



HM Inspectorate  
of Prosecution in Scotland

# Joint review of diversion from prosecution

February 2023



## About us

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### **HM Inspectorate of Constabulary in Scotland**

HM Inspectorate of Constabulary in Scotland (HMICS) is established under the Police and Fire Reform (Scotland) Act 2012 and has wide ranging powers to look into the state, effectiveness and efficiency of both Police Scotland and the Scottish Police Authority (SPA).

HMICS has a statutory duty to ensure that the Chief Constable and the SPA meet their obligations in terms of best value and continuous improvement. HMICS also has an established role in providing professional advice and guidance on policing in Scotland.

### **HM Inspectorate of Prosecution in Scotland**

HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service (COPFS). The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person.

### **Care Inspectorate**

The Care Inspectorate is the independent scrutiny, assurance and improvement support body for social care and social work in Scotland. The powers and duties of the Care Inspectorate are set out in the Public Services Reform (Scotland) Act 2010. The Scottish Government tasked the Care Inspectorate to lead on scrutiny and assurance of justice social work and support the implementation of the community justice model.

### **HM Inspectorate of Prisons for Scotland**

HM Inspectorate of Prisons for Scotland (HMIPS) is responsible for the inspection and monitoring of Scotland's 15 prisons, and reporting publicly on its findings. Inspection and monitoring activity focuses on establishing the treatment of and the conditions for prisoners, as well as the conditions in which prisoners are transported or held in pursuance of prisoner escort arrangements.

# Contents

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Introduction .....	4
Key findings .....	6
Recommendations .....	9
Context .....	13
Methodology .....	18
Direction.....	21
Execution .....	30
The Standard Prosecution Report .....	30
The decision to divert .....	35
The referral.....	41
The suitability assessment.....	44
COPFS response to the suitability assessment .....	47
The diversion intervention.....	49
The completion report.....	56
COPFS response to the completion report .....	58
Communication with the accused person .....	61
Communication with complainers .....	67
Results.....	71
Appendix 1 – Key terms .....	74

## Introduction

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The aim of this review was to assess the operation and impact of diversion from prosecution in Scotland. We sought to provide an overview of diversion practice from a policing, prosecution and justice social work perspective, highlight what is working well and explore any barriers to the more effective use of diversion.

The review was carried out by HM Inspectorate of Constabulary in Scotland, HM Inspectorate of Prosecution in Scotland, the Care Inspectorate and HM Inspectorate of Prisons for Scotland. Given that effective partnership working is essential to the delivery of diversion, we considered that a similarly collaborative approach was required for its scrutiny.

The number of diversion from prosecution cases commenced rose by 12% between 2019-20 and 2020-21, the highest level in the last seven years. This rise is likely linked to changes in prosecution policy in 2019. Prosecution policy now states that diversion should be considered for all people where there is an identifiable need that has contributed to their offending and which can best be met through diversion. For children under the age of 18 in particular, there is a presumption that an alternative to prosecution will be in the public interest. More broadly, there has been a shift in public policy in recent years, with a greater focus on community justice and early intervention to address the underlying causes of offending.

We welcome this shift in focus as well as plans to optimise the use of diversion even further. Many accused persons require support for mental health, substance use or other issues and diversion from prosecution offers an opportunity for that support to be provided swiftly. Early intervention can help address the underlying causes of offending, avoid the person being drawn further into the criminal justice system and reduce or prevent further offending, to the benefit of the person, victims and communities. We therefore welcome the efforts made by a range of agencies involved in diversion at a national and local level to encourage greater use of diversion, to work in partnership and to deliver effective interventions.

During our review, we interviewed people who had been diverted from prosecution. They were overwhelmingly positive about their experience and welcomed the support they had received, saying it had helped them make meaningful changes in their lifestyle and behaviour.

In the past, people were often referred to diversion 'schemes' that provided support for a particular issue. Diversion practice has moved on, with people now receiving bespoke, person-centred interventions that are tailored to their needs. In the vast majority of cases, prosecutors can make a referral to justice social work without having to first check the availability of a service. This is a positive development and promotes equal access to diversion.

We consider that diversion is working well and is developing in a positive direction. The publication in 2020 of national guidelines on diversion has been a significant milestone, and we welcome ongoing work to revise them and hope that they will be re-launched to achieve widespread awareness and understanding of current policy and practice. We have also, however, found scope for improvement in how diversion from prosecution operates and we have made 34 recommendations. These recommendations are intended to support the diversion partner agencies to continue to plan and deliver diversion services more effectively, to manage diversion efficiently across agencies, and to maximise diversion while maintaining confidence in its use as an appropriate response to offending behaviour.

Scotland's National Strategy for Community Justice includes an aim to optimise the use of diversion and intervention at the earliest opportunity. Our findings show that there are several ways in which diversion could be increased, including by:

- improving the quality of information submitted by the police to COPFS to assist appropriate decision making by prosecutors
- further increasing consistency in case marking by COPFS
- ensuring the processes for managing diversion across agencies are as effective and efficient as possible
- increasing the take-up of diversion by accused persons. While diversion is voluntary, more could be done to tackle the high level of non-engagement in the diversion assessment process.

There also needs to be a recalibration of the processes for managing diversion from prosecution to account for cases in which the accused person is diverted in relation to more serious offending.<sup>1</sup> While diversion may only be used infrequently in such cases, there is nonetheless a need to strengthen the processes for managing them and to ensure they are robustly monitored.

There is a need to raise awareness of diversion as an appropriate response to offending by adults. Among professionals, confidence in the use of diversion for children is high and diversion is well-established as a positive and effective approach. More could be done to promote a similar level of confidence in the use of diversion for adults. The Children and Young People's Centre for Justice hosts a national forum for diversion practitioners and stakeholders working with children. We found that those who attended the forum typically have a better strategic and operational awareness of diversion, and we consider there to be merit in establishing a similar forum for those working with adults diverted from prosecution.

By its very nature, diversion from prosecution is focused on the needs and circumstances of the accused person and on providing them with support to address the underlying causes of their behaviour. While the impact of the offence on the complainer is taken into account by the prosecutor when they decide whether to offer diversion from prosecution, there should be a greater focus on the needs of complainers when diversion proceeds. In particular, there is a need to improve communication with complainers where the accused person in their case has been diverted.

In our recommendations, references to the 'diversion partner agencies' should be taken to include Police Scotland, COPFS, local authority justice social work services and Community Justice Scotland.

We would like to thank all those organisations and individuals who participated in our review and who shared their views and experiences with us. Their input has helped shape our findings and recommendations.

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<sup>1</sup> Throughout this report, where 'offending' or 'offences' are mentioned in relation to diversion from prosecution, this refers to alleged offending or alleged offences.

## Key findings

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### Direction

There is strong support for diversion from prosecution among those agencies involved in the diversion process. The use of diversion has risen in recent years and the diversion partner agencies are keen to extend its use further, in line with the government's national strategy for community justice.

The publication of national guidelines on diversion has been a significant milestone. The guidelines are valued by those who are aware of them. However, awareness of the guidelines is not yet widespread, resulting in variable practice across Scotland. The ongoing review of the guidelines offers an opportunity to address our recommendations and to promote greater standardisation in approaches to diversion.

Awareness of the national guidelines and of diversion from prosecution more generally could be improved by better training across the diversion partner agencies. In particular, the greater use of multi-agency training would help partner agencies gain a better understanding of each other's roles and responsibilities and facilitate communication between agencies.

There was strong and effective multi-agency collaboration at a strategic level to plan and deliver diversion services in some areas, supported by national strategy and guidance. However, other areas placed less emphasis on diversion service planning.

There is scope to increase the use of diversion from prosecution further by addressing key attrition points in the diversion process.

While some community justice partnerships expressed readiness to respond to an anticipated increase in diversion referrals, others were less confident about their capacity to manage an increase in referrals against a backdrop of already stretched resources.

Improved consultation with victims, communities and those with lived and living experience of diversion has the potential to enhance service planning and delivery.

Confidence in and awareness of diversion from prosecution for child accused were high, but there is scope to develop this further in respect of diversion for adults.

### Execution

When completed with relevant information, Standard Prosecution Reports submitted by the police allowed prosecutors to take informed decisions to divert accused persons from prosecution. Reports containing relevant information tended to relate to child accused.

In 26% of the cases we reviewed, information held by the police that could support a prosecutorial decision to divert was not included in the report. In only 10% of cases did the reporting officer give a view on the accused person's potential suitability for diversion.

There was limited awareness among reporting officers of diversion from prosecution and how information about the accused person's circumstances might support a decision to divert.

The creation of a national case marking unit within COPFS has promoted consistency in prosecutorial decision making across Scotland. However, consistency could be improved even further as some cases continue to be marked by other units whose staff sometimes have a lower level of awareness and understanding of diversion.

There is scope to support greater awareness of current diversion practice among all COPFS staff involved in marking and managing diversion cases by providing updated, comprehensive guidance and through training.

COPFS rarely notified justice social work of the reasons a person was being referred for an assessment of their suitability for diversion. However, new referral processes are being developed which should address this issue.

There were significant delays in processing some of the diversion cases we reviewed. The recent creation of a dedicated diversion administrative team should help avoid such delays recurring. Generally, more could be done to improve the efficient management of cases across COPFS and justice social work.

Suitability assessments were undertaken by a mix of social work and paraprofessional justice staff. Where the alleged offending was of a more serious nature, assessments were undertaken by qualified social workers and there was more likely to be early and effective communication between justice social work and COPFS.

79% of people assessed as unsuitable for diversion had not engaged in the assessment process. Assessments did not always indicate the extent of the efforts made by justice social work to engage the accused person before they were assessed as unsuitable.

The people we spoke to who were currently on, or had recently completed diversion were overwhelmingly positive about their experience. Many felt they had been given a 'second chance' to access support and to gain or maintain employment.

A range of interventions for people diverted from prosecution were available in every community justice partnership area. Diversion interventions were largely bespoke, person-centred and tailored to the needs and circumstances of the person.

The profile of people being referred for diversion is changing. This relates to the complexity of their needs and/or the seriousness or frequency of their offending. Some areas found this challenging, but others were responding by using appropriately trained staff, investing in further training or implementing appropriate protocols, all of which had resource implications.

There was effective multi-agency collaboration in delivering diversion interventions between justice social work and other services, including third sector organisations, youth justice, mental health, health, employment and housing.

Just over half of completion reports were rated as good or better, with the majority describing how the diversion intervention had addressed the issues identified at referral or during the suitability assessment.

Most suitability assessments and completion reports were submitted by justice social work to COPFS within the target timescale.

There was no nationally agreed template for suitability assessments, completion reports or diversion plans. This led to inconsistencies in the information provided to COPFS, as well as variation in how progress, outcomes and feedback from people on diversion was captured.

A more robust approach to the diversion process involving greater oversight by prosecutors is needed in respect of some cases, such as those involving more serious offending.

Justice social work staff are keen to learn the final outcome in cases where the accused person has received a diversion intervention, but they are rarely informed of this by COPFS.

There is a need for COPFS to improve its communication with accused persons who are diverted from prosecution. Template letters are generally not fit for purpose and are rarely tailored to individual needs.

COPFS should also improve its communication with complainers in cases where the accused person has been diverted from prosecution. Complainers were usually referred to the Victim Information and Advice service where they met specified criteria, but the referrals were rarely acted upon.

## **Results**

In the cases we reviewed, 90% of people who commenced diversion completed it successfully.

At a more strategic level, community justice partnerships were not always able to demonstrate either the impact of diversion or that intended outcomes had been achieved.

Across agencies and local areas, diversion outcomes were defined, gathered, recorded, communicated and used in varying ways, contributing to missed opportunities to benchmark performance in support of improvement in service design and delivery.

There are significant variations between local authorities in, for example, the rates at which diversion referrals are converted to cases commenced and at which cases commenced are successfully completed. These variations do not appear to be fully understood by partner agencies.

Some of the inconsistent diversion practices we found may contribute to inequity in diversion outcomes.

# Recommendations

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## **Recommendation 1**

While prosecution policy remains a matter for the Lord Advocate, the Scottish Government should lead a working group comprising the diversion partner agencies to coordinate implementation of the recommendations in this review.

## **Recommendation 2**

Community justice partners should ensure that appropriate services and interventions are available to all those who have been assessed as suitable for diversion. They should carry out joint strategic needs and strengths assessments to understand the needs of their local population, to inform service planning, and to assess their ability to meet an increased demand for diversion services.

## **Recommendation 3**

Community Justice Scotland should ensure that the revised national guidelines on diversion take account of the findings of this review. The revised guidelines should be re-launched, such that they are widely disseminated to community justice partners. Diversion partner agencies should ensure that they are used by staff and embedded in the planning and delivery of diversion processes and interventions.

## **Recommendation 4**

Through robust governance, community justice partnerships should improve collaboration and communication between statutory partners regarding people subject to diversion. In particular, the Crown Office and Procurator Fiscal Service (COPFS) should consider what more it can do to improve communication with partners at a local level.

## **Recommendation 5**

The diversion partner agencies should develop a training strategy that meets the needs of individual agencies and ensures that staff involved in diversion from prosecution are equipped to undertake their role effectively. At a national level, this should include awareness raising for the police, COPFS, justice social work, the third sector and other key partners. Locally, community justice partnerships should identify opportunities to deliver joint training across statutory partners and key agencies with a role in diversion from prosecution.

## **Recommendation 6**

Community justice partnerships should consult with victims, people with lived experience of diversion, and affected community groups in the planning of diversion services.

## **Recommendation 7**

The Scottish Government should review funding arrangements to maximise the use of diversion from prosecution and ensure the provision of interventions at the earliest opportunity.

## **Recommendation 8**

Police Scotland should ensure that reporting officers have an appropriate level of awareness of the overarching principles of diversion from prosecution, including the role of partner agencies, and a good working knowledge of the national guidelines on diversion.

## **Recommendation 9**

Police Scotland should ensure that internal police guidance, standard operating procedures and templates provide adequate information to guide reporting officers on the completion of Standard Prosecution Reports (SPRs) as they relate to diversion.

### **Recommendation 10**

Police Scotland should ensure that adequate supervision and quality assurance processes are in place to improve the quality of SPRs relevant to diversion.

### **Recommendation 11**

Police Scotland should ensure that information known to the police that is relevant to the diversion assessment, such as that held on the Interim Vulnerable Persons' Database, is included in SPRs.

### **Recommendation 12**

COPFS should ensure that prosecutors record the reason an accused person is being referred to justice social work for an assessment of their suitability for diversion. The identifiable need in relation to which the accused person is being considered for diversion by COPFS should be noted in the referral to justice social work.

### **Recommendation 13**

COPFS should review its internal guidance on diversion to ensure it is compatible with the national guidelines on diversion, reflects current practice and provides consolidated, comprehensive guidance for staff.

### **Recommendation 14**

COPFS should provide training to its staff on diversion from prosecution. This should be available to all staff involved in marking and managing cases for diversion.

### **Recommendation 15**

COPFS should identify the most appropriate process for referring an accused person for diversion and ensure:

- the process is reflected in clear, accessible instructions for staff and communicated to justice social work
- the guidance includes direction on whether and in what circumstances justice social work should await an instruction to proceed with diversion following a positive suitability assessment
- the revised process is followed in practice.

### **Recommendation 16**

Justice social work should be proactive in its efforts to engage with a person referred for assessment before concluding that they are not suitable. These efforts should be recorded in the suitability assessment sent to COPFS.

### **Recommendation 17**

COPFS and justice social work should work together to ensure that all referrals, assessments and completion reports are tracked and submitted timeously. A more robust system for following up overdue reports or responses should be put in place.

### **Recommendation 18**

When revising the national guidelines on diversion, Community Justice Scotland and partners should clarify what giving 'specific consideration' to victims during the diversion process entails. They should make clear to staff what is expected of them and establish or adapt processes as needed.

### **Recommendation 19**

Justice social work should ensure that staff delivering diversion interventions involving domestic abuse and harmful sexual behaviour are appropriately trained and supported to do so.

### **Recommendation 20**

While conducting the suitability assessment and throughout the diversion period, justice social work staff should assess whether the accused person's needs necessitate a diversion intervention lasting longer than three months. Where this is envisaged, COPFS should be informed.

### **Recommendation 21**

When revising the national guidelines on diversion, Community Justice Scotland and partners should develop a standardised, nationally agreed template for diversion planning. Justice social work should ensure that people diverted from prosecution actively contribute to and agree their diversion plans.

### **Recommendation 22**

Justice social work should develop and use a standard tool for gathering feedback from people who have been diverted from prosecution. This feedback should be incorporated in completion reports and should inform the continuous improvement of the service.

### **Recommendation 23**

COPFS and justice social work should improve communication between them in support of the diversion from prosecution process. Communication is particularly important in more complex or serious cases.

### **Recommendation 24**

When creating diversion plans, justice social work should provide a clear rationale for the intended levels of contact during the diversion intervention commensurate with the circumstances of the case.

### **Recommendation 25**

COPFS and justice social work should review their processes for managing diversion from prosecution to ensure they are suitable for all types of cases. In particular, the process for managing cases involving more serious offending should be sufficiently robust. The agreed processes should be reflected in guidance and training for all relevant staff.

### **Recommendation 26**

Community Justice Scotland and partners should develop standardised templates for suitability assessments and completion reports which comply with the national guidelines on diversion. Consideration should also be given to developing abbreviated and full templates if new diversion processes are adopted in light of Recommendation 25.

### **Recommendation 27**

The diversion partner agencies should agree how further offending by the accused person during the diversion period affects their diversion from prosecution. Where the person has been diverted in relation to more serious charges, protocols should be developed to gather and share information about further offending which should be used to inform decisions about the final prosecutorial action or whether to continue diversion.

### **Recommendation 28**

COPFS should inform justice social work of the final marking in cases where the accused person has received a diversion intervention.

### **Recommendation 29**

COPFS should review when and how it communicates with the accused person in cases that have been diverted from prosecution. In particular, COPFS should:

- revise its template letters to accused persons who are being diverted from prosecution
- ensure letters are in plain English and tailored to the individual needs of the accused person
- ensure letters are sent promptly at key stages of the diversion process
- ensure this improved approach is clearly set out in the national guidelines and in COPFS policy and instructions to staff.

### **Recommendation 30**

COPFS should revise its approach to complainers in cases where the accused person is diverted from prosecution. The new approach should be reflected in policy and in guidance and training for staff. Complainers meeting specified criteria should be referred to Victim Information and Advice and kept informed of developments in their case.

### **Recommendation 31**

COPFS should clarify whether the Victims' Right to Review applies in cases where the accused person has been diverted from prosecution and this information should be shared with staff and made public.

### **Recommendation 32**

Community justice partnerships should implement effective mechanisms to monitor the impact of diversion and outcomes for people who have been diverted. This information should be used by all diversion partner agencies to inform service design and delivery.

### **Recommendation 33**

COPFS and justice social work should ensure that assessment, diversion intervention and case outcomes are recorded accurately, consistently and in accordance with the national guidelines on diversion. To support this:

- guidance on recording should be provided to staff
- those who have not engaged in the assessment process should be recorded separately to those who have been assessed as not suitable for diversion
- COPFS should consider the need for more nuanced marking codes which more accurately reflect diversion outcomes.

### **Recommendation 34**

The Scottish Government should review the diversion data it requests and publishes annually to ensure that national data on diversion is comprehensive, accurate, and usefully informs measuring the effectiveness of diversion.

# Context

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## What is diversion from prosecution?

1. Diversion from prosecution is one of several alternatives to prosecution available to the Crown Office and Procurator Fiscal Service (COPFS) upon receipt from the police of a report of alleged offending. Diversion is the process by which COPFS refers an accused person to local authority justice social work (or a partner agency) for support, treatment or other action as a means of addressing the underlying causes of the alleged offending and preventing further offending. Diversion from prosecution will be considered in any case where the person reported to COPFS has an identifiable need that has contributed to the offending and where it is assessed there is a sufficiency of evidence and that diversion is the most appropriate outcome in the public interest.

## Diversion in context

2. Diversion from prosecution is one of a range of community justice interventions available to address the underlying causes of offending and to prevent reoffending. Although prosecution policy is a matter for the Lord Advocate and prosecutorial decisions in individual cases are taken by the procurator fiscal, diversion has Scottish Government support. In 2016, the Scottish Government published its first National Strategy for Community Justice and set out its vision for people to be held to account for their offending, but also to be given the opportunity to tackle the causes of that offending via early intervention, diversion and community-based disposals.<sup>2</sup> The strategy stated that community justice partners should:  
'Maximise opportunities for the use of diversion. This will require a balance of appropriate decision-making by the Procurator Fiscal and provision of suitable services by criminal justice social work and the third sector.'
3. The strategy described the Scottish Government's understanding of the aim of diversion from prosecution as being to prevent individuals entering the wider criminal justice system by addressing the underlying causes of offending, and to help ensure people get access to the drug, alcohol and mental health services they need.
4. In June 2022, the Scottish Government published a revised National Strategy for Community Justice.<sup>3</sup> The new strategy reiterates the government's commitment to community-based interventions. It sets out four national aims for community justice, one of which is to, 'Optimise the use of diversion and intervention at the earliest opportunity'. One of the strategy's priority actions is to:  
'Enhance intervention at the earliest opportunity by ensuring greater consistency, confidence in and awareness of services which support the use of direct measures and diversion from prosecution.'
5. The new strategy highlights the importance of ensuring effective services provided by justice social work and the third sector are in place across Scotland for those who have been diverted from prosecution, and of decision makers having confidence in those services. It also emphasises the need for community justice partners, including the police, COPFS, justice social work and the third sector, to work together to achieve positive outcomes.

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<sup>2</sup> Scottish Government, National Strategy for Community Justice (2016).

<sup>3</sup> Scottish Government, [National Strategy for Community Justice](#) (2022).

## National guidelines

6. To support diversion from prosecution, Community Justice Scotland<sup>4</sup> published national guidelines on diversion in 2020.<sup>5</sup> Developed in partnership with Police Scotland, COPFS, the Scottish Government and others, the guidelines describe the aims and benefits of diversion, the diversion process and the role played by the police, prosecutors and local authorities.
7. The benefits of diversion are described in the guidelines as:
  - providing an opportunity to the accused for support with issues related to their offending
  - avoiding unnecessary contact with the criminal justice system
  - not receiving a conviction for the alleged offence, which can impact the accused's longer term employment opportunities.

## The diversion process

8. The following is a brief overview of the diversion process and the role played by the key agencies involved.

### Police

9. When the police detect a crime, they report the accused person to COPFS via a Standard Prosecution Report (SPR). The SPR template features an antecedent section in which the police should record information relating to the accused's mental health, alcohol or drug use, risk, vulnerability, disability, attitude to offending, family dynamics and education or employment status. There is also an opportunity for the police to express a view on the accused's potential suitability for diversion from prosecution, based on their knowledge of the incident and the individual.

### Crown Office and Procurator Fiscal Service

10. The information provided by the police in the SPR is used by COPFS to inform prosecutorial decision making. Prosecution decisions are guided by the Prosecution Code as well as case marking instructions. In relation to each case, prosecutors will consider whether there is a sufficiency of evidence and, if there is, what prosecutorial action, if any, is in the public interest. Since 2019, prosecution policy has required that diversion be considered for all individuals reported to COPFS where there is an identifiable need which has contributed to the offending which can best be met through diversion.
11. Where a prosecutor considers that an accused person should be diverted from prosecution, the prosecutor:
  - writes to the accused, offering them the opportunity to opt out of diversion (diversion is a voluntary process)
  - refers the accused to local authority justice social work for assessment.

### Justice social work

12. On receipt of a referral, justice social work assess whether the accused person is suitable for diversion and submit an assessment report to COPFS within 20 working days. If the person is suitable, justice social work design an intervention that will address the underlying causes of their offending. The intervention may be delivered by justice social work, by another statutory service, or by the third sector. At the

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<sup>4</sup> Established by the Community Justice (Scotland) Act 2016, the role of Community Justice Scotland is to oversee and report on the performance of community justice services, and promote and support improvement and awareness of community justice.

<sup>5</sup> Community Justice Scotland, [National Guidelines on Diversion from Prosecution in Scotland](#) (2020).

conclusion of the intervention (which usually lasts three months), justice social work submit a completion report to COPFS.

13. Where the accused person is assessed as unsuitable for diversion or where justice social work consider the person has not successfully completed the diversion, prosecutors reconsider the case and the full range of prosecutorial options will be available to them (for example, to prosecute, to offer another alternative to prosecution or to take no further action).

### **Diversion – an example**

Joe is 28 years old. He has previous convictions for shoplifting.

Late one night he was seen by neighbours walking in the middle of the road, kicking car tyres, swearing and continually shouting threats of violence. Alarmed by his behaviour, they phoned the police. When the police arrived, Joe acted erratically and appeared delusional and paranoid. He was arrested for a contravention of section 38(1) of the Criminal Justice and Licencing (Scotland) Act 2010 (threatening behaviour).

The police submitted an SPR to COPFS and included information about Joe's excessive drinking and their view that he might also have mental health issues. The prosecutor marking the case noted these identifiable needs and referred Joe to justice social work for an assessment of his suitability for diversion from prosecution. Joe agreed to take part in diversion and he was assessed as suitable, with an appropriate plan being devised for the diversion intervention.

Joe engaged with the diversion process which involved:

- offence-focused work, which explored and addressed his offending behaviour
- engagement with an alcohol counselling service
- a referral to counselling via his GP in relation to his mental health.

After three months, Joe's diversion worker submitted a completion report to COPFS saying that Joe had successfully completed his diversion. As a result of Joe addressing his alcohol issues and his mental health stabilising, he was able to return to his previous employment as a painter and decorator. The offence-focused work undertaken by Joe helped him recognise the alarm he had caused to his neighbours and he had plans to make amends. After reviewing the completion report, COPFS took no further action against Joe. Following completion of diversion, Joe continued to engage with support services.

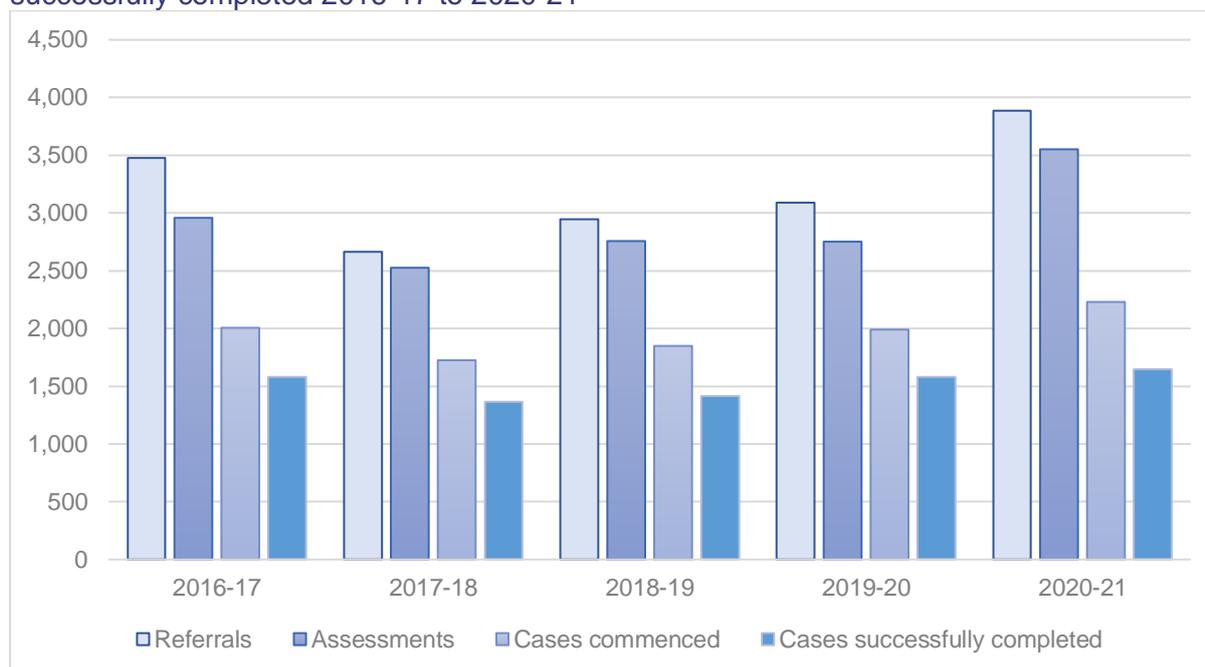
### **Data on diversion**

14. The Scottish Government publishes annual data on diversion from prosecution in its Justice Social Work Statistics series.<sup>6</sup> The data is extracted from justice social work management information systems. Chart 1 shows the extent of diversion since 2016, including the number of cases referred by COPFS to justice social work, and the number of assessments carried out by justice social work regarding an individual's suitability for diversion, as well as the number of diversion cases commenced and successfully completed.

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<sup>6</sup> Scottish Government, [Justice Social Work Statistics](#).

Chart 1 – Diversion from prosecution referrals, assessments, cases commenced and cases successfully completed 2016-17 to 2020-21



15. Chart 1 shows that the number of referrals fluctuated over this five-year period, dropping from 3,476 in 2016-17 to 2,662 the following year before rising steadily to 3,886 in 2020-21. A similar pattern can be seen for cases commenced and cases successfully completed.
16. The Scottish Government also publishes data on the age, gender, employment status and ethnicity of the accused person in the diversion cases that were commenced. This data shows that, for example:
  - The majority of diversion cases commenced involve males. In 2020-21, 67% of cases involved males and 33% involved females. This gap has widened in recent years – in 2016-17, 58% of cases involved males and 42% involved females.
  - Those aged under 18 made up 26% of diversion cases commenced in 2020-21, up from 21% in 2016-17 (though down from 33% in 2019-20).
  - Those aged under 21 have consistently made up the largest proportion of diversion cases commenced (40% of cases in 2020-21). Those aged over 40 are consistently the second largest proportion (27% of cases in 2020-21).
17. As well as national data, the Scottish Government publishes data at local authority level. This data shows that there are significant variations in diversion across Scotland. While nationally there were 5.8 diversion cases commenced for every 10,000 in the population in 2020-21, this ranged from 12.1 to 1.5 cases commenced.
18. Across Scotland, the rate of cases commenced per 10,000 population rose by 11% between 2016 and 2021. Four local authorities more than doubled their rate of cases commenced during this period while 11 local authorities saw their rates fall. In one authority, the rate of diversion cases commenced dropped by 66% over the five-year period.

19. Using the Scottish Government's data, we made approximations of the conversion rate from referrals to cases commenced between 2016 and 2021.<sup>7</sup> This showed wide variation between local authorities. While 61% of referrals go on to diversion across Scotland, six local authorities appeared to have conversion rates of 80% or higher, while six local authorities had conversion rates of below 50%.
20. Similarly, we made approximations of the success rate of cases commenced between 2016 and 2021.<sup>8</sup> Again, this showed significant variation between local authorities. While 77% of cases commenced were successfully completed across Scotland, in 11 local authorities the success rate was more than 90% while in three local authorities it was less than 60%.
21. COPFS also holds data on diversion from prosecution although this is not published. This data includes the type of charges faced by those who receive a first substantive marking of diversion.<sup>9</sup> Over the period from 2016-17 to the first half of 2021-22, there were 14,486 cases in which an accused was marked for diversion based on a single charge.<sup>10</sup> The five most common types of charge account for more than 80% of all single charge cases where the accused person was marked for diversion. The five most common charges were:
  - offences relating to drugs (25%)
  - breach of the peace etc (23%)
  - common assault (19%)
  - shoplifting (8%)
  - dangerous and careless driving (7%).
22. Accused persons can be diverted in respect of serious offences, such as sexual crime, although this tends to be rare. In such cases, the accused person tends to be under the age of 18. Over the period from 2016-17 to the first half of 2021-22, only 1% of single charge cases initially marked for diversion involved a sexual offence.

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<sup>7</sup> This data can only be an approximation and should not be taken to represent the actual conversion rate because some cases commenced within the five-year period will have been referred before that period, and some referred cases may not have commenced until after the period.

<sup>8</sup> This data can only be an approximation and should not be taken to represent the actual success rate because some successfully completed cases within the five-year period will have been commenced before the five-year period and some cases commenced within the period will not have been completed afterwards.

<sup>9</sup> A first substantive marking for diversion refers to the prosecutor's initial assessment of the case. In some of these cases, the accused person may not go on to be diverted, for example, because they are assessed as unsuitable by justice social work.

<sup>10</sup> Data on those who faced multiple charges has been excluded from this analysis because it is not possible to determine from the data which of the charges the diversion marking referred to. For example, an accused may face three charges, but a sufficiency of evidence only exists in relation to one of those charges. The accused can only be diverted in relation to that charge while no action will be taken in respect of the other two charges.

## Methodology

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23. In this review, we have sought to assess the operation and impact of diversion from prosecution in Scotland. We have provided an overview of diversion practice from a policing, prosecution and justice social work perspective, highlighted what is working well and explored any barriers to the more effective use of diversion.
24. The review was carried out by HM Inspectorate of Constabulary in Scotland (HMICS), HM Inspectorate of Prosecution in Scotland (IPS), the Care Inspectorate and HM Inspectorate of Prisons for Scotland (HMIPS) (the scrutiny partners).
25. Each of the four scrutiny partners has an inspection framework which underpins our approach to scrutiny. All of the frameworks are informed by the European Framework for Quality Management (EFQM) Model, the latest iteration of which incorporates three overarching tenets: direction, execution and results. In the context of diversion from prosecution, we considered:
  - direction – the extent to which the police, the Crown Office and Procurator Fiscal Service (COPFS) and justice social work, alongside other community justice partners, share a vision for diversion from prosecution and collaborate on a strategy for delivery, while respecting the important principle of independent prosecutorial decision making
  - execution – the effectiveness of systems and processes that support diversion from prosecution and the progress made in implementing the national guidelines on diversion
  - results – the extent to which the impact of diversion is understood and the intended outcomes are being achieved.
26. In relation to execution, we considered the individual and collective roles that the justice partners play at the various stages in the diversion process:
  - the Standard Prosecution Report (SPR)
  - the decision to divert
  - the referral to justice social work
  - the suitability assessment and the response by COPFS
  - the diversion intervention
  - the completion report and the response by COPFS
  - communication with the accused
  - communication with the complainer.
27. In support of our review, we gathered evidence from a range of sources including:
  - a review of relevant strategies, policies, guidance, procedures and other documentation relating to diversion from prosecution
  - analysis of data on diversion
  - a survey of all community justice partnerships in Scotland regarding the operation of diversion from prosecution in their local area
  - extensive interviews with those involved or with an interest in the diversion process
  - a review of cases in which an initial decision to divert the accused from prosecution had been taken by COPFS, as well as some cases in which diversion did not appear to have been considered.
28. Our interviews with those involved in diversion included in-depth interviews in four local authority areas with justice social work staff, other community justice partners, and 13 people who had been diverted from prosecution. The people who had

experience of being diverted were put forward for interview by justice social work. We also interviewed professionals involved in diversion in a further three local authority areas which had highlighted particularly notable or novel practice in their responses to our survey. Interviews were also carried out with a range of relevant personnel within Police Scotland and COPFS, as well as third sector organisations involved in delivering diversion interventions and other key stakeholders such as Community Justice Scotland, Social Work Scotland and the Children and Young People's Centre for Justice (CYCJ).

29. With the assistance of Victim Support Scotland, we sought to gather the views and experiences of complainers in cases where the accused person had been diverted from prosecution. This proved challenging however, as often complainers are unaware that the accused person has been diverted.
30. We reviewed a statistically significant sample of 90 cases in which the first substantive marking decision taken by prosecutors was to divert the accused from prosecution to justice social work.<sup>11</sup> These marking decisions were all taken in the three months between 1 March and 31 May 2021. This allowed sufficient time for the referral to justice social work to have been made and for the diversion intervention to have been delivered and the case closed before we assessed it in the summer of 2022. The 90 cases were randomly selected for review. Ten cases were selected from each of the four local authority areas in which we carried out in-depth interviews. The remaining 50 cases were randomly selected from across the rest of Scotland.
31. While suitability assessments are usually submitted to COPFS within 20 days of referral and diversion interventions are usually completed within three months, these timescales were temporarily extended in 2020 in response to the Covid-19 pandemic. This meant that all of the cases we reviewed were subject to extended timescales with suitability assessments due within six to eight weeks of referral and six months being allowed for the diversion intervention to take place.
32. In each of the 90 cases, we reviewed:
  - the content of the SPR submitted by the police to COPFS
  - the decision taken by prosecutors to divert the accused person from prosecution
  - how the case was managed by justice social work, including any suitability assessment, diversion intervention and completion report.
33. We reviewed a further five cases in which the accused person was charged with a sexual offence and in which the first substantive marking decision was for diversion. All of the accused persons were aged under 18. We reviewed these cases with a particular focus on the prosecutor's decision to divert and whether this was informed by any discussions with justice social work, and what communication took place with the complainer.
34. We also reviewed 30 cases featuring charges which often result in a diversion marking but which were not marked for diversion. This was not a statistically significant sample, but we assessed these cases with a view to checking whether any should have been marked for diversion.

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<sup>11</sup> The results of our case review are statistically significant with a confidence interval of 95%±10%.

## Key findings from review of cases



**90** cases marked for diversion from prosecution

**79%**  
of accused persons marked for diversion were male



**21%**  
were female



**27%**  
were under the age of 18



**43%**  
had no previous convictions



**86%**  
had not previously been offered diversion



**43%**  
were diverted in relation to possession of drugs



**88**  
accused persons were referred to justice social work



**88%**  
had an identifiable need



**60%**  
were assessed by justice social work as suitable for diversion



**39%**  
were assessed as unsuitable\*



\*79% of which was due to non-engagement of the accused person in the assessment



**50** accused persons went on to be diverted



**90%**  
of diversion interventions were completed successfully

Of those cases where the accused person **did not** go on to diversion

**56%** resulted in no further action being taken

## Direction

35. The Scottish Government's National Strategy for Community Justice sets the national direction for community justice.<sup>12</sup> The strategy recognises that the effective operation of diversion from prosecution cannot be achieved by any one agency and is dependent on partner agencies working together at a strategic and operational level. A broad range of statutory partners as well as other stakeholders, such as the third sector and communities themselves, play a vital role in the planning and delivery of community justice services, including diversion. The statutory partners for community justice are outlined at Figure 1.<sup>13</sup>

Figure 1 – Community justice statutory partners



36. Community justice partners acting together at the local level are referred to as 'community justice partnerships' (CJPs). Their role is set out in the Community Justice (Scotland) Act 2016 (the 2016 Act). CJPs are expected to assess the community justice related needs of people and communities in their local authority area and ensure that appropriate services and interventions are in place. While the key stages of the operational delivery of diversion from prosecution are led by Police Scotland, COPFS and justice social work, community justice partners are collectively responsible for ensuring that effective diversion services are available for those assessed as suitable for diversion.
37. Community Justice Scotland also has a key role to play in the oversight of the diversion from prosecution process as well as a range of other responsibilities across the community justice landscape. Community Justice Scotland is the national leadership body for community justice and has a statutory duty to promote the national strategy. It also has a duty to monitor performance in the provision of community justice and the achievement of nationally determined outcomes. Community Justice Scotland identifies and promotes good practice; provides advice,

<sup>12</sup> Scottish Government, [National Strategy for Community Justice](#) (2022).

<sup>13</sup> While the effective operation of diversion from prosecution requires a multi-agency approach, prosecution policy remains a matter for the Lord Advocate and the decision to refer an accused person for an assessment of suitability for diversion is one solely for COPFS.

guidance and assistance to CJPs; and makes national and local improvement recommendations where appropriate.

### **The vision for diversion from prosecution**

38. The Scottish Government has for some time sought to increase the use of early intervention and prevention approaches in order to reduce the likelihood of people being drawn further into the criminal justice system. Its vision is for people to be held to account for their offending, but also to be given the opportunity to tackle the causes of that offending at an early stage through diversion and community-based disposals.
39. In its Programme for Government 2021-22, the Scottish Government outlined plans to invest in a 'substantial expansion of community justice services supporting diversion from prosecution, alternatives to remand and community sentencing, which evidence shows is more effective at reducing reoffending.'<sup>14</sup>
40. In our review, we have focused on the extent to which the statutory partners, particularly the police, Crown Office and Procurator Fiscal Service (COPFS) and justice social work, share a vision for diversion from prosecution and have collaborated effectively to maximise opportunities for diversion through strategic planning. We have also considered how prepared community justice partners are to meet the expectation of the Scottish Government that the use of diversion from prosecution should be optimised.

### **National and local leadership**

41. The extent to which national and local leadership enables opportunities for effective use of diversion from prosecution is key to achieving successful outcomes. Our review considered how well national strategy, leadership and oversight supports diversion from prosecution and how effectively CJPs are operating to deliver a shared strategy.
42. The current National Strategy for Community Justice provides a clear vision for community justice in Scotland. It sets out the role of community justice partners and details national aims and priority actions intended to drive the community justice agenda. The national strategy highlights the importance of partnership working and the significance of early intervention in order to have the greatest impact. It states:  
'Where appropriate and relevant, effectively diverting people away from prosecution – or away from the justice system entirely – can allow individuals to address a range of issues, behaviours or needs which have contributed to their alleged offending at the earliest opportunity. This improves outcomes for both individuals and communities, and can lead to less offending and reoffending and, ultimately, fewer victims and harm to society.'<sup>15</sup>
43. CJPs have been established in each of the 32 local authorities across Scotland. Three authorities have opted to work in partnership across their areas, meaning 30 CJPs were operating at the time of our review. While CJPs have arrangements in place for the provision of diversion services, there was considerable variation in the level of diversion across areas. Consequently, the extent to which CJPs were meeting the expectations of the national strategy in respect of diversion from prosecution also varied.

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<sup>14</sup> Scottish Government, [A fairer, greener Scotland – Programme for Government 2021-22](#), page 101.

<sup>15</sup> Scottish Government, [National strategy for community justice](#) (2022).

44. The national strategy states there should be consistency in the delivery of diversion from prosecution to ensure that individuals have appropriate access to interventions regardless of where they live. However, some of the inconsistent practices we noted risk contributing to inequities in accessing diversion and in diversion outcomes. We also found there to be a lack of shared agreement on intended outcomes of diversion from prosecution and inconsistent gathering and analysis of outcomes across CJPs. This limited the ability of partnerships to use data to inform future planning.
45. To develop effective community justice plans, CJPs should form a comprehensive understanding of the needs of their local population. From our survey of CJPs, we noted that while some have used strategic needs and strengths assessments to effectively inform service planning for diversion, this approach was not universal. While some had assessments covering community justice generally, diversion did not always feature prominently. Some partnerships indicated they were awaiting the development of a new Outcomes, Performance and Improvement Framework before setting their community justice priorities.<sup>16</sup>
46. We found that while CJPs had planned for and delivered diversion services for children under 18, service planning and the provision of interventions for adults was more limited in many areas.
47. Measuring the impact of diversion was considered to be a challenge across CJPs. There was a lack of shared vision and agreement as to the intended outcomes of diversion, varying between addressing needs and/or risks, reducing reoffending, and facilitating the person's engagement with non-justice services.
48. In terms of governance arrangements, CJPs were not the sole vehicle for direction-setting or strategic planning for diversion from prosecution. Others involved included community planning partnerships and public protection committees which existed prior to the establishment of CJPs, and through which partnership working was already established.
49. Some areas informed us that they have used Covid-19 funding provided by the Scottish Government to invest in developing diversion services. In some instances, this included the recruitment of dedicated staff for the coordination of local diversion arrangements.

### **Partnership working**

50. Community justice partnership (CJP) meetings were the main mechanism by which statutory partners and key stakeholders planned the delivery of local community justice services. While we found evidence of effective multi-agency collaboration at a strategic level to plan and deliver diversion services in some areas, others placed less emphasis on diversion service planning. Some of the survey responses we received were focused on operational issues with limited reference to collaborative working at a strategic level.
51. Strategic partnership working was highlighted as a strength in approximately one third of the CJP survey responses. These CJPs described strong governance arrangements and multi-partner forums to plan for diversion services. Our interviews with statutory partners in the areas we visited affirmed that strong, collaborative working relationships, combined with a shared vision for community justice, were the basis for effective governance.

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<sup>16</sup> The 2016 Act requires Scottish Ministers to publish a performance framework in relation to community justice, known as the Outcomes, Performance and Improvement Framework. The Framework is currently being revised.

52. We found that most statutory partners and the third sector contributed to CJPs through regular involvement and representation at an appropriate level but there was a lack of consistent representation from COPFS across the majority of areas. CJPs acknowledged that this would be resource intensive and challenging for COPFS as a national organisation much of whose work is organised by function rather than geography. Moreover, while COPFS has a role in respect of diversion, the work of CJPs is much broader, covering all aspects of community justice including those whose relevance to COPFS is limited. However, the potential benefit and value of having increased involvement from COPFS in the strategic planning process was highlighted by most CJPs.
53. Interviews in the areas we visited highlighted that the degree of communication between COPFS and other partners varied locally and there were sometimes limited opportunities for dialogue. However, at a more strategic level, Criminal Justice Board meetings take place for each of the six sheriffdoms. These offer a potentially useful mechanism for the various partners to share and receive feedback on diversion as well as other matters. COPFS has begun to make arrangements for staff from its national marking team to provide a standard input for these meetings. While welcome, this may not sufficiently meet the needs of local authority-based CJPs – for example, more than one local authority area straddles two sheriffdoms.
54. Some CJPs had introduced arrangements intended to improve communication and collaboration between partners. In one area, partners from Police Scotland, COPFS and justice social work have developed information sharing and collaboration protocols with a view to improving the quality of information contained within SPRs. A pilot has been introduced to examine the impact of this collaboration which, while at an early stage of development, has shown improvement in the quality of information relevant to diversion within SPRs.
55. We found evidence of effective collaboration with alcohol and drug partnerships and mental health services in some CJPs and also saw that some had combined resources to jointly fund posts and projects for diversion.

### **National guidelines**

56. While some senior leaders across the diversion agencies were aware of the national guidelines on diversion published in 2020, others were not. Most noted that this was an unfortunate consequence of the timing of the publication, at the very early stage of the pandemic when the focus of most operational staff was on implementing contingency plans and engaging in the emergency response. While some efforts had been made to disseminate the guidelines, awareness of them and their impact had been low.
57. At the time of our review in 2022, awareness of the guidelines remained limited. Little reference was made to the guidelines in our interviews with frontline justice social work and COPFS staff. Interviews with frontline police officers (predominantly response officers) in the areas we visited highlighted that there was no awareness of the national guidelines. Such low awareness inevitably impacted the extent to which the processes and protocols outlined in the guidelines were implemented.
58. Where staff were familiar with the guidelines, they were viewed as sufficiently flexible and reflective of the person-centred principles of providing a diversion intervention. These staff stated that the processes outlined within the guidelines were useful in supporting effective discussions between partners on how diversion cases should be managed. We heard of positive examples of COPFS and justice social work staff

using the guidelines to highlight to partners the approaches to be taken in particular circumstances.

59. A review of the national guidelines commenced in November 2021 and is expected to conclude in Spring 2023. This is being led by Community Justice Scotland with the involvement of key partners including Social Work Scotland, COPFS and Police Scotland. We anticipate that the revised guidelines will reflect the findings of our review. Most community justice partners we spoke with welcomed the work being done on the guidelines and hoped that they would be relaunched with a view to achieving greater awareness and impact across the relevant agencies.

### **Agency-specific guidance**

60. As well as the national guidelines, some of the diversion partner agencies have their own guidance relevant to diversion. Police Scotland has guidance for officers on completing Standard Prosecution Reports (SPRs) in the form of a reports and statements writing guide.<sup>17</sup> While this provides useful guidance on a range of issues that must be considered and included in an SPR, it does not make specific reference to diversion from prosecution nor what is expected of the reporting officer in this regard. That said, the guidance does require reporting officers to provide relevant information on the accused person's circumstances and potential vulnerabilities within the antecedents section of the report.
61. Additional detailed guidance is available on the police intranet in the form of report writing guides. These provide instruction on the completion of the antecedents and remarks sections of an SPR.
62. COPFS also has useful guidance for staff on diversion from prosecution. This was a combination of general guidance on marking cases for diversion and guidance on marking specific types of cases (in relation to which diversion may be an appropriate prosecutorial option). There were some inconsistencies in the COPFS guidance however, with the marking instructions for some offence types making clear reference to diversion considerations while instructions for other offences did not. There was relatively comprehensive guidance to inform decisions to divert children from prosecution, but staff felt the guidance was less clear in relation to adults. There was no reference to the national guidelines on diversion in COPFS guidance, and there were some inconsistencies between COPFS guidance and the national guidelines on how diversion cases should be managed.
63. A review of COPFS guidance is required to ensure that it is clear, consolidated and includes reference to the national guidelines where appropriate. The inclusion of practical examples and scenarios for case markers relevant to the consideration of diversion would be beneficial. We anticipate any revision of COPFS guidance will reflect the findings of our review.

### **Impact of centralised marking on partners**

64. Within COPFS, the National Initial Case Processing (NICP) unit was established to promote consistency and efficiency in the marking of cases, and to facilitate a national approach to prosecution.<sup>18</sup> In the past, marking had been carried out by prosecutors working in local offices. The centralisation of much case marking by COPFS was an issue raised by several CJPs in their responses to our survey and in interviews with justice social work staff. They felt centralised marking negatively affected their ability to communicate with COPFS at a local level, to liaise over

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<sup>17</sup> Police Scotland, Reports and statements: standard operating procedures (March 2022).

<sup>18</sup> See paragraph 108 for more detail on NICP.

decisions about diversion and for COPFS to be responsive to local priorities. Some felt there had been a loss of local knowledge within COPFS, and they described difficulties knowing who to contact at COPFS.

65. In some areas, we noted there was some disconnect between the partners and a lack of understanding among other partners of COPFS policy on and processes for diversion including (for example, a lack of knowledge about the rebuttable presumption against prosecution for a child accused). However, there were examples of some areas reporting better engagement with COPFS and COPFS staff attending local partnership meetings. In these areas, communication between agencies and a better understanding of each other's roles was evident. While we consider that centralised marking has brought benefits in terms of consistency and efficiency, there is clearly more for COPFS to do to better manage its relationships at a local level and to make itself more accessible to partners.

### **Training and awareness-raising**

66. There was no national training programme for diversion from prosecution at the time of our review. At a local level, joint training had been introduced in some areas and included partners such as the police, justice social work and the Crown Office and Procurator Fiscal Service (COPFS). Where joint training had taken place, we heard that it had benefits, including developing a shared understanding of diversion roles, processes and terminology. We also heard that joint training had been more widespread before the pandemic but had declined recently. However, some of the community justice partnerships (CJPs) we met were developing plans for joint training on issues relevant to diversion. In relation to joint and agency-specific training, there was a general sense that more was available on diverting children from prosecution, but less was available in relation to adults leading to a gap in knowledge.
67. A review and re-launch of the national guidelines presents an opportunity for the further development and delivery of joint training. Joint training would help staff gain a better understanding of the roles of other agencies involved in the diversion process and would facilitate communication between partners, all with a view to improving case outcomes. This would be particularly helpful in supporting agencies to respond to the changing profile of accused persons and offences being diverted.
68. There were no internal diversion training or awareness raising programmes operating within Police Scotland. The need for training and awareness raising was recognised by senior officers, some of whom considered that this could be aligned to raising awareness of the force's harm reduction strategy<sup>19</sup> given the links to identifying and understanding vulnerabilities. While direct measures and alternatives to prosecution featured in the training of probationers, there was no input regarding diversion from prosecution. Those responsible for probationer training indicated a willingness to incorporate this into future training following liaison with local and specialist police divisions on what may be required.
69. Some COPFS staff had received inputs from justice social work, which they felt had provided a useful insight into diversion interventions. While there was no widespread training across COPFS focusing on diversion from prosecution, we heard that training on diversion is included as part of the induction for case markers in National Initial Case Processing unit (NICP). NICP staff felt there was a good level of training on diversion as well as awareness raising, but said this was not consistently available for staff working in other units. Most staff considered that additional training would be

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<sup>19</sup> Police Scotland, [Harm Reduction Strategy 2020-23](#).

useful, including refresher training for NICEP and training and awareness raising for those in other teams who mark cases and including those who administer the diversion process.

70. A national forum led by the Children and Young People's Centre for Justice provided a useful platform for a wide range of practitioners and senior personnel across statutory partner agencies and key stakeholders. Meetings were well attended and played an important role in raising awareness of diversion from prosecution and associated services and interventions. The forum was also considered to be helpful in developing a shared understanding of the role and practice of other partners. Of the staff we interviewed during our review, those who had attended the forum typically had a better understanding of the strategic context for diversion as well as a better awareness of national guidelines and understanding of diversion processes.

### **Consultation with victims, communities and those with lived experience**

71. There was limited evidence of consultation with victims and affected community groups in the planning of diversion services. Most strategic leaders and frontline managers in justice social work recognised that there was a lack of understanding of diversion within communities and, as a result, perhaps a negative public perception of it. There was a need to build public confidence in diversion as an alternative to prosecution. Some areas highlighted plans to address this through greater collaboration with organisations providing support to victims and improved community engagement. Some areas described plans for increased consultation with victims and those with lived experience of diversion in relation to service planning and other developments that may affect them, which we would welcome.

### **Readiness for expansion of diversion from prosecution**

72. Among strategic leaders, there was a clear commitment to expand the use of diversion from prosecution in line with the national strategy for community justice, the programme for government and the recommendations made by the Scottish Drugs Deaths Taskforce.<sup>20</sup> Indeed, in our review, we have noted several ways in which the number of accused persons diverted from prosecution could be expanded, through better identification of accused persons suitable for diversion and through improvements in diversion processes. If these are addressed in line with our recommendations, the demand for diversion should increase.
73. While most community justice partnerships (CJPs) valued diversion services and recognised the benefits of diversion, they noted that additional services and interventions would be needed to meet the expected rise in demand, which would come at additional cost.
74. Moreover, additional services and interventions would be required to meet the increasing complexity of cases being referred for diversion. Community justice partners report that there has been a gradual increase in accused persons being considered for diversion in relation to more serious offending, including domestic abuse and sexual crime. Should referrals in such cases rise, justice social work will require to provide more specialist interventions, often requiring the skills of qualified social workers rather than paraprofessionals. This will also require additional resource.
75. While some felt ready to meet this demand, many frontline justice social work staff raised concerns about their capacity to manage an increase in diversion referrals. They highlighted already stretched resources and limits on staff capacity to meet

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<sup>20</sup> Scottish Drugs Deaths Taskforce, [Changing lives – our final report](#) (July 2022).

demand, as well as the need to prioritise the supervision of individuals subject to statutory orders. It will therefore be important for CJPs and statutory partners to work together to achieve a shared understanding of what will be required to manage an increase in referrals for diversion and ensure the availability of appropriate interventions.

## Funding

76. The Scottish Government funds justice social work to deliver a wide range of justice-related functions and services within a local authority area, referred to as section 27 funding.<sup>21</sup> The funding landscape is complicated by the range of partner agencies and services involved with accused persons who are subject to diversion, including statutory agencies and the third sector.
77. The current funding arrangements for diversion were considered by some community justice partners to be a potential barrier to achieving an increase in the use of diversion and other early intervention measures, with some areas raising concerns about the lack of ring-fenced funding for diversion. While Covid-19 funding provided for local authorities by the Scottish Government had been used creatively in some areas to increase capacity for diversion, there were concerns over the sustainability of this. Nonetheless, the vision expressed by the majority of CJPs was to ensure that diversion was an option available to anyone considered suitable.

### Recommendation 1

While prosecution policy remains a matter for the Lord Advocate, the Scottish Government should lead a working group comprising the diversion partner agencies to coordinate implementation of the recommendations in this review.

### Recommendation 2

Community justice partners should ensure that appropriate services and interventions are available to all those who have been assessed as suitable for diversion. They should carry out joint strategic needs and strengths assessments to understand the needs of their local population, to inform service planning, and to assess their ability to meet an increased demand for diversion services.

### Recommendation 3

Community Justice Scotland should ensure that the revised national guidelines on diversion take account of the findings of this review. The revised guidelines should be re-launched, such that they are widely disseminated to community justice partners. Diversion partner agencies should ensure that they are used by staff and embedded in the planning and delivery of diversion processes and interventions.

### Recommendation 4

Through robust governance, community justice partnerships should improve collaboration and communication between statutory partners regarding people subject to diversion. In particular, the Crown Office and Procurator Fiscal Service (COPFS) should consider what more it can do to improve communication with partners at a local level.

### Recommendation 5

The diversion partner agencies should develop a training strategy that meets the needs of individual agencies and ensures that staff involved in diversion from prosecution are

<sup>21</sup> Section 27 of the Social Work (Scotland) Act 1968 covers the 'Supervision and care of persons put on probation or released from prisons etc.' Section 27 and subsequent sections make provision for the related grant funding. This is the key funding received annually from Scottish Government which is allocated to local authorities to pay for justice social work services.

equipped to undertake their role effectively. At a national level, this should include awareness raising for the police, COPFS, justice social work, the third sector and other key partners. Locally, community justice partnerships should identify opportunities to deliver joint training across statutory partners and key agencies with a role in diversion from prosecution.

**Recommendation 6**

Community justice partnerships should consult with victims, people with lived experience of diversion, and affected community groups in the planning of diversion services.

**Recommendation 7**

The Scottish Government should review funding arrangements to maximise the use of diversion from prosecution and ensure the provision of interventions at the earliest opportunity.

# Execution

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## The Standard Prosecution Report

78. Where the police detect a crime and no other suitable form of disposal is appropriate, they are generally obliged to report the accused person to the Crown Office and Procurator Fiscal Service (COPFS).<sup>22</sup> This is done by means of a Standard Prosecution Report (SPR). The purpose of the SPR is to provide relevant, accurate and comprehensive information that supports the prosecutor marking the case to select the most appropriate prosecutorial option. Usually, the SPR will be the only information the prosecutor has about a case so its content is vital. Responsibility for the quality of SPRs and the sufficiency of evidence contained within lies with the officer who completes it, known as the reporting officer, and their supervisor.
79. SPRs follow a nationally agreed format and include, for example, details of the charge and the accused person, including a list of their previous convictions; a summary and analysis of evidence; and a list of witnesses and productions. They also contain two sections which are particularly relevant to our review of diversion from prosecution: the antecedents and remarks sections.
80. In the antecedents section of the SPR, the reporting officer is encouraged to outline the personal circumstances of the accused person. The national guidelines on diversion from prosecution state that when a reporting officer considers there is potential for diversion, they should consider including in the antecedents section information relating to the accused person's:
- mental health
  - alcohol or drug use
  - risk
  - vulnerabilities
  - disability
  - attitude to offending
  - family dynamics
  - education, employment or training.
81. Such information will assist prosecutors marking the case to ascertain whether the accused person has an identifiable need that has contributed to their offending and which may be addressed through diversion from prosecution.
82. In the remarks section of the SPR, the national guidelines state that the reporting officer has an opportunity to give a view on the accused person's potential suitability for diversion from prosecution based on their knowledge of the incident and the individual.
83. During our review, we sought to assess the extent to which SPRs inform decisions by prosecutors to divert an accused person from prosecution. We reviewed 90 cases which were marked for diversion and assessed how well the SPRs in those cases supported prosecutors in their decision to divert, with a particular focus on the antecedents and remarks sections. We considered the extent to which the reporting officer included information known to the police about the accused person in the SPR. Information is held by the police on a range of systems, but we focused on the

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<sup>22</sup> And/or the Scottish Children's Reporter Administration (SCRA), where appropriate.

extent to which information held on the Interim Vulnerable Persons' Database (iVPD)<sup>23</sup> was used in SPRs.

84. In the 90 cases we reviewed, only 20% of SPRs fully or mostly adhered to the national guidelines on diversion from prosecution by including the type of information highlighted at paragraph 80 (see case study below for an example). Forty one per cent of SPRs adhered to the guidelines to some extent, but 39% did not provide any antecedent information that might support a decision to divert the accused person from prosecution. While it is possible that no such information existed for some accused persons, our review of iVPD found that in 26% of all the cases we reviewed, relevant information about the accused person was known to the police but was not included in the SPR. This information would have assisted prosecutors in their decision making.

### Case study 1

A 24-year-old man was arrested for possession of illicit drugs. He was on bail at the time of the alleged offence and was known to police in the local area. He had a long history of previous convictions and had received various community payback orders and several custodial sentences.

Within the antecedents section of the SPR, the reporting officer stated that the man used drugs and also suffered poor mental health. His mental health had been deteriorating over the past few months and he had been diagnosed with depression, anxiety and a personality disorder. The reporting officer assessed that he was not a risk to the public and noted that the man had a supportive family. The reporting officer suggested in the remarks section of the SPR that an alternative to prosecution may be appropriate. In completing the SPR, the reporting officer appears to have used the national guidelines as a template for his comments regarding the man's personal circumstances.

On the basis of the information contained in the SPR, the prosecutor recognised that there was an identifiable need that had contributed to his offending and which could be addressed through diversion from prosecution.

85. There was also limited reference to diversion from prosecution in the SPRs we reviewed. In only 10% of cases did the reporting officer give a view on the accused person's potential suitability for diversion. The majority of these cases involved an accused person under the age of 18. Generally, we found that SPRs with a child accused were more likely to contain information relating to vulnerabilities and identifiable needs. In 8% of cases, there was evidence in the SPR of communication between reporting officers and other services such as justice social work. Again, this most often related to the sharing of information regarding a child accused. More generally, we found the remarks section of the SPRs to be underused.
86. A third of the SPRs we reviewed contained information such that they fully or mostly supported COPFS decision making, while 50% did so to some extent. In these SPRs, more information on the accused person's suitability for diversion, lifestyle, vulnerabilities and personal circumstances would have been helpful. The SPRs in the remaining 17% of cases contained insufficient information to support COPFS decision making in respect of diversion.

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<sup>23</sup> Information relating to police incidents where the people involved are deemed to be vulnerable are recorded on iVPD by police officers and can be shared electronically with partner agencies such as social work and SCRA. The iVPD is owned by Police Scotland and no other public bodies have direct access to it.

87. We assessed the overall quality of the SPRs in terms of the extent to which they informed decisions about diversion from prosecution. We assessed them as either excellent, very good, good, adequate, weak or unsatisfactory. None were excellent or unsatisfactory. We rated 33% as good or very good; 44% as adequate and 22% as weak.<sup>24</sup> It is worth noting that despite the absence of antecedents information or a view expressed by the reporting officer on the suitability of the accused person for diversion, all of the 90 cases were still marked for diversion by prosecutors. In a separate review of 30 cases that were not marked for diversion, while the majority were not suitable for diversion, there was a small number of cases in which, had the reporting officer made better use of the antecedents or remarks sections, diversion may have been a more appropriate outcome.
88. A lack of information in SPRs can delay prosecutorial decision making. In 9% of the 90 cases we reviewed, prosecutors requested additional information from reporting officers before being able to make their decision. The reasons for requesting additional information varied and rarely related to specific requests regarding diversion. Some prosecutors we interviewed suggested that requests for additional information were made even more frequently than our review suggested, but others said they were reluctant to seek further information from reporting officers due to it causing delay.
89. While the standard SPR format was used for the majority of reports to COPFS, amended formats have been created for cases which are jointly reported to COPFS and SCRA and in order to provide additional detail in domestic abuse cases. We found a significant difference between the level of information provided in these amended formats compared to standard SPRs. For example, jointly reported SPRs have additional fields which require to be completed to provide specific background information about a child accused of an offence. Similarly, the domestic abuse report format requires additional information on the circumstances of the incident.
90. Abbreviated SPR formats were also being used in some areas.<sup>25</sup> We found that these SPRs rarely provided detailed information in the antecedents or remarks sections. While abbreviated SPRs may have value in certain circumstances, they were not conducive to fulfilling the expectations for SPRs set out in the national guidelines on diversion from prosecution, or indeed in Police Scotland's own standard operating procedure on report writing.
91. While the national guidelines suggest that justice social work staff make contact with the police in respect of those whom they are already supporting who have been charged with a further offence and who staff believe would benefit from diversion, we saw no evidence of this in the cases we reviewed.
92. To better understand the findings of our case review, we interviewed over 50 police officers, focusing on those working in the four local CJP areas where we carried out our in-depth fieldwork. This included frontline officers from response, community and roads policing, as well as officers from a domestic abuse response unit. We also interviewed sergeants, inspectors and chief inspectors in those areas, as well as staff and managers from Police Scotland's national Criminal Justice Services Division (CJSD) and Case Management Unit (CMU).

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<sup>24</sup> In this report, percentages may not add up to 100 due to rounding.

<sup>25</sup> Abbreviated SPRs were introduced by Police Scotland in an effort to improve efficiency and reduce demand on reporting officers. The format has similar sections to a standard SPR template but is sometimes used in relation to what may be considered lower level offending, such as possession of a controlled substance.

93. The majority of reporting officers we interviewed had not heard the term ‘diversion from prosecution’, and had a limited understanding of the diversion process and the circumstances in which diversion may be used. Some reporting officers, mistakenly, thought the term related to the existing range of direct measures at their disposal such as fixed penalty notices and recorded police warnings.
94. Most reporting officers lacked awareness of the range of vulnerabilities referenced in the national guidelines that should be considered and detailed in the SPR when appropriate. There was limited recognition of the potential benefits of diverting an accused person with an identifiable need at an early stage so as to address the causes of offending and reduce further offending. There was also a general lack of understanding of the potential value of diversion to policing and the wider criminal justice system, such as a reduction in the number of court appearances for officers and citations for other witnesses involved in a case.
95. While the majority of reporting officers were unfamiliar with the term diversion and the diversion process, some noted that they had used the antecedents or remarks sections of their SPRs to suggest that COPFS consider an alternative to prosecution in specific cases. This demonstrated that, despite a lack of awareness of formal processes, some reporting officers were using their knowledge and experience to identify accused persons with vulnerabilities who might benefit from diversion.
96. We found that in a small number of areas, local arrangements had been put in place whereby, in line with the Whole System Approach,<sup>26</sup> reporting officers liaised with justice social work or youth justice social work services or other specialist policing teams such as concern hubs or youth justice units when preparing reports. This clearly improved the quality of the information in the antecedents and remarks sections of SPRs from these areas. However, in the main, these reports related to accused persons under 18 rather than SPRs generally.
97. Most reporting officers we spoke with recognised that diversion from prosecution could be a suitable alternative to prosecution for young people, but had a limited understanding of its utility for adults, particularly those with previous convictions or who had committed what they perceived to be a more serious offence. Consequently, with the exception of senior police officers with strategic responsibilities, the diversion from prosecution of adults was not well-established nor widely understood among officers. From the evidence gathered in our review, it is evident that the lack of awareness of diversion from prosecution and of the national guidelines among reporting officers has hampered their ability to submit SPRs that more effectively support the selection of diversion as a prosecutorial option.

### **Supervision and quality assurance of SPRs**

98. The supervision of the quality of SPRs lies predominantly with the reporting officer’s line manager (most often a sergeant) who also has a wide range of other responsibilities. In the areas we visited, line managers prioritised oversight of SPRs relating to those in custody, SPRs written by probationers and SPRs relating to serious offences (often domestic abuse). There was limited oversight by line managers of SPRs falling outwith these categories.

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<sup>26</sup> The Whole System Approach (WSA) is the Scottish Government’s programme for addressing the needs of young people involved in offending. It is underpinned by Getting it Right for Every Child, which aims to ensure that support for children puts their and their family’s needs first. WSA highlights the importance of different organisations and professions working together to support children, and emphasises offering alternatives to prosecution such as diversion.

99. A lack of awareness of diversion and the national guidelines among line managers meant they were unlikely to highlight to reporting officers that they may have missed an opportunity to include more antecedents information or indicate a person's potential suitability for diversion in an SPR. The lack of familiarity with diversion also meant it was unlikely to feature in supervisory conversations.
100. Reporting officers told us they would routinely forward completed SPRs to the Case Management Unit (CMU) for oversight. One of the primary functions of the CMU is to ensure that SPRs meet the required standard for prosecution. It is responsible for the transfer of all SPRs to COPFS. It is not, however, responsible for making significant amendments to SPRs as that role remains with reporting officers who have direct knowledge of the incident and the accused person.
101. Reporting officers highlighted that while the CMU would give feedback on gaps or omissions in a report, this focused on evidential requirements rather than the accused person's antecedents or suitability for diversion. This was largely due to pressures resulting from the volume of, and submission times for, reports. Responsibility for this aspect of supervision and oversight of the SPR remains with line managers. It will therefore be necessary for line managers to have a greater awareness of the diversion process in order to fulfil this function effectively.

#### **Police Scotland improvement plans**

102. Police Scotland is in the process of developing IT solutions to improve the quality and consistency of crime recording and reporting and has made considerable investment in new systems. It has established the Digitally Enabled Policing Programme in order to guide the development of a national case and crime recording system (known as Core Operational Solutions (COS)). In an effort to improve efficiency and effectiveness, COS will replace a number of legacy systems. It has been piloted in police divisions in the north of Scotland and, pending any necessary adjustments, will be rolled out across Scotland by the end of 2023. The new system is intended to provide a nationally consistent platform for reporting to COPFS. It will prompt officers to include specific information required for the antecedents and remarks sections of the SPR. It is also intended to reduce the amount of duplication that currently exists whereby reporting officers are required to enter similar information across a number of existing systems. This has the potential to assist with ensuring relevant information held on other police systems can more easily be included in SPRs.

#### **Recommendation 8**

Police Scotland should ensure that reporting officers have an appropriate level of awareness of the overarching principles of diversion from prosecution, including the role of partner agencies, and a good working knowledge of the national guidelines on diversion.

#### **Recommendation 9**

Police Scotland should ensure that internal police guidance, standard operating procedures and templates provide adequate information to guide reporting officers on the completion of Standard Prosecution Reports (SPRs) as they relate to diversion.

#### **Recommendation 10**

Police Scotland should ensure that adequate supervision and quality assurance processes are in place to improve the quality of SPRs relevant to diversion.

## Recommendation 11

Police Scotland should ensure that information known to the police that is relevant to the diversion assessment, such as that held on the Interim Vulnerable Persons' Database, is included in SPRs.

### The decision to divert

103. On receipt of an SPR from the police, a prosecutor reviews the case and considers whether a crime has been committed and whether there is a sufficiency of admissible, credible and reliable evidence against the accused person. If yes, consideration is then given to whether prosecutorial action is in the public interest.<sup>27</sup> Prosecutorial action includes the full range of direct measures, diversion and court proceedings. This process is known as case marking.

### COPFS policy

104. Much of the Crown Office and Procurator Fiscal Service's policy on marking cases for diversion from prosecution is set out in its case marking instructions. The instructions set out the general approach to be taken to marking cases for diversion, as well as guidance on marking specific offence types. The instructions also include a section on cases involving a child accused, in which diversion features prominently as a prosecutorial option. Further guidance on cases involving a child accused can also be found in two operational instructions,<sup>28</sup> while further guidance on marking domestic abuse and hate crime cases for diversion can be found within the Crown's Victims and Witnesses Manual.

105. It is COPFS policy that diversion from prosecution should be considered for all accused persons reported to it where there is an identifiable need which has contributed to the offending which can best be met through diversion. COPFS policy further states that diversion is appropriate where all of the following requirements are met:

- there is a sufficiency of evidence against the accused person
- it is assessed that in all the circumstances of the case, diversion is the appropriate outcome for the accused
- diversion is in the public interest taking into account the nature of the offending and the impact of the offence on the victim.

106. The case marking instructions note that no category of crime is automatically excluded from an offer of diversion. They also note, however, that those who breach sexual offence orders should not be considered for diversion and that, as a general rule, the more serious the criminal conduct, the more likely it is that prosecution rather than diversion is the appropriate course of action.

107. For a child accused, where referral to the children's reporter is not appropriate, there is a presumption that an alternative to prosecution will be in the public interest. Diversion from prosecution will always be considered where they have an identifiable need which has contributed to the offending and diversion is the most appropriate outcome.

### Implementation of COPFS policy

108. Within COPFS, the National Initial Case Processing (NICP) unit was established to promote consistency and efficiency in the marking of cases, and to facilitate a

<sup>27</sup> For further information about the public interest, see the COPFS, [Prosecution Code](#) (2001).

<sup>28</sup> Operational Instructions 5 of 2019 (Prosecution policy on accused under 18 years and diversion) and 5 of 2021 (Briefing on the United Nations Convention on the Rights of the Child).

national approach across Scotland. Prosecutors working in NICP are responsible for marking the majority of cases that will be diverted from prosecution. However, prosecutors working in other units will also mark some cases. For example:

- When an accused person is reported to COPFS after being released by the police on an undertaking to appear at court at a specified time, the case is marked by a prosecutor in the local COPFS office.<sup>29</sup>
- NICP refers cases likely to be prosecuted at the solemn level and some specific crime types to other teams within COPFS for an initial marking decision and, where appropriate, prosecution. A small number of SPRs will automatically be sent to specialist units without the need for a referral by NICP (such as those relating to wildlife crime).

109. In addition, prosecutors working in other units may sometimes assist NICP with marking cases. They may do this as overtime or as part of a marking initiative to help clear a backlog of unmarked cases.

110. A broad range of staff working across COPFS are therefore required to be familiar with COPFS policy on case marking and the circumstances in which diversion from prosecution is appropriate. Of the 90 cases we reviewed that were marked for diversion, 88% were marked by NICP and the remaining 12% were marked by prosecutors in local court offices. None of the 90 cases were referred by NICP to another unit for marking. Of the five additional sexual crime cases that we reviewed, all were marked by teams specialising in such cases, whether at the High Court or sheriff and jury level.

111. Within NICP, all cases involving a child accused are allocated to one of two dedicated NICP prosecutors for marking. These prosecutors actively consider diversion in all such cases due to the rebuttable presumption against the prosecution of children. As a result, these prosecutors have built up expertise in relation to diversion. It was clear from our interviews with COPFS staff that there is a strong emphasis on diverting children from prosecution. Indeed, data shows that in 2020-21, those under the age of 18 made up 26% of all diversion cases commenced.<sup>30</sup> Similarly, 27% of the 90 cases we reviewed involved a child accused. Of the five sexual crime cases we reviewed, all related to a child accused aged 16 or younger.

112. Overall, we found those marking cases in NICP to have a good awareness of COPFS policy on diversion from prosecution, particularly in relation to accused persons under 18. Prosecutors in NICP tended to have greater knowledge of the case marking instructions and related policies than those marking cases in local court offices. To some extent, this is understandable as those in NICP will likely mark cases where diversion is an appropriate outcome more often than those in local court. Some local court prosecutors told us they would only rarely mark a case for diversion and some appeared less likely to consider diversion as an option. There was a variance in attitudes towards diversion among prosecutors working in different units, with some in local court being less aware of relevant policies and the range of identifiable needs that might give rise to diversion, and less likely to be aware of the benefits of diversion from prosecution.

113. Among those we interviewed, there was consensus that having a national unit had improved consistency in marking. Nonetheless, some stakeholders, including justice

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<sup>29</sup> A pilot scheme is currently operating whereby undertaking cases calling at Dundee, Hamilton and Paisley Sheriff Courts are being marked by NICP. It is likely that this pilot will be extended in 2023 so that NICP marks all undertaking cases.

<sup>30</sup> Scottish Government, [Criminal Justice Social Work Statistics 2020-21](#), Table 4.

social work staff, perceive there still to be inconsistencies in case marking – they sometimes see accused persons being prosecuted in similar circumstances and for similar offences to those being diverted from prosecution. These inconsistencies may arise from some case marking being done outwith NICEP and by those who are less familiar with current policy on diversion from prosecution.

114. To help assess whether there were inconsistencies in case marking, we reviewed an additional 30 cases reported to COPFS in June 2022 which had not been marked for diversion. We randomly selected cases where the alleged crime was either theft by shoplifting or a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 (threatening or abusive behaviour). We chose these crime types as they are ones for which accused persons are often diverted. There were two cases which we considered should have been marked for diversion but in which the accused was prosecuted. In both cases, the SPR noted the accused person had a drug issue and there were no other recorded factors which would have made diversion inappropriate.
115. COPFS intends that in 2023 NICEP will begin marking all undertaking cases. This will likely result in diversion from prosecution being considered as a prosecutorial option more frequently and a further improvement in the consistency of case marking. The marking of other types of cases by prosecutors outwith NICEP will continue however. There is therefore a need to ensure that all prosecutors have an awareness and understanding of diversion as a prosecutorial option, and that COPFS policy and guidance is sufficiently comprehensive and accessible to support those who may infrequently mark cases for diversion. Coupled with an improvement in the quality of information included in SPRs by reporting officers, this should help prosecutors divert an accused person from prosecution in those cases where it is appropriate.
116. Among the COPFS staff we interviewed, diversion was viewed positively. This positive attitude towards diversion was particularly evident in relation to a child accused, as a means of addressing issues that contribute to offending at an early stage with a view to preventing or reducing the risk of further offending.

### **Identifiable need**

117. The case marking instructions state that diversion should be considered for all accused persons where there is an identifiable need and that, 'case markers should actively consider diversion even in the absence of any explicit reference to an identifiable need' in the SPR.
118. In circumstances where no identifiable need is referenced in the SPR, we heard that case markers may contact the reporting officer for further information. We also heard that case markers are less inclined to contact justice social work for more information even where the accused person had social work involvement as relevant contact details were not often easily available. Moreover, some case markers said they were unlikely to contact either reporting officers or justice social work as this would result in delays marking the case and they were concerned about contributing to a backlog of unmarked cases. Case markers should be encouraged and facilitated to make contact with other agencies where further information would help them select the most appropriate prosecutorial option. It is reassuring that, in the smaller number of sexual crime cases that we reviewed, it was more likely the case marker would make early contact with justice social work to discuss the circumstances of the offence, whether diversion may be appropriate and what interventions might be available, prior to a referral being made.

119. Where an identifiable need is not explicitly referenced in the SPR, we heard that some case markers will routinely consider whether the circumstances of the charge, or the nature of the charge or any previous convictions suggest the accused person has an identifiable need. Some case markers also said that even when there was no suggestion of an identifiable need, they may still consider a case for diversion to, for example, try to break a cycle of offending. In such cases, they relied on their experience and professional judgement and considered that, taking into account all the circumstances, diversion was in the public interest and the most appropriate outcome for the accused person.

120. Of the 90 cases we reviewed, the case marker was able to ascertain one or more identifiable needs from the SPR in 91%. In the remaining eight (9%) cases, there was no explicit or implicit identifiable need in the SPR. No further information about the accused person appeared to have been sought, but nonetheless the cases were marked for diversion. In four of the eight cases, justice social work assessed the accused person as suitable for diversion and the diversion was completed successfully. In the other four cases, the accused person either failed to engage in the suitability assessment or were (erroneously) assessed as unsuitable by justice social work because they had refused to accept their guilt.<sup>31</sup> In none of these cases was the accused person assessed as unsuitable because they did not have an identifiable need.

### Case study 2

The accused person was a mother in full-time employment with no previous convictions who was charged with two assaults. The assaults arose from an ongoing dispute between her extended family and neighbours. The SPR made no explicit or implicit reference to an identifiable need. Despite this, she was diverted from prosecution. She engaged with justice social work and was assessed as suitable for diversion. She successfully completed the diversion intervention, with the completion report noting that justice social work had worked with her to help her manage stressful situations and to apply cognitive behavioural techniques. There have been no further reports of offending.

121. Even in cases where there is an identifiable need, the case marking instructions make clear that an accused person can only be diverted from prosecution where diversion is the most appropriate outcome for the individual and in the public interest. Case markers told us that there will be circumstances where diversion is either not permissible or appropriate. This may include cases where:

- the accused person has been charged with a very serious offence
- the accused person has numerous or serious previous convictions
- there has been significant injury to or impact on the complainant
- special bail conditions are considered necessary
- an order from the court may be an appropriate disposal (such as a non-harassment order)
- the accused person has been charged with a statutory offence subject to an impending time bar and there has already been a delay in the submission of the SPR, for example, while awaiting forensic analysis in a drug-related case.

122. There was a lack of clarity among case markers we interviewed as to whether an accused person who had previously been diverted from prosecution could be diverted again. Some thought that it was not appropriate to offer diversion on repeated occasions while others felt, depending on the circumstances, a repeat offer

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<sup>31</sup> The National Guidelines on Diversion from Prosecution state that an accused person does not have to accept guilt in order to be assessed as suitable for diversion.

of diversion was justified. In the cases we reviewed, only 13% of the accused persons had previously been offered diversion from prosecution.

123. There was also limited guidance on the consideration that should be given to an accused person's previous convictions when deciding whether to divert. Previous offending need not be a barrier to diverting an accused person and we heard from case markers that they will consider various factors including the number of previous convictions, the nature of the previous offending, the length of time between previous convictions and since the last conviction, and whether the accused person had received a custodial sentence for analogous offending. We also heard that where an accused person is charged with possession of drugs and has a long history of similar charges, they would still be considered for diversion.
124. In the 90 cases we reviewed that had been marked for diversion, 43% of the accused persons had no previous convictions; 9% had one previous conviction; and a further 13% had up to five previous convictions. Just over a third of those diverted from prosecution had more than five previous convictions.
125. In the 30 cases we reviewed that had not been marked for diversion, 14 of the accused persons had an identifiable need. Of those 14, we considered that 12 were not suitable for diversion. Many of these accused had numerous previous convictions, often for drug-related offences, including custodial sentences for analogous offending, community payback orders and drug treatment and testing orders.
126. In response to the high rate of drug deaths in Scotland, the Scottish Government established the Scottish Drug Deaths Taskforce to identify measures to improve public health by preventing and reducing drug use, harm and related deaths. The taskforce's final report, published in July 2022, stated that there required to be a 'broad culture change from stigma, discrimination and punishment towards care, compassion and human rights'.<sup>32</sup> One of the recommendations was that there should be a fully integrated, person-centred, trauma-informed public health approach to drug use in the justice system and that structured pathways for supporting individuals with problem drug use throughout their justice journey should be developed.<sup>33</sup>
127. The report envisages that accused persons with substance use issues and with an extensive history of offending should, if appropriate, be offered an intervention to support them to tackle their substance use. The Lord Advocate has made clear that dependency on drugs may be an identifiable need,<sup>34</sup> and some offence-specific case marking instructions, such as those for shoplifting and possession of drugs, note that previous convictions are not a barrier to offering diversion. Nonetheless, from our interviews with staff, it was clear they would benefit from further guidance on the weight that should be given to *extensive* previous convictions when marking cases where the accused has an identifiable need. Such guidance could usefully include examples of when diversion is and is not appropriate.
128. Among the prosecutors we interviewed, there was a perception that insufficient efforts were made by justice social work to engage with accused persons who had been offered diversion as part of the assessment process. They were concerned at the number of people assessed as unsuitable for diversion due to a lack of engagement. When an accused person is assessed as unsuitable, the case requires

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<sup>32</sup> Scottish Drug Deaths Taskforce, [Changing lives – our final report](#) (2022) at page 8.

<sup>33</sup> Scottish Drug Deaths Taskforce, [Changing lives – our final report](#) (2022), Recommendation 9.

<sup>34</sup> [Scottish Parliament Official Report 22 September 2021](#), from col 19.

to be remarked. There was a suggestion that the high proportion of people assessed as unsuitable and the need for those cases to be remarked resulted in some prosecutors being less inclined to mark cases for diversion. While they acknowledged that engaging some accused persons in the assessment process can be challenging, they felt a more consistent approach to efforts to engage the accused by justice social work was required.

129. Under the current process, suitability assessments and completion reports are generally only returned to case markers where the accused is assessed as unsuitable or where the diversion is not successful. This may skew markers' perceptions of diversion and result in a loss of understanding and knowledge of justice social work's tailored diversion interventions. Some markers felt this affected their confidence in diversion as a prosecutorial option and may impact the number of cases marked for diversion. The adoption of a new process (see paragraph 231) involving markers reviewing some positive assessments and successful completion reports should assist in this regard.

### **Approval to divert**

130. Some case marking instructions state that, in relation to certain offences, approval from a senior prosecutor is required before the accused person can be referred to justice social work for diversion. The need to obtain approval is detailed within the offence-specific case marking instructions and includes, for example, domestic abuse offences.

131. We heard that the approval system worked well and that cases referred for approval were dealt with quickly. Senior prosecutors were generally supportive of proposals to divert the accused person. Of the 90 cases we reviewed, 16% required approval from a senior prosecutor before being referred to justice social work. Most required approval because the charges related to domestic abuse. In most of these cases, approval was sought and given but in two, there was no record of approval being sought. Both cases involved offences with a domestic aggravation.

132. For serious offences, Crown Counsel's instructions are often sought on whether diversion is an appropriate outcome.<sup>35</sup> Crown Counsel's instructions were sought in all five of the sexual crime cases we reviewed that were marked for diversion and only after a full investigation of the offence had been carried out. While some case markers obtained a suitability assessment from justice social work prior to submitting a report to Crown Counsel for instructions, others first sought instructions before requesting that justice social work assess the accused person for suitability for diversion. There may be benefit in COPFS adopting a more consistent approach and this being recorded in guidance for staff.

### **Marking timescales**

133. There was a perception among justice social work staff that there can be delays in COPFS marking cases for diversion. They felt any delays should be minimised as a diversion intervention is often most effective when it follows on closely after the alleged offence itself. Of the cases we reviewed, 66% were marked for diversion within seven days of receipt of the SPR. A further 19% were marked within 21 days of receipt of the SPR and 16% took longer than 28 days to be marked for diversion, with some taking substantially longer. Some marking decisions were unavoidably delayed pending the results of forensic analysis or while awaiting information from another agency. However, in too many of these cases, there was no apparent reason

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<sup>35</sup> Crown Counsel is the collective term for the Law Officers (Lord Advocate and Solicitor General) and advocate deputes, Scotland's most senior prosecutors.

for the delay. To maximise the chances of a successful diversion, COPFS must ensure that decisions to divert an accused person from prosecution are taken promptly.

## The referral

134. The national guidelines on diversion from prosecution state that when referring a case to justice social work for diversion, the prosecutor should outline the key issues and reasons behind their decision. In the 90 cases we reviewed that were marked for diversion, only 88 went on to be referred to justice social work. Of those 88 cases, the reason the accused person was diverted was recorded in the COPFS case file in only 76% of cases. In only one case was there a record of COPFS passing on the reason for diversion to justice social work as part of the referral. Instead, the referral simply comprised:

- a letter requesting that justice social work carry out a suitability assessment of the accused person
- the SPR<sup>36</sup>
- often, but not always, a copy of the letter sent by COPFS to the accused person informing them that diversion from prosecution is being considered and that their suitability for diversion will be assessed by social work.

135. Case markers we interviewed were not all aware that they should record the reasons for diverting an accused person from prosecution. Even those who did routinely record their rationale were not always aware of why they should do so and how sharing this information with justice social work might be helpful. Justice social work staff told us that they were often unaware of why someone had been referred to them for an assessment of suitability for diversion. While they could sometimes infer it from the documentation provided, often very little information was provided about the accused person that would assist them to understand why the referral had been made. This made carrying out an assessment more challenging. Encouragingly, we heard that the COPFS administrative staff who now make the referrals to justice social work are beginning to include the reason for diversion in the referral although this did not yet appear to be routine.

136. The cases we reviewed were drawn from a period when the SPR was included as part of the referral documentation to justice social work. This practice has since ceased in order to minimise the risk of non-compliance with data protection legislation and to ensure that only information that is necessary and proportionate is shared. Instead, a summary of the circumstances of the incident which led to the accused person being charged, and a note of the charges and the accused person's previous convictions are shared with justice social work. Useful information about the accused person's circumstances contained in either the antecedent or remarks sections of the SPR and which may have informed justice social work's suitability assessment is not currently being shared. We understand, however, that a new referral template is being developed within COPFS to address this. The template will be populated by case markers and will include relevant antecedents and remarks from the SPR, as well as the reason the accused person is being diverted. While we welcome this development which should better support justice social work in their assessment, until this template is adopted, case markers should be reminded of the need to record their reasons for diverting an accused person, and staff referring cases to justice social work should ensure those reasons are included in the referral.

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<sup>36</sup> The practice of sending the SPR to justice social work as part of the diversion referral has since ceased – see paragraph 136.

137. During our review, we were concerned that justice social work were not always being informed of the correct charges for which the accused person was being diverted from prosecution. This was because the charges shared with justice social work were those contained in the SPR. While these charges would be accurate in most cases, charges can sometimes be amended, deleted or added by the marker. In particular, the marker will delete charges where there is no sufficiency of evidence. While we heard that some markers would ensure justice social work were informed of amended charges, this did not appear to be universal practice. The need to populate the new referral template referred to above should encourage markers to include amended charges rather than the original charges that feature in the SPR. Until this new template is introduced, case markers should ensure that the charges shared with justice social work are correct.
138. Once a prosecutor marks a case for diversion, administrative staff process the referral to justice social work. A specialist diversion administrative team was established in April 2022. Although the team is based within NICP, it processes all diversion referrals regardless of which unit within COPFS marked the case. The creation of this team has had a number of benefits including processing a backlog of diversion cases that had accumulated during the pandemic, and monitoring outstanding suitability assessments and completion reports. This is a welcome development as, during our case review, we had concerns about several cases in which referrals had not been made timeously, or in which suitability assessments or completion reports were either outstanding and had not been followed up or had been received but had not been actioned. The failure to process these cases efficiently was regrettable and resulted in the accused person, complainers and partner agencies being left unaware of the progress or outcome of a case.
139. The creation of the diversion administrative team should help address these failures. For example, in 19% of cases that were referred to justice social work for assessment for diversion, the referral took place more than 28 days after the case had been marked. Following the creation of the new team, we heard that there is now a focus on making referrals to justice social work within five days of marking rather than allowing them to accumulate.
140. One of the most frequent concerns we heard about from justice social work during our review was that COPFS ‘batch marked’ cases for diversion. Rather than receiving a steady flow of diversion referrals, justice social work received no referrals for a while and then a large number of referrals at the same time. This affected service planning and made it hard to manage the demands on social work staff, given the timescales within which assessments required to be carried out. We heard that it caused waiting lists for assessments. We consider that cases were not being batch marked, but may have been batch referred by administrative staff at a time when referrals were being made intermittently rather than regularly. This practice should have ceased due to the creation of the dedicated diversion administrative team but justice social work should be encouraged and facilitated to raise such issues of concern with COPFS, and COPFS should address them.
141. Among the administrative failures we noticed were emails with referrals, suitability assessments or completion reports that appear to have gone awry – whether from COPFS to justice social work or vice versa. Emails to justice social work were not routinely acknowledged and it could be some time before a problem was identified and followed up. The diversion partners should consider acknowledging receipt of key emails so that an audit trail is established and so that problems can be identified more quickly.

142. Outside of NICEP, there is low awareness of the creation of the dedicated diversion administrative team. Given the knowledge the team is building up of diversion and the justice social work partners, it would be helpful if its existence was communicated to case markers across COPFS so that the team can provide assistance and advice to those who are less familiar with the diversion process. In light of comments from partner agencies that contacting COPFS to discuss diversion can be challenging, it would also be helpful to notify justice social work of the team's existence to help create a channel for communication.
143. Policy and guidance around diversion from prosecution states that COPFS may refer an accused person to justice social work or another agency for diversion. All of the cases we reviewed were referred to justice social work and all of the suitability assessments were carried out by justice social work, rather than another agency. Most case markers thought that referrals were now only made to justice social work, with the exception of referrals to the National Driver Improvement Scheme in connection with road traffic offences.<sup>37</sup>
144. The process for diverting a case from prosecution and referring it to justice social work described in the case marking instructions is not aligned with the desk instructions available to staff and no longer reflects what happens in practice. We also noted some inconsistencies in current practice. The most appropriate and efficient process for referring cases for diversion should be identified, and should be reflected in clear, accessible guidance for staff. This will help promote consistent practice as well as resilience in the event of staff absence or turnover.

#### **Recommendation 12**

COPFS should ensure that prosecutors record the reason an accused person is being referred to justice social work for an assessment of their suitability for diversion. The identifiable need in relation to which the accused person is being considered for diversion by COPFS should be noted in the referral to justice social work.

#### **Recommendation 13**

COPFS should review its internal guidance on diversion to ensure it is compatible with the national guidelines on diversion, reflects current practice and provides consolidated, comprehensive guidance for staff.

#### **Recommendation 14**

COPFS should provide training to its staff on diversion from prosecution. This should be available to all staff involved in marking and managing cases for diversion.

#### **Recommendation 15**

COPFS should identify the most appropriate process for referring an accused person for diversion and ensure:

- the process is reflected in clear, accessible instructions for staff and communicated to justice social work
- the guidance includes direction on whether and in what circumstances justice social work should await an instruction to proceed with diversion following a positive suitability assessment
- the revised process is followed in practice.

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<sup>37</sup> The National Driver Improvement Scheme was introduced in Scotland in 2004. Its purpose is to provide an alternative to prosecution for drivers charged with a contravention of section 3 of the Road Traffic Act 1988 (careless driving). In suitable cases, the accused person will be diverted from prosecution and will attend a driver improvement course.

## The suitability assessment

145. On receipt of a referral from the Crown Office and Procurator Fiscal Service, justice social work undertake an assessment of the accused person's suitability for diversion. This involves making a holistic assessment of the person's circumstances, exploring any identifiable needs highlighted by the police and any reasons given by COPFS for the referral. The assessment process also provides justice social work the opportunity to identify any other underlying needs which may have contributed to the offending behaviour and to identify appropriate interventions. Justice social work submit the results of the assessment to COPFS.
146. The national guidelines on diversion from prosecution state that the assessment report, as a minimum, should include:
- whether the individual is suitable for diversion from prosecution
  - what the jointly identified issues are that require to be addressed
  - what the proposed intervention will include, with indicative timescales for completion
  - what the proposed outcomes of the intervention are.
147. In our case review, just under half (46%) of the suitability assessments were undertaken by paraprofessional<sup>38</sup> justice staff. Almost a quarter (23%) were undertaken by justice social workers. In the cases involving sexually harmful behaviour, all assessments were appropriately undertaken by a justice social worker commensurate with the presenting level of risk and need. The remaining assessments were appropriately undertaken by children and families or youth justice social workers due to the circumstances of the case or the age of the person referred. Some areas actively promoted relationship-based practice by allocating assessments to workers with existing or recent supervisory relationships with the accused person. This existing knowledge of the person's circumstances enhanced the overall quality of the assessment.
148. Some areas had established a dedicated diversion coordinator or service for all diversion referrals which was valued by staff. Benefits of this approach were noted in relation to the quality of information at assessment stage, improved communication with other agencies and providing quality assurance to assessment reports.
149. The quality of the majority (68%) of assessments we reviewed was rated as good or better using the scale highlighted at paragraph 87. The assessments showed that staff had actively sought to involve the accused person in the assessment process, and provided COPFS with key information on the needs to be addressed by the diversion intervention. A similar proportion (72%) of assessments were mostly or fully aligned to the national guidelines. Where information was absent from the assessment report, this most commonly related to specific comment on the accused person's understanding and expectations of diversion, and their view of the alleged offence. A small proportion (9%) of assessments were not aligned to the national guidelines. For example, we saw assessments which contained one line indicating that diversion was proceeding and justice social work would make contact with COPFS in three months' time.
150. There is no nationally agreed template for suitability assessments. We found just under half of the assessments were completed using a locally developed structured template. Over a quarter used a structured letter to COPFS with the remainder conveying the assessment in an unstructured letter or email. Local templates did not

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<sup>38</sup> This is a term used to denote a variety of roles including social work assistants and justice officers.

always align to the national guidelines which contributed to inconsistencies in the information provided.

151. Only a few assessments indicated the use of a specific assessment tool. As there is no national, standardised diversion assessment tool, some areas had developed their own assessment tools or adopted a person-centred approach to assessment. Where specialised assessments were undertaken these were mostly for children or for specific offence types, such as sexually harmful behaviour. In the five sexual crime cases we reviewed, we found clear evidence of early and effective communication between justice social work and COPFS. This was encouraging and reflected the appropriate public protection considerations in offences of this nature.
152. The national guidelines note that where the accused person is already supported by other social work colleagues, justice social work should liaise with them to inform the overall assessment. Where information from other sources was sought to inform the assessment, this was made available in almost all instances and demonstrated effective and efficient partnership working and collaboration. The other sources of information in these instances included children and adult's social work services, substance use and mental health services, and housing. We also found examples of families contributing to the assessment of children who had been referred for assessment.
153. The national guidelines state that all agencies should consider the impact of the alleged offence on complainers. While this refers to the diversion intervention, it can equally be applied to other stages of the diversion process including the suitability assessment. Justice social work did not routinely gather information about complainers or consult with victims' organisations where appropriate to inform assessments. While this may not be possible or necessary in respect of every case where there is an identifiable complainer, where the alleged offence included domestic abuse, the absence of consultation with complainers meant that there was an over-reliance on an accused person's description of the incident and its causes. This issue was compounded by limited information about victim impact at the point of referral.
154. Just over half of the suitability assessments we reviewed included a plan for the proposed intervention. In many instances, the plans were SMART (Specific, Measurable, Achievable, Relevant and Timebound). The inclusion of a SMART plan encourages appropriate targeting of interventions, clarity of expectations and supports transparency. It provides focus on intended outcomes and supports quality assurance. Other plans lacked specificity on the intended outcomes and timescales for completion.
155. There was a perception that there has been an increase in referrals for people with more complex needs. There was some resistance among justice social work to this development, primarily due to the standard three-month diversion period being viewed as insufficient to enable effective intervention. The national guidelines allow for the assessor to indicate to COPFS that an extended period is necessary for effective intervention. However, while some staff indicated the need for an extension in their assessment to COPFS, they told us they rarely received a response from COPFS confirming whether this was acceptable.
156. In our case review, of the 88 accused persons who were referred for assessment of their suitability for diversion:
  - 60% were assessed as suitable
  - 39% were assessed as not suitable

- the outcome of one assessment was not known.

157. Of those assessed as not suitable, 79% did not in fact engage in the assessment process. Therefore, where an outcome of 'not suitable' was recorded, this was predominantly due to non-attendance rather than as a consequence of the accused person actually being assessed as not suitable for a diversion intervention. While diversion from prosecution is voluntary for the accused person, the extent of non-engagement in the assessment process suggests opportunities for justice social work services to usefully focus their attention in order to increase the take-up of diversion.

158. Assessment reports did not always indicate the extent of the actions taken and efforts made by justice social work to engage the accused person before they were assessed as not suitable. There were instances of justice social work services being proactive in their efforts to engage the person in the assessment process in just under half of the reports we read. Efforts included home visits and contacting housing or support services for further information. In one example when the accused person failed to attend for assessment, justice social work contacted housing who advised the person had moved house and may not have been aware of the diversion offer. Justice social work subsequently contacted the person at the new address and while the person did not ultimately engage with the diversion process, we were pleased to note that additional efforts were made to ensure they were aware of the option. Conversely, there were also examples of minimal efforts being made to engage the accused person. This included one instance where the assessment letter was returned to justice social work with 'addressee gone away' resulting in the person being assessed as unsuitable without any further documented efforts by justice social work to establish their address.

159. When a person is assessed as not suitable for diversion, COPFS is required to reconsider the case. Some case markers will write to justice social work seeking assurance that proactive efforts were made to engage the accused person. Such efforts may have been made, but may not have been recorded in the assessment report sent to COPFS. This contributed to unnecessary work for both agencies. Including details of the efforts made to engage the person in the assessment report provides assurance to COPFS at the earliest opportunity.

160. Excluding those assessed as not suitable due to non-engagement in the process, almost all other accused persons in the cases we reviewed were assessed as not suitable for reasons outwith the national guidelines. Failure to accept guilt for the alleged offence was one such reason despite the national guidelines clearly stating that acceptance of guilt is not a requirement for suitability for diversion. The diversion intervention itself provides an opportunity for the accused person to understand the impact of, and accept responsibility for, their behaviour and to address the underlying causes.

161. Other reasons for unsuitability included insufficient time to undertake the intervention, the nature of the alleged offence, and the availability of interventions to address the identified need. Again, these reasons are outwith the national guidelines.

162. There were also examples of people being assessed as unsuitable due to their mental health or learning disability. The suitability assessment did not make clear if this was reflective of the capacity of the accused person to engage in the intervention, the availability of an appropriate intervention or simply the presence of these issues. Depending on the reason, this may call into question the equity of access to diversion from prosecution for those with particular protected characteristics.

163. Although not observed in our case review, we heard from prosecutors that an assessment of unsuitability could sometimes be avoided by speaking to justice social work and citing the national guidelines. This illustrates the need to raise awareness of the guidelines among staff working in all agencies involved with diversion.

164. We also found that assessment outcomes were not always communicated in line with national guidelines. Some people were assessed as 'unsuitable for positive reasons' due to lifestyle changes made during the period between the alleged offence and the assessment. This was despite the national guidelines providing mutually agreed language for such circumstances (they should be recorded as 'Individual is suitable for diversion from prosecution, but no further intervention is required'). There were also variations in recording outcomes for people who did not engage with the assessment process. For example, such data was not always included in statistical returns. These issues resulted in inconsistencies and anomalies in the recording of outcomes. This ultimately limits the utility of local and national data, and likely contributes to some of the variations between local authority areas seen in diversion data.

165. Usually, suitability assessments must be submitted to COPFS within 20 working days of receipt of the referral although this timescale was extended to eight weeks during the pandemic.<sup>39</sup> This longer timescale was the one in place for all of the cases we reviewed. Most assessments were submitted by justice social work within eight weeks of the referral and almost half were submitted within 28 days. However, there were some instances of protracted delays in the submission and receipt of assessments. This reinforces the need for improved monitoring of the diversion process and following up overdue reports, as highlighted at paragraph 138.

### **COPFS response to the suitability assessment**

166. Depending on the outcome of the suitability assessment, COPFS may take a range of actions in accordance with the case marking instructions. Where the accused person has been assessed as suitable, COPFS may:

- instruct diversion to proceed and waive the right to take any further prosecutorial action
- instruct diversion to proceed and defer the decision on whether to take any other prosecutorial action until the outcome of the diversion intervention is known.

167. A case marker might waive the right to take any further action where they consider that no alternative prosecutorial action would be in the public interest and there is no need for COPFS to oversee whether the accused person completes the diversion. In none of the cases we reviewed did COPFS adopt the waiver approach.

168. In practice, we found that COPFS instructed justice social work to proceed with diversion in only nine cases. There was no record of an instruction to proceed in the remaining cases where the accused was assessed as suitable for diversion. Instead, it appears many local authorities immediately proceed with the diversion on the basis of a positive suitability assessment, without awaiting further instruction. However, others awaited an instruction to proceed. We heard from managers in COPFS that there was no expectation or requirement for its staff to inform justice social work that they agree with the suitability assessment and that diversion should proceed, however this was not reflected in case marking instructions and did not appear to have been communicated widely to partner organisations.

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<sup>39</sup> The timescale reverted to 20 working days on 1 October 2022.

169. Where the accused person has been assessed as not suitable for diversion, COPFS will re-mark the case. At this stage, the full range of prosecutorial actions is available to the case marker, from taking no further action to prosecuting the accused person. Of the cases we reviewed that were assessed as not suitable for diversion, the subsequent action taken by COPFS was:
- in 26% the accused person was prosecuted in court
  - in 12% an alternative direct measure was taken (including a compensation order, a fiscal fine and fiscal warnings)
  - in 59% no further action was taken
  - in 3% the final outcome was not yet known.
170. No further action will sometimes be taken after the accused person has been assessed as not suitable for diversion because, in the period between the referral and the case being re-marked, the circumstances have changed. However, the fact that no further action was taken in more than half of the cases where the accused was unsuitable for diversion suggests that, at least in some cases, a waiver rather than a deferred approach may have been appropriate.
171. Justice social work submit their suitability assessments to COPFS via email, and the assessments are triaged by the COPFS diversion administrative team. We heard that the assessments are not read in any depth by administrative staff and they simply check whether or not the accused person has been assessed as suitable for diversion. If the accused person has been assessed as suitable, the assessments are generally not returned by COPFS administrative staff to the case marker. Instead, the diversion proceeds without any further consideration by a legally qualified member of staff. The only exceptions to this approach appear to be:
- in some cases involving more serious offending, the assessments may be returned to the specialist marking unit for review by a prosecutor. In such cases, detailed suitability assessments were valued by prosecutors and the decision to divert was not confirmed until after the assessment report had been reviewed
  - in cases where there is some ambiguity as to whether the accused person is suitable.
172. The approach taken in the vast majority of cases therefore, is that case markers do not reconsider cases on receipt of suitability assessments and that the professional judgement of social work staff is respected regarding their assessment of suitability for diversion. We heard that COPFS rarely disagreed with an assessment of suitability. In one case we reviewed, a woman was referred for assessment following a charge of threatening and abusive behaviour with a domestic aggravation. She was assessed as suitable, but soon after reoffended. While justice social work were keen to keep working with her, COPFS decided – appropriately, in our view, in light of the nature of the subsequent offending – that diversion was no longer the correct prosecutorial option.
173. The majority of accused persons are referred for diversion in relation to lower level, non-complex offences. In these circumstances, it may not be the best use of case markers' time to revisit cases which they have already decided are suitable for diversion pending a positive suitability assessment. However, we were concerned that assessment reports were not being read and considered in detail, and that this may result in potential issues going unnoticed by COPFS. This issue will be considered in more detail at paragraph 227, in respect of the consideration given by COPFS to completion reports.

174. At paragraph 164, we noted inconsistencies in recording assessment outcomes by justice social work limits the utility of diversion data. We also noted inconsistencies and inaccuracies in how COPFS records assessment outcomes on its own system, with cases with the same outcome being recorded differently by those closing the case. For example, where the accused person is referred for diversion but the assessment notes that they have already been in receipt of social work support since the alleged offence, this is often recorded by COPFS as a failed diversion which is not strictly accurate. To improve the quality of its data, COPFS staff would benefit from guidance on how to record diversion cases, and consideration should be given to the need for more nuanced marking codes which more accurately reflect diversion case outcomes.

175. In none of the cases we reviewed where the accused person was assessed as unsuitable for diversion was justice social work told the final outcome. While COPFS may not provide this information because justice social work involvement has come to an end, justice social work staff expressed an interest in knowing the outcome of these cases. They said it would help them gain a better understanding of the consequences for an accused person of not being assessed as suitable. Even if this information is not passed on in individual cases, justice social work staff would benefit from a broader awareness of case outcomes through, for example, the provision of data.

#### **Recommendation 16**

Justice social work should be proactive in its efforts to engage with a person referred for assessment before concluding that they are not suitable. These efforts should be recorded in the suitability assessment sent to COPFS.

#### **Recommendation 17**

COPFS and justice social work should work together to ensure that all referrals, assessments and completion reports are tracked and submitted timeously. A more robust system for following up overdue reports or responses should be put in place.

### **The diversion intervention**

176. Of the 88 cases we reviewed that were referred to justice social work, 57% went on to be diverted following the suitability assessment. In the cases where a diversion intervention was delivered, the alleged offences included:

- various contraventions of the Misuse of Drugs Act 1971
- threatening and abusive behaviour contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010
- assault
- other offences, such as those involving dishonesty.

177. Individualised support and a range of justice social work interventions for people diverted from prosecution were available in every community justice partnership area in Scotland. In accordance with the national guidelines, diversion interventions were largely bespoke, person-centred, and tailored to the needs and circumstances of the person. This was a real strength.

178. The legacy concept of diversion 'schemes' was widely recognised in justice social work as outdated. However, other agencies involved in diversion, including some case markers, appeared unaware of the development of more tailored diversion interventions and often retained notions of diversion 'schemes'. This may act as a barrier to referring some accused persons for diversion, with concerns about whether

local authorities can provide a particular diversion intervention generally no longer justified. Some case markers were concerned about inconsistencies regarding the availability of certain services across Scotland. While inconsistencies appear to have largely been addressed, some variation may still exist with regard to particular types of offending or accused persons with particular needs.

179. Among some Crown Office and Procurator Fiscal Service staff, there was a lack of awareness and understanding about what actually happens during a diversion intervention. We heard from some COPFS staff that the intervention delivered sometimes differed from what they had requested or expected. They did not always understand that interventions were tailored based on need, and that needs identified during a thorough suitability assessment were sometimes different from those identified from the more cursory information supplied in the Standard Prosecution Report. There was a risk that because some interventions were not as expected, confidence in diversion was undermined. These issues highlight opportunities for improved training for COPFS staff, particularly joint training with justice social work. We heard of some examples of COPFS staff, often those working in NICP, being involved in joint training. They felt this provided them with valuable insights into the diversion process.

180. Similarly, justice social work staff sometimes lacked a full understanding of diversion processes within COPFS. For example, that a sufficiency of evidence was required before an accused person could be diverted from prosecution. This reinforces the need for joint training so that all the agencies involved in diversion can gain a fuller understanding of each other's roles.

### **Nature of the intervention**

181. From the cases we reviewed, we found that diversion interventions were predominantly delivered on a one-to-one basis. During focus groups with justice social work services, we heard that incorporating people on diversion into existing groupwork programmes was under consideration in some areas. This was in recognition of the merits of a groupwork approach (where appropriate and available) but also, in part, due to an increasing volume of diversion referrals.

182. A wide range of diversion interventions were offered across the country, including:

- offence-focused work
- emotional regulation/management
- anger management
- managing relationships
- victim awareness
- support to address substance use
- mental health support
- employment/education support
- support to access housing
- budgeting
- food parcels or referrals to food banks
- support with children and families social work processes
- veterans support
- referral and signposting to other relevant services and facilitating engagement with these services
- co-ordination of support with other agencies
- extending support beyond the intervention period where relevant.

183. In the five sexual crime cases we reviewed, we found that specific, specialist interventions were appropriately offered. Such support sought to address the alleged behaviour, as well as addressing wider needs. Specialist support was echoed for other specific types of offending, such as where substance use or parenting issues were present. Some areas used restorative approaches<sup>40</sup> as part of a diversion intervention, and there was an indication that justice social work, third sector services and COPFS would find expansion of this beneficial with sufficient resourcing in place.

### **Diversion delivery**

184. Interventions were predominately delivered by justice or youth justice social work paraprofessionals. In some areas, in instances where there was greater complexity of risk and need, a qualified social worker supervised or delivered the intervention. When the accused person was already engaged with justice social work, youth justice or children's services, those services generally provided the intervention. This continuity helped to facilitate positive working relationships and an individualised approach for people on diversion. Third sector organisations also played a vital role in some areas in providing either all, or some elements of, the intervention.

185. Recognising that people with no or limited offending histories are at risk of being drawn into the criminal justice system to their possible detriment, social workers considered that people being diverted from prosecution should have the shortest possible contact with statutory justice social work services. This emphasised that the key benefit of the intervention was to divert people away from the justice system and, where possible, engage them with appropriate community supports and/or universal services.

186. There was evidence of effective multi-agency collaboration in delivering the diversion intervention between justice social work and other services, including third sector organisations, youth justice, mental health, health, employment, and housing. Where multi-disciplinary services were co-located, this was a particular strength and allowed for more direct referrals to key agencies and strong communication, such as same-day access to critical mental health support.

187. Rurality was an inevitable challenge in many areas, with examples provided in our survey and in our interviews of limited access to specialist supports including mental health services. Nonetheless, staff and services were generating solutions to address unmet need where possible. Where the capacity of other services was a barrier, social work staff sometimes provided the appropriate support directly. For example, workers in some areas received mental health training so that they could better support those being diverted. However, this had implications for capacity and sustainability.

188. One area noted a gap in service provision for accused persons with a learning disability. Another area had addressed this by incorporating specialist staff within justice social work services to provide support to people with learning disabilities as part of the intervention.

189. Covid-19 had an impact on the availability of other services and had resulted in some waiting lists. This was challenging given the typically short timescale within which a diversion intervention is usually delivered. The closure of some public offices and

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<sup>40</sup> Restorative approaches refer to a range of methods and strategies which can be used both to prevent relationship-damaging incidents from happening and to resolve them if they do happen. They enable those who have been harmed to convey the impact of the harm to those responsible, and for those responsible to acknowledge this impact and take steps to put it right ([Restorative Justice Council](#)).

locality offices necessitated by the pandemic remained an issue in some areas, making access to basic statutory services such as housing and benefits support more difficult.

### **Frequency and nature of contact**

190. There is no prescribed standard in the national guidelines for the frequency or the nature of the contact with the accused person during the diversion intervention. In the cases we reviewed, the frequency of contact was variable. It was often difficult to determine from the records on what basis decisions about the level of contact were made. Some people received weekly in-person appointments or telephone calls, while others received one phone call per month for three months. In some cases, the level of contact appeared proportionate based on the assessment of the person's needs but in others, it did not. Overall, completion reports submitted at the end of the intervention period made little reference to the frequency of contact that took place although COPFS staff indicated this information would be useful. A clear rationale as to why a minimal intervention has been decided or delivered should be set out by justice social work.
191. The cases we reviewed showed that the nature of the diversion contact was a balance between in-person office visits and/or telephone contact (43% each). Unsurprisingly, given the pandemic and the period from which the cases for review were drawn, there was limited evidence of home visits. Justice social work staff and partners told us that when they did take place, they largely related to welfare checks or facilitating engagement. When challenges in delivering a service were noted they related to engaging the person, complexity of needs, location and accessibility (particularly in more rural areas). Justice social work staff noted that for some people on diversion, there was a perceived stigma of attending a social work office, or a lack of understanding about what diversion involved. Despite these difficulties there were examples of justice social work and partner agencies proactively trying to engage people through regular telephone calls, texts and, in some instances, unplanned home visits.
192. Although much contact with people on diversion over the past two years took place over the telephone as a result of the pandemic, this was not necessarily a barrier to engagement. Some staff told us that adopting a blended approach of telephone and socially-distanced in-person contact improved the overall quality of engagement with the accused person. More recently, most areas had resumed delivery of in-person interventions, in line with Scottish Government and local guidance.
193. Nevertheless, learning from the pandemic had been retained with examples of mixed, creative and flexible methods of engagement being used depending on the accused person's circumstances. There were also examples of improved levels of engagement and collaborative working as a result of a more flexible approach. For example, some social work staff described better links with colleagues across different teams as a result of working remotely. This had contributed to an increased understanding of each other's roles which led to more joined-up approaches to the delivery of diversion interventions.
194. A lack of access to technology in order to engage in remote appointments had affected some people diverted from prosecution. Frontline staff also said that, during remote appointments, it was not always possible to fully ascertain a person's well-being. Some areas told us that the impact on staff of home working as a result of Covid-19 requirements with people with complex needs and vulnerabilities had led to staff burnout and loss of staff.

## Intervention plans and timescales

195. There was no standardised template for planning diversion interventions in use across the country. Outcomes Star<sup>41</sup> (particularly the Justice Star) was increasingly being used, with some areas investing in training to use the approach for those diverted from prosecution. Other tools used included the template provided in the Structured Deferred Sentence national guidance and other locally-developed resources. There was some evidence of specialist intervention tools being used for young people, such as the SHANARRI Wellbeing Wheel,<sup>42</sup> START-AV,<sup>43</sup> and AIM3.<sup>44</sup> The lack of consistent planning or outcome-gathering measures contributes to the difficulties in gathering data and determining overall outcomes for diversion.
196. The national guidelines expect most diversion interventions to be completed and a completion report submitted to COPFS by justice social work within three months (extended to six months during the pandemic). As previously noted, in some instances the expected three-month timescale for diversion was not always considered realistic to affect change. Justice social work and third sector staff reflected that it often took that long to build a relationship and secure engagement and buy-in from the person being diverted, particularly for children or those involved in substance use.
197. COPFS staff also thought that the three-month intervention timescale was not always suitable for those diverted in relation to more serious offences, such as sexual offences. One suggestion was that the requirement for a longer timescale should be determined at the assessment stage (for example, if justice social work consider that a three, six, or nine-month intervention is necessary). This should be communicated to COPFS and should prompt the assessment to be reviewed by a prosecutor rather than by a member of the diversion administrative team. Knowing the expected duration of the diversion intervention would provide clarity to the accused person and align with a person-centred approach that is based on assessed need.
198. The national guidelines on diversion as well as internal COPFS guidance allow for diversion to be discontinued where there is a good reason to do so. In such instances the decision requires effective and efficient communication between the diversion partner agencies. There was one example of this in the cases we reviewed (see paragraph 172). This case, where the diversion process was halted due to further offending by the accused person, raises a broader question about how further offending by the person during the diversion period should be dealt with, and which agency is responsible for monitoring reports of further offending.

## Complexity

199. During our review, we heard about and observed a change in the profile of people diverted from prosecution. This related to the complexity of their needs and/or the seriousness of their offending.

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<sup>41</sup> The [Outcomes Star](#) is a suite of collaborative, person-centred tools for supporting and measuring change when working with people. It includes versions for young people, families, people with learning disabilities, and people involved with the justice system. There is a cost associated with obtaining training for, and a license to use, any of the Outcomes Stars.

<sup>42</sup> [SHANARRI](#) is part of the Getting It Right For Every Child approach and consists of eight wellbeing indicators – Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.

<sup>43</sup> [START-AV](#) (the Short-Term Assessment of Risk & Treatability: Adolescent Version) is a structured professional judgement risk assessment focusing on short-term risk (up to three months) and strength factors in adolescents.

<sup>44</sup> [AIM3](#) is an assessment framework to assess sexual violence risk for 12-18 year old males, including technology-assisted sexual offences such as downloading indecent images.

200. The national guidelines explicitly state that it is not appropriate for local authorities to exclude certain categories of offences for diversion from prosecution as this is a prosecutorial decision. However, there were mixed views from frontline and senior staff in some areas on the appropriateness of more serious offences such as sexual and domestic abuse allegations being referred for diversion. Concerns related to managing risk and the possibility that complainers would be unhappy with diversion as an outcome.
201. Nonetheless, in some areas, justice social work responded to this increasing complexity by supporting staff in developing specific knowledge and skills to address relevant needs, and developing specific programmes and processes. Staff sometimes engaged with local specialist workers to address more complex needs, and we also found examples of pan-authority collaboration in this regard. However, some areas reported a lack of relevant training for diversion workers, which meant that their offence-specific interventions were more limited.
202. Of the cases we reviewed, 12% involved domestic abuse. We found that approaches to addressing diversion referrals for domestic abuse were variable. There were examples of specially-trained Caledonian<sup>45</sup> workers undertaking diversion assessments and overseeing interventions. However, we were concerned that in other areas, relationship-based interventions were delivered by staff with no specific training in domestic abuse.
203. There was a useful example of an area developing a diversion protocol to obtain police call-out information. This enabled them to determine and report on whether any other domestic incidents had been reported during the diversion period. In general, however, there was an over-reliance on the person's self-reported behaviour change in relation to domestic abuse offences which we did not consider to be acceptable.
204. Generally, justice social work staff reported that they would find increased communication with COPFS regarding more complex referrals beneficial.

### Contact with complainers

205. The national guidelines note that all agencies must give specific consideration to victims, 'including alleged, actual and/or potential individuals or groups', with no further details on what this might involve.<sup>46</sup> Despite this instruction, little reference was made in the cases we reviewed to contact with complainers or victims' organisations as part of the diversion intervention. Where there were examples, they included liaising with children and families social work where the complainer was a child, and noting the views of the person's partner where there was a domestic abuse incident. However, in other instances this information was not sought or included where it might have been expected in order to corroborate the accused person's claims of desistance or change. Justice social work noted that staff did not routinely have access to information about complainers and/or did not consider victims' perspectives as it was not within their remit as part of diversion.

### National guidelines and other supports for diversion staff

206. Familiarity with and reference to the national guidelines by frontline justice social work staff delivering interventions was limited. This was largely due to the guidelines

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<sup>45</sup> The [Caledonian System](#) is a behaviour change programme provided in some local authorities in Scotland for men convicted of domestic abuse offences, and offers support, safety planning and advocacy services for their partners (or ex-partners) and children.

<sup>46</sup> Community Justice Scotland, [National guidelines on diversion from prosecution](#) (2020), page 9.

being published at the onset of the pandemic when services were addressing other priorities. As a result, there was an inevitable impact on their visibility and use. Where staff were familiar with the guidelines, they were viewed as sufficiently flexible and reflective of the person-centred principles of providing a diversion intervention.

207. Some areas had developed a resource library of interventions for use with people on diversion. Many staff referred to the Children and Young People's Centre for Justice (CYCJ) as a very useful resource for advice and guidance on working with young people on diversion. The diversion from prosecution practitioners' forum hosted by CYCJ was described as invaluable in accessing support and sharing good practice across the country. Staff noted there was scope for a similar forum to support work with adults on diversion.

208. There is no specific national training on diversion for community justice partners. The majority of those we interviewed saw potential benefits in some form of national, multi-agency joint training on diversion. Some areas had developed their own multi-agency training for partners involved in diversion. Others accessed specific training depending on types of need, for example mental health and trauma. As noted above, some areas had invested in training to use the Outcomes Star to assess need.

### **Feedback from people on diversion**

209. We interviewed 13 people who were currently on, or had recently completed, diversion.<sup>47</sup> They were overwhelmingly positive about their experience. Many felt they had been given a 'second chance' after having been charged by the police. They described the potential negative consequences for them had they been prosecuted instead of being diverted, including:

- loss of employment
- difficulties gaining future employment
- reputational damage/stigma
- family stress
- financial difficulties
- the stress and anxiety of having to attend court.

210. Being able to continue to work without disruption while being diverted from prosecution was a priority and was highly valued. Avoiding a criminal record was also important to future employment prospects. There were important examples of people only being able to pursue their chosen careers as a result of being diverted from prosecution. One person we interviewed said that being offered diversion instead of being given a fiscal fine was welcome as the support provided had enabled them to achieve meaningful changes in their lifestyle and behaviour.

211. None of the people we spoke to had heard of diversion prior to the offer being made. The majority recalled first hearing they had been offered diversion via justice social work rather than from COPFS, but in some instances this encouraged increased engagement with the process. People spoke very positively about the service they received from justice social work, commonly referring to their allocated workers as the most helpful aspect of diversion. Worker qualities which were highly valued included being supportive, consistent, encouraging, understanding and easy to talk to. Of those we interviewed, 85% rated the service they received from justice social work as a four or five, on a scale of one to five.

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<sup>47</sup> Views were gathered from people with experience of diversion who had been selected by the local authority to participate. Their views may therefore not represent a universal experience of being diverted from prosecution.

212. Just under half of the people we spoke to were aware of a specific plan for the diversion period and were involved in creating the plan. Approaches to proactively seeking formal feedback from people on diversion were under-developed. This was a missed opportunity to capture outcomes and the impact of services on the lives of people diverted from prosecution.

#### **Recommendation 18**

When revising the national guidelines on diversion, Community Justice Scotland and partners should clarify what giving 'specific consideration' to victims during the diversion process entails. They should make clear to staff what is expected of them and establish or adapt processes as needed.

#### **Recommendation 19**

Justice social work should ensure that staff delivering diversion interventions involving domestic abuse and harmful sexual behaviour are appropriately trained and supported to do so.

#### **Recommendation 20**

While conducting the suitability assessment and throughout the diversion period, justice social work staff should assess whether the accused person's needs necessitate a diversion intervention lasting longer than three months. Where this is envisaged, COPFS should be informed.

#### **Recommendation 21**

When revising the national guidelines on diversion, Community Justice Scotland and partners should develop a standardised, nationally agreed template for diversion planning. Justice social work should ensure that people diverted from prosecution actively contribute to and agree their diversion plans.

#### **Recommendation 22**

Justice social work should develop and use a standard tool for gathering feedback from people who have been diverted from prosecution. This feedback should be incorporated in completion reports and should inform the continuous improvement of the service.

#### **Recommendation 23**

COPFS and justice social work should improve communication between them in support of the diversion from prosecution process. Communication is particularly important in more complex or serious cases.

#### **Recommendation 24**

When creating diversion plans, justice social work should provide a clear rationale for the intended levels of contact during the diversion intervention commensurate with the circumstances of the case.

### **The completion report**

213. At the conclusion of the diversion intervention, justice social work submit a completion report to the Crown Office and Procurator Fiscal Service (COPFS). Its primary purpose is to brief COPFS on how the issues identified at the point of referral and during the suitability assessment have been addressed at the intervention stage. It also enables justice social work to record the impact of diversion on the accused person and to cite evidence of change.

214. Similar to suitability assessment reports, there is no nationally agreed, standardised template for completion reports. As a result, there was significant variability in the range and detail of information provided to COPFS at the end of the diversion intervention. Some areas had developed their own comprehensive completion report templates. These were used consistently in those areas and provided information to COPFS under clear and relevant headings.
215. In the cases we reviewed that proceeded to diversion, we assessed the quality of just over half (52%) of completion reports as good or better using the scale referred to at paragraph 87. A third were rated as adequate, with a few rated as weak or unsatisfactory. The majority (68%) of completion reports mostly or fully described how the diversion intervention had addressed the issues identified at referral or during the suitability assessment, and most (78%) contained additional information to inform COPFS decision making. However, given that almost half of completion reports were assessed as less than good and that almost a third did not sufficiently describe how diversion had addressed the issues contributing to the offending, there is clearly scope for improvement.
216. Completion reports did not always provide information about the nature and frequency of contact between services and the accused person. The inclusion of this information would provide greater assurance on the robustness of the intervention.
217. Where more than one service was involved in delivering the intervention, including the third sector, most completion reports evidenced clear accountability for the coordination of services. While the majority detailed proportionate and relevant information sharing, there remained room for improvement. For example, we noted useful feedback from partner services within electronic recording systems that could have informed completion reports but had not been referenced. This was a missed opportunity to demonstrate positive engagement and improved outcomes.
218. Where feedback from the accused person was included in the completion report, it was well integrated and enhanced the overall quality of the report. However, just over half of reports did not include such feedback. This reflected the variation in systemically gathering feedback highlighted earlier.
219. The national guidelines on diversion from prosecution set out three possible outcomes at the conclusion of the diversion intervention:
- did not complete the intervention
  - completed the intervention in full
  - further intervention required.
220. While completion reports contained useful and often in-depth information about progress and person-centred outcomes, there was not always explicit reference to the three outcomes highlighted in the guidelines. Making an explicit reference to the appropriate outcome removes ambiguity, makes the outcome clear to COPFS and more easily informs final decision making.
221. While most diversion interventions last no longer than three months, the national guidelines on diversion as well as COPFS case marking instructions note that the diversion period can be extended if needed. In such cases, a progress report should be submitted to COPFS at the three-month stage. Justice social work staff were aware that the diversion period could be extended, but said that when they submitted requests for an extension to COPFS, they generally received no response. Despite this, they proceeded with the extended intervention.

222. In the cases we reviewed, we saw only one example of a progress report being submitted as a result of justice social work identifying the need to extend the period of diversion. This was due to contact with the accused person being limited due to illness and the need for ongoing support in relation to mental health and substance use. In this case, the need for an extension was fully supported by a clear rationale and was approved by COPFS who retained oversight of the diversion process until it was successfully completed.

223. While completion reports should usually be submitted to COPFS within three months of the commencement of the diversion, this was extended to six months as a result of the pandemic. This timescale was met in most of the cases we reviewed. There were a few instances of protracted delays in completion reports being received by COPFS which resulted in delays concluding the diversion process.

### **COPFS response to the completion report**

224. On receipt of a completion report, COPFS case marking instructions state that prosecutors should attach considerable weight to justice social work's assessment of the value of the diversion intervention. The instructions acknowledge that it is not realistic to expect the accused person's needs to have been 'solved' or that the accused person has been 'cured'. The criteria for success is that the accused person has made an appropriate effort to cooperate with and complete the diversion.

225. In the cases we reviewed that proceeded to diversion, only five (10%) accused persons were not considered to have completed the diversion successfully. The reasons for this included that they had not meaningfully or only partially engaged with the diversion intervention, or that they had reoffended during the diversion period. COPFS reassessed these five cases following the unsuccessful diversion and initiated court proceedings in one while no further action was taken in the other four.

226. Both the case marking instructions and the national guidelines on diversion envisage that it will be a prosecutor who assesses the completion report submitted by justice social work and makes a final decision as to the case outcome depending on whether and the extent to which the diversion has been completed. However, this was not always happening in practice.

227. Completion reports sent to COPFS are first reviewed by administrative staff. Similar to their approach to suitability assessments, administrative staff told us they did not read completion reports in any detail, they simply reviewed the report's conclusion and acted accordingly. Where justice social work said that the diversion had not been completed, administrative staff sent the completion report to the case marker for review and a final decision. However, where justice social work said the diversion had been completed successfully, we found that administrative staff themselves closed the case.

228. In some cases involving more serious offending, administrative staff sent the completion report to the case marker whether or not the diversion was considered successfully completed. In those cases, the completion reports were reviewed carefully by case markers and, when appropriate, their contents shared with Crown Counsel before a final decision was taken on how the case should proceed. In some of these more serious cases, as well as the completion report, justice social work submitted detailed risk assessments which were invaluable in supporting prosecutorial decision making.

229. We are concerned that the current COPFS practice of administrative staff closing cases does not accord with the case marking instructions or national guidelines. We are also concerned that they are doing so without reading completion reports in any detail, undermining the effort and resource put into those reports by justice social work. While there is greater involvement of prosecutors in some cases involving more serious offending even where justice social work have deemed the diversion to have been completed, we were concerned that there were more cases in which prosecutor involvement would have been appropriate. Having a prosecutor review the completion report allows them to see how the issues identified at referral and during the suitability assessment have been addressed and what the impact of diversion has been on the accused person, before taking a final decision to conclude the case or take further action. There is a risk that prosecutors who only see completion reports in respect of unsuccessful interventions will lose their confidence in diversion, and that not seeing successful completion reports will limit their awareness and understanding of the positive impact that diversion can have.

230. We consider that a more robust approach to the diversion process involving greater oversight by a prosecutor is needed in respect of some cases. This approach is not needed in respect of all cases being diverted from prosecution however. If prosecutors were to review every suitability assessment and every completion report, this would have significant implications for the resourcing of COPFS and would not be proportionate to the level of risk in some cases. Similarly, justice social work should not be required to submit comprehensive reports in cases where there is little likelihood that they will be read. We therefore consider that a more nuanced approach to managing diversion cases should be adopted depending on the circumstances of the case and particularly the seriousness of the offence.

231. A new model for managing diversion cases that makes best use of available resources while being proportionate to the circumstances of each case could include:

(1) Consideration being given by COPFS to whether there is greater scope to use the waiver approach in some cases marked for diversion. In such cases, there would be no need for comprehensive assessments and reports from justice social work. Instead, abbreviated assessment and report templates could be developed for use. Although there would be no reconsideration of prosecutorial action in these cases, the outcome of assessments and diversion interventions would still be reported to COPFS to inform future decision making should the accused person reoffend.

(2) The current approach, whereby COPFS administrative staff oversee cases with positive suitability assessments and successful completion reports, could be retained for non-complex cases involving low-level offending. However, the current approach would need to be improved so that assessments and reports are read in detail, with any ambiguities or uncertainties being escalated by administrative staff to the case marker.

In cases subject to this approach, the diversion process could be formally streamlined so that justice social work need not await an instruction from COPFS to proceed with the diversion intervention where the accused person has been assessed as suitable; and where justice social work assess that a person is suitable for diversion and has successfully completed their diversion, consideration could be given to using abbreviated reporting templates. Where the accused person is assessed as unsuitable or where the diversion has not been completed successfully, full reporting templates could be used to better

inform subsequent COPFS decision making and, as happens currently, COPFS administrative staff would return all such cases to the case marker for review.

- (3) A new, more robust approach should be used in respect of certain cases, such as those involving more serious offending. This approach would draw on the informal, ad hoc processes already used by some specialist units within COPFS. However, the approach should be formalised to ensure all relevant cases are subject to an increased level of prosecutorial oversight. In these cases, all suitability assessments and completion reports, regardless of their conclusions, would be reviewed by the case marker and the marker would be responsible for closing (or re-marking) the case.

This approach could include a proviso that diversion does not proceed until instructed, and it could be these cases where a more robust approach is taken to monitoring any reoffending during the diversion period and reducing justice social work's reliance on the accused person's account of the impact of diversion by, for example, engaging with complainers or making use of other sources of information regarding changes in behaviour.

232. In short, there should be a simple process requiring less resource for many cases, and there should be a more robust process for the small number of more serious cases in which the accused person is diverted from prosecution. It would be for the case marker who first marks the case for diversion to determine which of the above approaches is most appropriate in each case and to communicate this to justice social work. There would be a presumption that more serious offending (including domestic and sexual offending) should follow the more robust approach.

233. Ultimately, it will be for COPFS to work with justice social work and other agencies involved in diversion to determine the details of any new processes to manage diversion cases. In doing so, the suggestions made above as well as the findings of our review should be taken into account. The outcome the diversion partners should be trying to achieve is that the processes for managing accused persons diverted from prosecution should be proportionate to the circumstances of the case, the seriousness of the offending behaviour, the complexity of the needs of the accused person and the level of risk posed. Once any new processes are agreed, they should be reflected in guidance and training for all relevant staff.

## Reoffending

234. COPFS has a template letter to the accused person for use following a positive suitability assessment. The letter advises the accused person that diversion will proceed and states that they are expected to co-operate with social work and to be of good behaviour during the period of diversion. We found this template letter is not being sent (see paragraph 257) and accused persons are not being advised of the potential consequences of any further offending during the diversion period.

235. COPFS case marking instructions note that diversion should not be discontinued without good reason, but states that offending while subject to diversion may constitute a good reason. Where it occurs, COPFS should discuss it with justice social work before deciding to discontinue diversion.

236. While a further Standard Prosecution Report may prompt a prosecutor to reconsider a diversion marking in respect of a case,<sup>48</sup> no process is set out in the national

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<sup>48</sup> As happened in one of the cases we reviewed, noted at paragraph 172, where a report of further offending to COPFS prompted it to halt the diversion process.

guidelines or in any agency-specific guidance on how further offending should be monitored. Generally, we found that COPFS is not conducting proactive checks into whether an accused has further offended since diversion was instructed. Similarly, no proactive checks are carried out by justice social work, although they may become aware, informally, of further offending. Proactive checks may not be required in many or even most diverted cases, but would be appropriate to manage potential risks associated with an accused person diverted in relation to a more serious offence, such as domestic abuse. In such cases, a report of further offending may inform a prosecutor's decision as to the final outcome in the diverted case.

### **Sharing diversion outcomes**

237. It was rare for COPFS to inform justice social work of the final outcome of a case in which the accused person had been diverted from prosecution. This is despite the national guidelines which state that the local authority as well as the accused person should be so informed. Of the 51 cases we reviewed that proceeded to diversion, COPFS only informed justice social work of the final outcome in 10%. Whether or not they have reported to COPFS that diversion has been completed successfully, justice social work are keen to learn the final case outcomes. This was one of the issues raised most often in our survey responses from CJPs and in our interviews with justice social work staff.

#### **Recommendation 25**

COPFS and justice social work should review their processes for managing diversion from prosecution to ensure they are suitable for all types of cases. In particular, the process for managing cases involving more serious offending should be sufficiently robust. The agreed processes should be reflected in guidance and training for all relevant staff.

#### **Recommendation 26**

Community Justice Scotland and partners should develop standardised templates for suitability assessments and completion reports which comply with the national guidelines on diversion. Consideration should also be given to developing abbreviated and full templates if new diversion processes are adopted in light of Recommendation 25.

#### **Recommendation 27**

The diversion partner agencies should agree how further offending by the accused person during the diversion period affects their diversion from prosecution. Where the person has been diverted in relation to more serious charges, protocols should be developed to gather and share information about further offending which should be used to inform decisions about the final prosecutorial action or whether to continue diversion.

#### **Recommendation 28**

COPFS should inform justice social work of the final marking in cases where the accused person has received a diversion intervention.

### **Communication with the accused person**

238. During our review, we considered what communication takes place between the Crown Office and Procurator Fiscal Service (COPFS) and the accused person about diversion from prosecution.<sup>49</sup>

239. The national guidelines on diversion state that when prosecutors decide to refer an accused person for diversion, COPFS will write to the accused person and advise

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<sup>49</sup> Communication between the accused person and justice social work has already been considered above at the relevant stages in the diversion process (including the suitability assessment and the diversion intervention).

that a referral has been made and that arrangements are being made for a suitability assessment to be carried out. The letter should state that participation in diversion is voluntary and that if the accused person has any queries about diversion, legal advice should be sought. It should also outline the potential outcomes if the accused person does not engage in either the suitability assessment or the subsequent intervention. Additionally, the national guidelines state that COPFS will advise the accused person of the final outcome of their case.

240. COPFS case marking instructions also require an accused person to be written to on two separate occasions regarding diversion from prosecution, however these occasions are not entirely aligned with those set out in the national guidelines. Similar to the national guidelines, the case marking instructions state that COPFS should first write to an accused person being referred for diversion to ask whether they are willing to participate in the assessment process. However, the case marking instructions further state that the accused person should be given seven days to consider the offer of diversion and to opt out, before justice social work makes contact to arrange the assessment. The case marking instructions also state that, where the accused has been assessed as suitable for diversion by justice social work, the accused should be written to a second time, notifying them that diversion will proceed. In contrast to the national guidelines, the case marking instructions make no reference to notifying the accused person of the final outcome in their case.

241. While notifying the accused person of the final outcome is not referred to in COPFS national case marking instructions, it is mentioned in desk instructions for National Initial Case Processing unit (NICP) staff and template outcome letters are available. Indeed, template letters to the accused person are available covering all three stages of communication referred to in both the national guidelines and case marking instructions:

- Initial letter – this letter to the accused person notes the offence or offences with which they have been charged and states there is sufficient evidence to justify a prosecution. It also notes, however, that the circumstances of the offence suggest that the accused may benefit from social work assistance and that arrangements are being made for a social worker to see the accused person to discuss the issues further. The template letter also includes some basic facts about diversion and what will happen next (notably, though, the term ‘diversion from prosecution’ is not used).
- Diversion to proceed letter – this letter to the accused person may be sent after they have been assessed as suitable by justice social work and informs them that diversion will proceed. It states that the accused person is expected to co-operate with social work and to be of good behaviour during the period of diversion. There are two variations of this letter – one to be used where prosecution is being waived, and one to be used when the decision on whether to prosecute is being deferred. Where the decision is deferred, the template later states that if the final decision is that the accused person will not be prosecuted, they will be advised of this by letter.
- Outcome letter – this letter to the accused person advises them of the final outcome of their case. There are two variations of the letter – one advising that no further criminal proceedings will be taken in respect of the charges for which they were diverted, and one where proceedings have been deemed appropriate. The latter encloses a complaint indicating the formal commencement of proceedings and a citation to appear at court.

242. The diversion administrative team in NICP update the template letters with relevant details from the case and post them to the accused person. The team does this

whether the cases are marked by prosecutors in NICP or by those working in other teams across COPFS. Where cases are marked by prosecutors in the High Court sexual offences team however, we heard that they prefer to write their own letters to the accused as they do not consider the template letters meet their requirements.

243. In the cases we reviewed that had been marked for diversion, we considered the extent and quality of communication with the accused person. We found that communication could be improved in several ways. The lack of alignment between the national guidelines, the COPFS case marking instructions, the desk instructions and the template letters likely contributed to some of the issues we noted. While all accused persons received an initial letter, none received the diversion to proceed letter and almost half were not notified of the final outcome in their case. Where letters were sent, their quality varied. Many accused persons will have relied on justice social work to provide key information about the diversion process and its implications. While social work staff will have been able to answer some questions, those we interviewed were not always fully aware of COPFS policies or decision making around diversion. It is therefore essential that COPFS itself provides the accused person with the necessary, accurate information.
244. Generally, we considered that the template letters to the accused were not fit for purpose. Portions of the letters were routinely deleted by administrative staff with new text inserted. These amendments were not always for the better, with key information sometimes being removed. We were also told the text of the diversion to proceed template letter was amended to become the outcome letter, and the outcome letter template not used. Given the letters were routinely amended, we queried why the templates themselves were not updated in the interests of efficiency. We heard that updates had been requested by NICP but had not been implemented.
245. Because the template letters were adapted by administrative staff, there was low awareness among prosecutors of the contents of letters to the accused person. This meant there were missed opportunities for the letters to be better tailored to the recipient. For example, many of those diverted from prosecution are under the age of 18. We found no tailoring of letters to an accused child, such that they might better understand the letter and its implications. While there was a consensus among staff we interviewed that letters should be tailored to individual needs, there was little evidence of this in the cases we reviewed.
246. We understand work is underway to revise the template letters, and particularly where the accused person is a child to ensure they are written in accessible language. This is in preparation for the implementation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. A new process is also being developed whereby prosecutors can more easily instruct changes to template letters. Given our concerns about the template letters and about the quality of correspondence with the accused person more generally, we welcome these initiatives. During our review, we heard that some local authorities have produced a simple, clear leaflet on diversion from prosecution which they provided to those asking for more information. COPFS may wish to consider the development of a similar leaflet, which it could include in its initial letter to accused persons.
247. There was a small number of cases where administrative failures in the diversion process – caused either by COPFS or justice social work – resulted in long delays in communication with the accused, or in no communication at all. For example, in one case marked for diversion, it appears that an administrative error resulted in the case never being referred to justice social work for diversion and no letter being sent to the accused person. In another case, a referral was made, but it appears no response

was received from justice social work. The accused received an initial letter saying social work would get in touch, but nothing further. The lack of response from justice social work had not been identified by COPFS until brought to its attention by our inspectors. These are just two examples of administrative errors that we noted during the course of our review that have contributed to delays or other poor outcomes in diversion cases. COPFS and justice social work should work together to ensure such errors do not recur.

248. Below, we have assessed the use of each of the template letters in more detail, as well as making an overall assessment of the quality of the communication with the accused person in the cases we reviewed.

### **Initial letter**

249. In 88 of the 90 cases we reviewed, the accused person was referred to justice social work for a suitability assessment. In all 88 cases, COPFS sent an initial letter to the accused person advising them of the referral. We assessed the quality of the letters sent using the scale referred to at paragraph 87.

250. None of the initial letters were assessed as excellent or very good. Five per cent were considered good; 72% were adequate; 22% were weak; and 2% were unsatisfactory.

251. One issue with the initial letters sent to the accused person was that it was not always clear the accused could opt out of diversion. While the template initial letter included two sentences that reinforced the voluntary nature of diversion, these sentences were deleted from the letters in almost every case we reviewed (the four letters we assessed as good tended to include these sentences or some other statement that reinforced the voluntary nature of diversion). The deletion of these sentences means that the accused person is not being informed who they should contact at COPFS if they wish to opt out, or a deadline for doing so. It appears that a decision has been taken by some staff within COPFS to no longer tell an accused they have a seven-day period in which to opt out of diversion before a referral is made, but policy has not been updated to reflect this change and the template initial letter is being amended piecemeal, rather than the entire letter being revised to account for changes.

252. As well as removing sentences from the template initial letter, on occasion staff are adding a sentence that if the accused person does not engage with social work, then it is likely that criminal proceedings will follow. While not problematic on its own, there is a risk that this addition, coupled with the deletion of sentences relating to opting out, further weakens the message that diversion is voluntary.

253. The lack of clarity regarding the voluntary nature of diversion was the reason most initial letters were assessed as adequate. Where letters were assessed as weak, this was because of the same lack of clarity in addition to other factors – usually the absence of any tailoring of the letter to the recipient, including children. An example of one of the two initial letters assessed as unsatisfactory is as follows: the letter to a child accused noted they were being referred to social work in respect of three statutory offences. It made no reference to a far more serious charge against the child which had been deleted by prosecutors due to a lack of any supporting evidence. Thus, the child would not have immediately understood that this charge had been dropped. In addition, two of the three offences mentioned in the letter were ones with which the child had not previously been charged by the police. Only one of the statutory offences was explained in plain English. Only the name of the Act and

the section number was given for the other two, meaning the child would have had to look up or seek assistance to understand the nature of those charges.

254. It is vital that in its communication with the accused person, COPFS is giving clear and accurate information, free from legal jargon and written in a way that can be easily understood. This is particularly important as research has shown that the incidence of those with communication support needs is greater among those involved in the justice system than in the general population.<sup>50</sup>
255. As a result of the pandemic, COPFS personnel worked mostly from home unless their presence was required in the office. An arrangement was set up whereby administrative staff attended the office once each week to print and send the letters to the accused person. Referrals to justice social work were made immediately by email. This meant that justice social work often made contact with the accused person to assess their suitability for diversion before the person had received their initial letter from COPFS, causing confusion. While this arrangement may have been considered necessary at the height of the pandemic to minimise the risks to staff, it was still in place at the time of our review. The failure to send letters to the accused person timeously should be addressed.
256. There are inconsistencies in when initial letters to the accused person are sent, depending on the local authority area in which they reside. These inconsistencies have arisen at the request of the local authority. While a copy of the initial letter to the accused is usually sent to justice social work as part of the referral from COPFS, two local authorities ask COPFS not to send the letter to the accused until after they agree to assess the person, one asks COPFS not to send the letter at all as they want to send it, and one asks for the letter not to be sent until after the suitability assessment has been completed. Some of those we interviewed in justice social work queried these inconsistencies and were not aware that these adaptations had been made by COPFS at the request of their own local authority. COPFS administrative staff are required to be alert to these local adaptations when making referrals. In the absence of a continuing reasonable reason for their existence, it would be easier and more efficient if there was a consistent, national approach.

### **Diversion to proceed letter**

257. In 50 of the 90 cases that we reviewed, a decision was taken to proceed with diversion after the accused person was assessed as suitable by justice social work. In none of these cases was the accused person advised of this by COPFS by way of a diversion to proceed letter.
258. Staff told us this letter was sent in the past, but that delays in the processing of suitability assessments by COPFS meant the letter was often not sent until the accused person had already completed the diversion intervention, causing confusion. A decision was therefore taken to stop sending the diversion to proceed letters to the accused although COPFS policy was not updated to reflect this change and the change in practice has persisted, despite staff telling us there are no longer delays in the processing of assessments.

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<sup>50</sup> For example, CYCJ has noted that speech, language and communication needs are extremely common in the youth justice population with major studies showing that 50% to 70% of males have significant difficulties with language function. See Section 9 of CYCJ, [A guide to youth justice in Scotland: policy, practice and legislation](#) (2017).

## Outcome letter

259. Of the 90 cases we reviewed, only 51% of accused persons were told the final outcome of their case. Forty nine per cent of accused persons were not informed of the final outcome.
260. Where the accused person was told the final outcome, this generally only occurred where the diversion went ahead and was completed successfully, or where the diversion did not go ahead or was unsuccessful and other prosecutorial action was taken. In these latter cases, the accused person was informed about the other prosecutorial action (such as being prosecuted in court or receiving a warning or fiscal fine) although no connection was made in correspondence by COPFS between the failed diversion and the subsequent action. For example, where a person failed to engage in diversion, they were never told 'because you failed to engage with justice social work, you are now being prosecuted'.
261. Among those who were not told the final outcome of their case were accused persons whose diversion did not go ahead or was not successfully completed, but where COPFS subsequently decided to take no further action. While this was most often due to the accused person's own non-engagement in the process, there were examples of cases where the diversion did not go ahead through no fault of the accused, but they were still not notified that no further action would be taken. For example, one accused person was referred for diversion but justice social work said no further intervention was required because during the period since the offence, the accused person had already sought and received help for the identifiable need. This case was marked no further action but the accused was never informed by COPFS.
262. Thirteen accused persons who successfully completed their diversion were not informed of this by COPFS, and were given no information on whether the case was now closed or whether other prosecutorial action might still be taken. These accused may still be under the impression that the charges against them are being considered by COPFS.
263. In some cases, prosecutors deliberately chose not to inform the accused that diversion has been successful or that no further action was being taken. Some prosecutors said they did this to reserve the right to prosecute the person in future for the same charges. Rather than leaving the accused in the dark, a better approach would be to inform the accused of outcome, but to include in the letter a statement that the right to prosecute has nonetheless been reserved. This will not be appropriate for the majority of diversion cases, but prosecutors said they felt it necessary for more serious cases, such as where an accused had been diverted in relation to a sexual crime.

## Overall quality of communication with the accused person

264. In the 90 cases we reviewed, we assessed the overall quality of COPFS communication with the accused person, taking into account all correspondence and any other form of communication. We used the same scale as that highlighted at paragraph 87. In making our assessment, we took into account the key issues noted above, including:
- the content of the initial letter to the accused person
  - whether they were advised that diversion was to proceed
  - whether any letters were tailored to meet their individual needs
  - whether they were advised of the final outcome in their case.

265. In the 90 cases:

- in no cases was the communication with the accused person assessed as excellent or very good
- in 30% of cases, the communication was assessed as good
- in 14% the communication was adequate
- in 32% cases, the communication was weak
- in 23% cases, the communication was unsatisfactory.

266. In the five additional cases we reviewed that all related to sexual offences, we noted similar issues with the extent and quality of communication with the accused. In these cases, we assessed the quality of communication with the accused person as weak in four and unsatisfactory in one.

### **Recommendation 29**

COPFS should review when and how it communicates with the accused person in cases that have been diverted from prosecution. In particular, COPFS should:

- revise its template letters to accused persons who are being diverted from prosecution
- ensure letters are in plain English and tailored to the individual needs of the accused person
- ensure letters are sent promptly at key stages of the diversion process
- ensure this improved approach is clearly set out in the national guidelines and in COPFS policy and instructions to staff.

### **Communication with complainers**

267. During our review, we considered what communication takes place between COPFS and complainers in cases where the accused person is being diverted from prosecution.

268. The Victim Information and Advice (VIA) service is provided by COPFS to victims and witnesses who meet certain criteria. This includes, for example, those who are:

- under age of the 18 or over the age of 60
- the victim of domestic abuse, hate crime, sexual crime or stalking
- assessed as needing additional support.<sup>51</sup>

269. Where the VIA criteria are met, the complainer will be referred to VIA. VIA staff proactively provide advice and information about the criminal justice process and the progress of the complainer's case, and may signpost complainers to additional sources of support. Complainers who do not meet the VIA criteria may also contact COPFS for information about their case.

270. In many cases where the accused is diverted from prosecution, there is no individual complainer (such as those where the accused is charged with possession of drugs). In our review of 90 cases, 34% had one or more individual, identifiable complainers. In 18 (20%) of cases, the complainers met the VIA criteria. Reasons for meeting the VIA criteria included:

- 11 cases involved domestic abuse, one of which was stalking
- five cases involved child complainers
- one case involved elderly complainers
- in one case, the complainer was assessed as needing additional support.

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<sup>51</sup> Other categories of victims and witnesses also meet VIA criteria, but the ones listed are most relevant to cases involving diversion from prosecution.

271. Each of the complainers in these 18 cases should have been referred to VIA, however there was a record of only 12 being referred. Of the complainers that did not appear to have been referred, five were involved in a domestic case and one was the complainer who required additional support.
272. In the 12 cases that were referred to VIA, there was no evidence that VIA took any action in response to the referral. No contact appeared to have been made with the complainers to tell them about the progress of the case or its outcome. The complainers in those cases were likely not aware that the accused person had been diverted from prosecution, nor whether the diversion had been successful.
273. There was an assumption by prosecutors marking cases for diversion that when a referral was made to VIA, it would be acted upon. However, those prosecutors also acknowledged not having seen any evidence of communication with complainers in case files. They were also uncertain as to what points in the diversion process communication with the complainer should take place.
274. When we sought information from VIA staff about what happens to referrals in diversion cases, they were uncertain as to whether VIA had any role in such cases. There was a suggestion that VIA only dealt with complainers in cases that went to court. VIA staff said they had received no guidance or training about diversion from prosecution, so would have felt ill-equipped to speak to a complainer about what was happening in their case.
275. While there was no record of any communication between VIA and the complainers in the cases we reviewed, there were three examples of communication between the prosecutor marking the case and the complainer. All three were at the instigation of the complainer who had themselves contacted COPFS to request either that no proceedings be taken against the accused person, or that they would refuse to cooperate in a prosecution. These were all domestic cases, and it was reassuring that the prosecutors carried out checks to make sure the complainers were not making the request under duress. In one of these cases, the prosecutor's engagement with the complainer was particularly good.
276. We would have expected to find a better standard of communication in the five sexual offence cases we reviewed that were initially marked for diversion. The complainers in all five cases met the criteria for VIA referral due to the sexual nature of the charges, and all cases were referred to VIA. However:
- in two cases, there was no communication by VIA with the complainer at all
  - in one case, initial contact was made with the complainer but further contact was significantly delayed due to an administrative error
  - in two cases, prosecutors referred the case to VIA and VIA initially took no action (in one case, this was despite the prosecutor in the High Court sexual offence team providing VIA with specific instructions on contacting the complainer). In both of these cases, communication with the complainer improved in the later stages of the case, although in one, communication only commenced once diversion did not proceed and the accused was instead prosecuted.
277. Four of the five sexual cases we reviewed were marked by sheriffdom sexual offence teams. Only one case was marked by the High Court sexual offence team and, as noted above, they did issue specific instructions on contacting the complainer. At interview, we heard that the High Court sexual offence team sought to apply their usual approach to contacting complainers in sexual offence cases, regardless of

whether the cases were marked for prosecution or for diversion. This meant engaging with the complainer directly, or through the police. Their experience was that once the concept of diversion was explained to complainers, they were generally supportive of the approach. They also noted that there was scope for the police to better manage the expectations of complainers in sexual offence cases where the accused person was under 18 – complainers sometimes felt the police had raised their expectations that the evidence in their case was sufficient and that there would be a prosecution, unaware that diversion may be a possible outcome.

278. As part of our review, we sought to gather the views of complainers who had experience of the accused person in their case being diverted from prosecution. We sought to do this with the assistance of Victim Support Scotland. However, it proved difficult for Victim Support Scotland to identify victims with whom they work who had experience of diversion – this was likely because complainers are not aware the accused person has been diverted and therefore were not able to share relevant experience. Drawing on their broader work, however, Victim Support Scotland highlighted comments from victims that, while not always specific to diversion, indicated they were open to accused persons receiving help for issues that contributed to their offending so long as they also recognised the effect the offending had on their victims. There was also a sense that diversion should be tailored to the offence and the accused person, and that it may only be appropriate for lower level offending.

279. The COPFS approach to complainers in cases where the accused person has been diverted is clearly lacking. There are missed opportunities to inform complainers who meet the VIA criteria about the progress and outcome of their cases, and to inform and reassure them about the diversion process. It is not acceptable that cases are not being referred to VIA when they meet the criteria, and it is not acceptable that referrals that are being made are not being actioned. We were particularly concerned about the absence or poor quality of communication with complainers in more serious cases, such as those involving domestic abuse or sexual offences. The failure to engage complainers risks a loss of confidence in the justice system and in diversion as a prosecutorial option. It also fails to recognise that complainers may be an important source of information as to whether the diversion intervention is having a positive effect – in the case involving a stalking charge, for example, communication with the complainer would have afforded an opportunity for the complainer to say whether the stalking behaviour had ceased during the diversion period.

280. We heard that there is work underway within COPFS on template letters to complainers in cases where the accused has been diverted. This work appears to have been ongoing for some time. It should be accelerated as part of broader work to review the Crown's approach to complainers in diversion cases.

### **Victims' Right to Review**

281. The Victims' Right to Review is the right of a complainer to ask COPFS to review its decision not to take action or to stop or discontinue a case after the case has started in court. There was uncertainty among the COPFS staff we interviewed whether a right to review could be exercised in a case where the accused person was diverted from prosecution (whether or not the diversion went ahead, and whether or not it was successful).

282. Many staff considered that the right to review was not available in diversion cases, whereas the High Court sexual offence team told us they now routinely inform

complainers of the right in the diversion cases they manage. There was no information available on the COPFS intranet to guide staff on this issue.

**Recommendation 30**

COPFS should revise its approach to complainers in cases where the accused person is diverted from prosecution. The new approach should be reflected in policy and in guidance and training for staff. Complainers meeting specified criteria should be referred to Victim Information and Advice and kept informed of developments in their case.

**Recommendation 31**

COPFS should clarify whether the Victims' Right to Review applies in cases where the accused person has been diverted from prosecution and this information should be shared with staff and made public.

## Results

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283. During our review, we considered the extent to which desired **outcomes** are being achieved for those accused persons who are diverted from prosecution. We also considered the extent to which the **impact** of diversion is understood at a strategic level.

284. Generally, we found that across agencies and across areas, outcomes were defined, gathered, recorded, communicated and used in varying ways. This variation contributed to missed opportunities to compare and benchmark performance in support of improvements in service design and delivery. A shared understanding of the outcomes and impact of diversion from prosecution is needed across partner agencies.

### Person-centred outcomes

285. While the impact diversion had on an accused person was usually noted in the completion report by justice social work and data existed on successfully completed diversions, there was no consistent approach across areas to gathering and reporting on outcomes. As a result, justice social work and community justice partnerships (CJPs) more generally were not always in a position to demonstrate either the impact of the diversion intervention or that intended outcomes had been achieved.

286. Where the Outcomes Star was being used to assess outcomes in individual cases, it supported a 'shared language' between agencies and with the accused person. However, there were limitations as to how effectively this information could be analysed and used to demonstrate specific diversion outcomes. Where feedback from people on diversion was sought, it was not always used consistently to demonstrate outcomes, or to inform service design or delivery.

287. The national strategy for community justice envisages there being greater consistency in diversion from prosecution. However, there are significant variations between local authorities in, for example, the rates at which diversion referrals are converted to cases commenced and at which cases commenced are successfully completed.<sup>52</sup> Some variation in local data is to be expected taking into account differences in the frequency and type of offending across areas. Differences in recording practices may also contribute to variations in data to some extent. However, the reasons for the significant local variations do not appear to be well-understood and require further exploration.

288. Accused persons should have equal access to diversion from prosecution. However, we are concerned that this may not always be the case. Some issues highlighted in this report that may contribute to inequity of diversion outcomes include:

- There was some variation in police awareness of diversion and in the level of information about accused persons included in SPRs. Some local policing divisions had arrangements in place that supported better quality SPRs and which increased the chances of the accused person being diverted from prosecution.
- While the creation of the National Initial Case Processing unit (NICP) promoted consistency in case marking by the Crown Office and Procurator Fiscal Service (COPFS), marking was still carried out by a range of other prosecutors outside of NICP. They tended to have less awareness of and training on diversion than

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<sup>52</sup> See paragraphs 17 to 20.

their NICEP colleagues, which risked diversion not being considered more routinely as a prosecutorial option.

- There appeared to be variations in the efforts made by justice social work to engage accused persons in the diversion process.
- Although there had been a significant shift towards delivering bespoke, person-centred diversion interventions which supported the achievement of positive outcomes for accused persons, some inconsistency in service provision still existed with regard to particular types of offending or accused persons with particular needs.
- Delays during the diversion process may negatively affect outcomes for the accused persons involved. These include unavoidable delays in reporting or marking cases, but also avoidable delays arising from poor case management or communication between partners.

289. These issues all require to be addressed to promote equal access to diversion and equity in outcomes for accused persons. To support greater consistency, there is scope to make more effective use of local and national data. This would help diversion partner agencies and CJPs better identify, understand and address variations in practice and the outcomes experienced by those diverted from prosecution.

290. As noted in the earlier section on communication with complainers, we found no data and very little information on outcomes for complainers in cases where the accused person had been diverted.

### **Strategic impact of diversion**

291. CJPs require to understand the impact of diversion and the outcomes being achieved in their areas so that they can plan services and interventions effectively. As noted at paragraph 47 however, they found this challenging due to a lack of shared vision for diversion and agreement on intended outcomes. In particular, many CJPs highlighted their inability to track the effectiveness of diversion in terms of reducing further offending as a significant gap. As the profile of accused persons and the alleged offending in relation to which they are diverted develops, there is a need for further research in this area.

292. Gathering and analysing data is one means of monitoring the impact and outcome of diversion. While data is gathered by both justice social work and COPFS, inconsistencies in recording practices (see paragraphs 164 and 174) as well as a lack of nuance in the data currently limits its usefulness.

293. Within justice social work, measuring diversion outcomes was often limited to using the annual statistical returns required by the Scottish Government for inclusion in its Criminal Justice Social Work Statistics series. The national guidelines outline the diversion data currently gathered by justice social work for the Scottish Government and suggest additional data that would be useful for monitoring purposes. A review of the data gathered and shared with the government could form part of the broader review of the national guidelines.

294. Data on diversion held by COPFS is not published and is not yet routinely shared with partner agencies although there has been recent progress in this regard in some areas, which we welcome. There appeared to be no monitoring of diversion outcomes by COPFS, meaning data was not being used to inform policy or practice or to support improvement. While diversion is viewed very positively by COPFS staff,

confidence in diversion could be boosted even further if prosecutors had a greater awareness of successful diversion outcomes.

295. The national strategy for community justice includes the aim of optimising the use of diversion and intervention at the earliest opportunity. It is expected that intended outcomes for CJPs will be aligned to priority actions outlined in the strategy, with a delivery plan and a revised Outcomes, Performance and Improvement Framework due to be published shortly.

296. Some CJPs and justice social work services were already using or planning to use improvement plans, quality assurance mechanisms, strategic needs and strengths assessments, and performance monitoring to look at the effectiveness of diversion services and to support continuous improvement. These were not all specific to diversion and were sometimes used for all justice social work interventions or community justice planning. There was evidence in the cases we reviewed of routine quality assurance in some areas in the form of line managers counter-signing reports submitted to COPFS.

297. We have already noted that justice social workers said they rarely heard from COPFS about the final outcome for accused persons who have been diverted from prosecution.<sup>53</sup> Similarly, police officers said they were unlikely to hear from COPFS about cases that had been diverted. While this may not be necessary or desired in all cases, a general awareness of circumstances in which diversion from prosecution is used would improve officers' understanding of diversion and encourage them to express a view on whether diversion may be appropriate when writing SPRs. This could be achieved through sharing case studies and outcome data, for example, during training for officers on diversion.

### **Recommendation 32**

Community justice partnerships should implement effective mechanisms to monitor the impact of diversion and outcomes for people who have been diverted. This information should be used by all diversion partner agencies to inform service design and delivery.

### **Recommendation 33**

COPFS and justice social work should ensure that assessment, diversion intervention and case outcomes are recorded accurately, consistently and in accordance with the national guidelines on diversion. To support this:

- guidance on recording should be provided to staff
- those who have not engaged in the assessment process should be recorded separately to those who have been assessed as not suitable for diversion
- COPFS should consider the need for more nuanced marking codes which more accurately reflect diversion outcomes.

### **Recommendation 34**

The Scottish Government should review the diversion data it requests and publishes annually to ensure that national data on diversion is comprehensive, accurate, and usefully informs measuring the effectiveness of diversion.

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<sup>53</sup> See paragraphs 175 and 237.

## Appendix 1 – Key terms

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**Accused person:** person charged with committing a crime.

**Alcohol and drug partnerships (ADPs):** multi-agency strategic partnerships focused on alcohol and drugs issues in their local areas. ADPs are responsible for developing local strategies for tackling, reducing and preventing problem alcohol and drug use.

**Alternative to prosecution:** the prosecutor may decide instead of prosecuting an accused in court that it is more appropriate and in the public interest that an alternative to prosecution is offered.

**Bail:** an accused person's status when they have been allowed to remain at liberty (i.e. not imprisoned) pending the conclusion of their case, subject to conditions.

**Care Inspectorate:** the Care Inspectorate is the independent scrutiny, assurance and improvement support body for social care and social work in Scotland. Further information is available on the [Care Inspectorate website](#).

**Case Management Unit (CMU):** the local area units within Police Scotland which review all SPRs to ensure that they meet the required standard for prosecution.

**Case marker:** the prosecutor who makes the initial decision on how to proceed with a case.

**Case marking:** decision by the prosecutor of action to be taken in a case.

**Case marking instructions:** Essential guidance and direction for prosecutors making initial decisions on reports from the police and other agencies.

**Charge:** the crime that the accused person is suspected of having committed.

**Child:** a person under the age of 18, as defined in the Children (Scotland) Act 1995.

**Children and Young People's Centre for Justice (CYCJ):** an organisation which supports improvements in youth justice in Scotland. For further information, visit the [CYCJ website](#).

**Community justice outcomes improvement plans:** plans setting out how community justice partners are achieving national and local outcomes.

**Community Justice Partnerships (CJPs):** these comprise community justice partners as defined in the Community Justice (Scotland) Act 2016 coming together locally to assess the community justice-related needs of people and communities in their area and ensure that appropriate services and interventions are in place. The community justice partners are set out at Figure 1.

**Community Justice Scotland:** the national body with responsibility to promote the National Strategy for Community Justice; to monitor, promote and support improvement in, and keep Scottish Ministers informed about, performance in the provision of community justice; to promote and support improvement in the quality and range of provision of community justice; and to promote public awareness of benefits arising from community justice.

**Community planning partnerships:** a community planning partnership is the name given to all those services that come together to take part in community planning.

**Complainer:** the person who made the allegation.

**Criminal Justice Services Division:** the division within Police Scotland that provides national oversight of police custody and other criminal justice functions relevant to policing.

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

**Crown Counsel's instructions:** instructions 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, the investigation of sudden, unexplained or suspicious deaths, and the investigation of criminal allegations against the police. Also referred to in this report as 'the Crown'.

**Direct measures:** options available to police and procurator fiscal following an alleged offence; for example a warning, a fine or unpaid community work.

**European Framework for Quality Management (EFQM) Model:** the globally recognised management framework that supports organisations in managing change and improving performance.

**First substantive marking:** the first significant decision of action to be taken.

**Fixed penalty notices:** on-the-spot fine for a minor offence, issued by the police.

**HM Inspectorate of Constabulary in Scotland (HMICS):** the inspectorate body that provides independent scrutiny of both Police Scotland and the Scottish Police Authority. For more information, visit the [HMICS website](#).

**HM Inspectorate of Prisons for Scotland (HMIPS):** the inspectorate body that is responsible for the inspection and monitoring of Scotland's prisons. For more information, visit the [HMIPS website](#).

**HM Inspectorate of Prosecution in Scotland (IPS):** the inspectorate body that is responsible for inspecting the operation of the Crown Office and Procurator Fiscal Service (COPFS). For more information, visit the [IPS website](#).

**Justice social work:** responsible for delivering a range of services for those involved in the justice system. This includes the completion of reports for courts and the Parole Board and the supervision of individuals on statutory social work orders and licences.

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

**National Initial Case Processing unit (NICP):** the national unit within COPFS where initial decisions are made in relation to alternatives to prosecutions and prosecutions in the Justice of the Peace Courts or Sheriff Courts before a judge without a jury.

**Operational instructions:** internal documentary guidance that informs COPFS staff of essential policies and updated guidance.

**Paraprofessional:** this is a term used to denote a variety of roles including social work assistants and justice officers.

**Procurator fiscal/prosecutor:** public prosecutor in Scotland who makes decisions on action to be taken in relation to crimes reported by the police and other agencies. They also investigate all sudden and suspicious deaths.

**Public Protection Committees:** public protection is a generic term used to describe a range of local structures to respond to child protection, adult support and protection, Violence Against Women and Girls Networks, people convicted of high-risk offending via Multi-Agency Public Protection Arrangements and suicide prevention. Local structures for governance and accountability regarding these processes may vary in local areas and can include Public Protection Committees.

**Rebuttable presumption against the prosecution of children:** a Crown policy against the prosecution of children unless evidence or other factors prove otherwise.

**Recorded police warnings:** use of police officers' discretion when dealing with minor offences.

**Reporting officer:** the term used for a police officer undertaking the completion of an SPR.

**Scottish Children's Reporter Administration (SCRA):** the public body responsible for protecting children at risk and intervening in cases where children commit criminal offences.

**Social Work Scotland:** the professional leadership body for the social work and social care professions.

**Solemn level proceedings:** prosecution of serious criminal cases before a judge and a jury in the High Court or Sheriff Court.

**Structured deferred sentence:** a structured intervention for people convicted of an offence but before final sentencing.

**Sufficiency of evidence:** evidence from at least two independent sources that the crime was committed and that the accused was the perpetrator of the crime.

**Third sector:** charities, social enterprises and voluntary groups supporting communities at a local level.

**Time bar:** the end of the time limit which regulates the maximum length of time that can elapse prior to the commencement of proceedings for accused persons.

**Undertaking:** the document signed by someone who has been arrested and released on police bail after promising to come to court at a later date and agreeing to certain conditions, such as not committing any other crimes.

**United Nations Convention on the Rights of the Child:** the international human rights treaty that grants all children and young people (under 18 years of age) a comprehensive set of human rights.

**Victim Information and Advice (VIA) service:** a service provided by COPFS which offers assistance to some victims and witnesses.

**Victim Support Scotland:** an independent charity which provides support and information to victims and witnesses of crime.

**Waiver approach:** give up the right to take any alternate prosecutorial action at the point at which the diversion scheme is offered and accepted.

**Youth justice unit:** specialist units within Police Scotland that operate in some local areas and collaborate with local statutory partners in respect of youth offending.



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### **About HM Inspectorate of Prosecution in Scotland**

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