on petition for possession of a knife, all were aged 16 and had no criminal convictions, although three had outstanding cases. Four pled guilty to the offence and one pled guilty to a breach of the peace including brandishing knives and a breach of bail. In addition, a 17 year old offender, with a number of criminal convictions and outstanding cases, who had been placed on petition for assault to severe injury, a breach of the peace and an offence of possession of a knife, pled guilty to a breach of the peace and possession of a knife. Five, including the 17 year old offender, were sentenced to a CPO with varying periods of supervision and requirement for unpaid work. One, who had 26 outstanding cases, was sentenced to 10 months detention in a YOI.
229. For four offenders the possession of a knife in a railway station or city centre fell within the category of offence that requires to be prosecuted.
230. Of the five placed on petition for wilful fire-raising, two were 15, one was 16 and two were 17. Four cases were discontinued due to insufficient evidence. One pled guilty and a CPO was imposed.
231. Of the 10 prosecuted for theft by housebreaking, there was a conviction in eight, one was discontinued and there is an outstanding warrant for the arrest of the remaining offender. Five offenders were detained in a YOI, ranging from nine to 16 months, and three were made subject to a CPO.
232. As the cases pre-dated the prosecution policy review, we examined 83 cases reported to COPFS in April 2018 to ascertain if a more outcome focused approach was being taken to more serious offences.
233. Of the 83 cases only four offenders were placed on petition. Three had no criminal convictions or outstanding cases. For three offenders there was a presumption of prosecution in the sheriff solemn court due to the nature of the offences: two were offences of wilful fire-raising and one was theft by housebreaking. The remaining case concerned an assault aggravated by serious injury and permanent disfigurement. Applying public policy considerations and taking account of the serious nature of the assault, solemn proceedings were in accordance with COPFS guidance. It remains to be seen whether, following any conviction, the offenders receive a sentence that could only be imposed in solemn proceedings.



234. In some cases, there is a tension between policies aimed at public protection and delivering justice for the community and treating those under 18 as children. As highlighted in Chapter 2, the cut off age of 16 for the two offenders, separated by a few days or weeks, reported for possession of a knife at a railway station, led to very different outcomes.<sup>118</sup>
235. Applying a whole systems approach to those under 18, placing more weight on the age of the offender in any assessment of whether there are exceptional circumstances to rebut such policies, may go some way to reconcile the interests of the offender with those of the wider community.

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<sup>118</sup> Discussed at paragraphs 116/117.





## CHAPTER 5 – ROAD TRAFFIC OFFENCES

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236. Prosecution of road traffic offences is undertaken in the public interest to maintain safety on the roads. For many young people road traffic offending is their only contact with the criminal justice system.
237. In 2016/17, 9%<sup>119</sup> of all cases involving young people reported to COPFS were for road traffic offences.
238. Penalties particular to such offences include the imposition of penalty points, disqualification from driving and, for those who obtain six penalty points within two years of passing their test, the revocation of their driving licence.<sup>120</sup>

### COPFS Policy

239. Under the Lord Advocate's Guidelines, road traffic offences alleged to have been committed by young people aged 15 or over require to be jointly reported where, in the event of a conviction the court is required or permitted to order disqualification from driving, and it is in the public interest for the disqualification to be in force when the person becomes 16.
240. 16 and 17 year old offenders are reported in the same manner as adults for road traffic offences.

### Case Review

241. We examined 76 road traffic cases reported between 2016/17 where the young person was prosecuted in the Justice of the Peace or sheriff summary court.<sup>121</sup>

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<sup>119</sup> See Chart 1, page 21.

<sup>120</sup> Road Traffic (New Drivers) Act 1995.

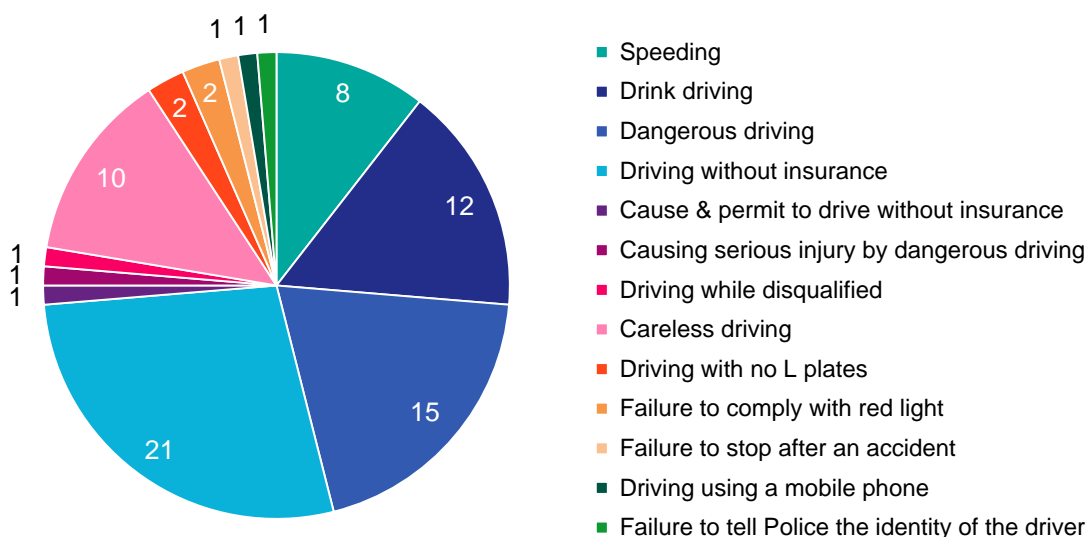
<sup>121</sup> Excludes cases where the offender was diverted to the Driver Improvement Scheme.



## Nature of Offences

242. Chart 9 provides a breakdown of the most serious road traffic offence prosecuted in each case.<sup>122</sup>

Chart 9



243. Drink driving, dangerous driving, driving without insurance and careless driving were the most commonly prosecuted offences.

## Dangerous Driving and Drink Driving

244. Offences of dangerous driving and drink driving incur a mandatory period of disqualification which can only be imposed by the court following a conviction. For public policy reasons, there is no scope to divert young people from the criminal justice system for such offences.

245. In 11 of the 12 drink driving cases there was a finding or plea of guilty. In the remaining case, proceedings were brought to an end by the court<sup>123</sup> due to the absence of an essential witness.

246. Of the 15 cases of dangerous driving there was a finding or plea of guilty in nine and of the less serious offence of careless driving in three. The prosecutor discontinued proceedings in two cases, one due to the absence of an essential witness and one as a result of the offender receiving an intervening custodial sentence and lengthy period of disqualification. A not guilty plea was accepted in the remaining case after the co-accused pled guilty.

<sup>122</sup> In 61% of cases there were other less serious offences.

<sup>123</sup> Known as deserted simpliciter.



## Driving without Insurance

247. There were 21 cases involving an offence of driving without insurance. Prosecutors can issue a fixed penalty of a £300 fine and 6 penalty points for such offences. Failure to accept a fixed penalty for any road traffic offence will normally result in a prosecution. Fixed penalties are not offered if more than one road traffic offence is committed on the same occasion. As it is relatively rare for an offence of driving without insurance to be reported as the sole offence – it occurred in only one of the 21 cases – this limits the use of fixed penalties. For young people, who may only have a provisional licence, driving without insurance is often coupled with offences of driving not in accordance with the correct class of licence or a MOT.
248. Another relatively common offence committed by young people is taking and driving a car, often belonging to a relative, without their permission. Charges of driving without, or not in accordance with the correct class of licence, and without insurance inevitably follow.
249. We examined the outcomes in the **21** cases:
250. In **one**, where driving without insurance was the sole charge, the court imposed a £315 fine and 6 penalty points.
251. In **seven** where the offender pled guilty to more than one road traffic offence, the court admonished the offender in respect of all other offences and imposed the following sentences for the driving without insurance:
- In 5: £300 fine and 6 points
  - In 1: £200 fine and 6 points
  - In 1: £300 fine and 7 points
252. In **five** the offender pled guilty to offences of driving without or not in accordance with the correct class of licence and without insurance. The court imposed a total sentence of:
- £400 fine and 8 points
  - £300 fine and 6 points
  - £500 fine and 6 points
  - £150 fine and 6 points
  - A CPO with supervision for 3 months and a requirement to undertake 40 hours of unpaid work and 6 points.
253. In **three** cases involving offences of taking and driving away a vehicle without the owner's permission and a number of associated charges, the court imposed:
- A CPO with 80 hours unpaid work and supervision for two years and one year disqualification for the taking and driving away offence. It admonished the offender for offences of failing to report an accident, driving without insurance and a driving licence. This was a relatively serious incident where the owner of the vehicle was not known to the offender;



- Monetary fines of £150 for the taking and driving away offence (his mother's vehicle), £300 for driving without insurance and £150 for driving not in accordance with his class of licence and 6 penalty points; and
- A CPO with a requirement to undertake 45 hours of unpaid work for the offence of taking and driving away a vehicle owned by a relative, disqualification for 6 months for driving without insurance and admonished the offender for driving without a licence. The offender, in this case, was already subject to a CPO.

254. In **four** proceedings were discontinued.

255. In **one** the offender was found not guilty.

256. Of the 16 cases involving a finding or plea of guilty, taking an outcome-focused approach, the sentence imposed in ten cases was comparable to the fixed penalty of £300 and 6 penalty points that can be offered by prosecutors.

### Careless Driving

257. Where careless driving is the sole charge, the prosecutor can decide to:

- Prosecute the offender in the Justice of the Peace or Sheriff Court.
- Issue a fixed penalty, if appropriate.
- Refer the offender to the Driver Improvement Scheme which is an alternative to prosecution.

258. There were **10** reports of careless driving:

- In **three**, proceedings were discontinued following receipt of additional information.
- **Seven** were prosecuted in the Justice of the Peace court. Three involved other road traffic offences. All received a monetary fine and penalty points ranging from £200-£450 and 3-7 penalty points.

### Driver Improvement Scheme

259. The Driver Improvement Scheme has been available nationally as a diversion from prosecution since 1 April 2004.

260. Where careless driving is the sole charge and the driving did not involve the death or serious injury of any person (including injury of the offender), the police report should contain the police officer's opinion on whether the offender is suitable for participation in the Driver Improvement Scheme.

261. The scheme is a one and a half day course, paid for by the offender, involving theory, driver assessment and practical instruction. It is designed to educate driving behaviours.



262. To enable a prosecution within the six month statutory time limit,<sup>124</sup> that applies to offences of careless driving, should the offender decline to participate or fail to satisfactorily complete the course, COPFS guidance provides that only cases reported by the police no more than 28 days after the date of offence can be considered.
263. We reviewed 28 cases where the offender was given the option of participating in the scheme as an alternative.
264. There was a high rate of success with 26 (93%) of the 28 cases being completed satisfactorily. Proceedings were discontinued in two cases; in one, the delay in referring the case provided insufficient time for the offender to participate and an administrative error in the other resulted in the expiry of the time limit.

### **Diversion from Prosecution**

265. Road traffic offences are often committed by young offenders who have no other involvement with the criminal justice system. In rural jurisdictions such offending often constitutes a disproportionate amount of all offences committed by young people. Unlike offenders who commit other type of offences, there is little scope to divert those who commit driving offences.
266. We were advised of a proposal by the Police Scotland Youth Justice Management Unit and Social Work Services in Aberdeenshire to establish an educational driving programme as an alternative to prosecution for young people involved in road traffic related offences. The intention was to tailor the programme to the individual needs of the offender and incorporate a theory element focussing on the consequences and risks of road traffic offending and practical sessions including car maintenance, where linked to the offences. It was envisaged that road traffic police officers would assist in delivering the programme providing the additional benefit of breaking down negative perceptions of the police.
267. Given the high success rate of the Driver Improvement Scheme, we consider there is merit in exploring whether the scope of the existing driver improvement scheme could be expanded or a programme similar to the one proposed above could be introduced to tackle driving behaviours for other low-level road traffic offences.
268. Taking a preventative, educational approach to road safety would address public concern, improve standards of driving and avoid many young people entering the criminal justice system and acquiring a criminal record.

### **Recommendation 12**

COPFS should explore the possibility of expanding the scope of the Driver Improvement Scheme and/or the feasibility of introducing a new road safety programme to address low-level road traffic offences.

<sup>124</sup> In general statutory charges that can be prosecuted in summary courts only must commence within six months after the date of the last mentioned offence. If the offender is remanded in custody, proceedings must commence within 40 days. Section 136(1) and Section 147(1) of the 1995 Act.



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### About the Inspectorate of Prosecution in Scotland

IPS is the independent inspectorate for the Crown Office and Procurator Fiscal Service. COPFS is the sole prosecuting authority in Scotland and is also responsible for investigating sudden deaths and complaints against the police which are of a criminal nature.

IPS operated on a non-statutory basis from December 2003. Since the coming into effect of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 Sections 78 and 79 in April 2007 the Inspectorate has been operating as a statutory body.

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ISBN: 978-1-78781-401-1 (web only)



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Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS498726 (11/18)