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Inspectorate of Prosecution in Scotland

Thematic Review of the Investigation and Prosecution of Sexual Crimes



November 2017



CONTENTS

	Page
Introduction	3
Key Findings	8
Recommendations	10
Key Terms	11
Chapter 1 – Outcome of High Court Sexual Crimes	13
Cohort of Investigation	19
Chapter 2 – Investigation and Prosecution of Sexual Crimes	20
Case study	33
Cohort of Pre-Petition Investigation	35
Chapter 3 – Pre-Petition Investigation	36
Chapter 4 – Victims and Witnesses	47
Chapter 5 – Sensitive Personal Records	69
Cohort of Child Offenders	75
Chapter 6 – Children	76
Annex A – Criminal Law and Procedure	82
Annex B – VIA Remit	87



INTRODUCTION

In contrast to most other types of reported crimes in Scotland, which have steadily fallen since 2007-08, sexual crimes recorded by the police have increased each consecutive year. Sexual crimes are at the highest level since 1971¹ and increased by 5% from 10,273 charges in 2015-16 to 10,822 in 2016-17.²

In 2016-17 rape and attempted rape accounted for 17% of sexual crimes, representing an increase of 66% between 2010-11 and 2016-17.³

In 2015⁴ we reported that sexual crimes constituted more than 50% of the overall Crown Office and Procurator Fiscal Service's (COPFS) High Court workload; it now constitutes 75%.⁵

A combination of reasons may explain increased reporting:

- A wider definition of rape and attempted rape introduced by the 2009 Act;
- Greater confidence on the part of those abused that their accounts will be listened to by the police following the successful outcome of cases, including historic crimes;
- Media coverage that has led to the identification of further victims who previously may not have reported crimes to the police;
- More pro-active policing involving investigations with multiple victims/offenders of sexual and domestic abuse offences which span a number of years through the creation of the Domestic Abuse and Rape Taskforces; and
- An increase in online child sexual abuse, which includes grooming/exploitation.

While there has been an increase in the reporting of such crimes, the high rate of attrition (the process whereby cases drop out of the criminal justice system at any point) and the low conviction rate,⁶ particularly for offences of rape and attempted rape, remain a source of concern. In 2015-16 the conviction rate for all sexual crimes was 72%, but only 48%⁷ for rape and attempted rape. Accounts of "secondary victimisation" experienced as a result of the trauma of the investigation, prosecution and court room processes, is a feature also associated with crimes of sexual violence.

¹ First year for which comparable crime groups are available.

² Scottish Government Bulletin on National Statistics on crimes and offences recorded by the police in 2016-2017.

³ Scottish Government Bulletin on National Statistics on crimes and offences recorded by the police in 2016-2017.

⁴ IPS Time Limits report para 116 (<http://www.gov.scot/Publications/2015/02/1907>).

⁵ As at 02/10/17.

⁶ Conviction rate is calculated as the proportion of people with charge proved as a proportion of people proceeded against for a specific crime type.

⁷ Scottish Government Criminal Proceedings in Scotland Statistics 2015-16.



The investigation and prosecution of sexual crimes pose particular problems for prosecutors.

- The requirement for corroboration to prove charges, which is a distinctive feature of Scots criminal law, impacts most acutely on offences that occur in private, a feature of many sexual crimes. This is a significant hurdle for the prosecution to overcome.⁸
- Contrary to common perception, many victims of such crimes do not report the offence at the time it occurs. In 2014-15, 39% of recorded rapes were reported one year or more after the alleged incident took place.⁹ Delays in reporting can impact negatively in two ways:
 - It may result in a loss of evidence and/or lead to inconsistencies in the account of the crime; and
 - For many members of the public, who make up juries, delays in reporting appear counter-intuitive behaviour and may present an obstacle to them accepting a victim's account of what happened.

Due to the nature of the offence and its impact on victims, disengagement of victims during the investigation or any court proceedings is not uncommon.¹⁰ This is likely to be exacerbated where:

- the accused is known to the victim and the breach of trust and betrayal compounds the abuse and adds to trauma and distress;
- the accused targets vulnerable individuals, including children, people with learning disabilities, or mental health problems who are the least equipped to participate in an adversarial criminal justice system.

Aim

The aim of this inspection was to review and assess the effectiveness COPFS investigation and prosecution of High Court sexual crimes having particular regard to:

- The effectiveness of procedures, processes and systems in ensuring cases are progressed expeditiously;
- The quality and thoroughness of the investigation; and
- The individual needs of the victims.

In doing so we examined:

- The operation of the specialist sexual crime teams and the National Sexual Crimes Unit (NSCU);
- The investigative processes and procedures;
- The use of pre-petition investigation;
- Communication and contact with victims;
- Whether sensitive, personal information is obtained in accordance with COPFS policy; and
- Offending by children.

⁸ Corroboration is discussed further at Annex A.

⁹ Police Scotland Management Information Report Quarterly Information 2014/15.

¹⁰ See pages 15/16.



Objectives/Outcomes

We seek to:

- Identify any weaknesses in the procedures, processes and systems aimed at progressing cases of High Court sexual crimes and make recommendations for improvement;
- Identify any barriers/impediments to delivering a quality product, and make recommendations for improvement; and
- Identify good practice.

Scope of Review

The focus of this inspection is the investigation and prosecution of sexual crimes prosecuted in the High Court of Scotland. The review does not include any assessment of advocacy or the presentation of cases at court.

While the review is concerned with investigation and prosecution of High Court sexual crimes by COPFS, it is impossible to review the prosecution of such crimes in isolation. The role of the police, courts and judiciary all contribute to the effectiveness of the system and the experience encountered by the victim.

While our recommendations are directed to COPFS, our findings in some areas go beyond the remit of COPFS recognising that system-wide solutions are required to improve the experience of victims.

Methodology

We adopted a mixed-method approach which combined the following evidence-gathering methods: **Interviews** with personnel, organisations and parties involved with such offences, including:

- Key personnel involved in the investigation and preparation of serious sexual crime cases in COPFS, including Senior Legal Managers (SLM), Crown Counsel (CC), business managers, case preparers, Victim Information and Advice (VIA) and administrative support
- Police Scotland, Scottish Courts and Tribunals Service (SCTS) and Scottish Government Justice Directorate
- Representatives from voluntary sector groups and principal support agencies for victims including Archway Glasgow, Barnardo's, Children 1st, Children and Families (City of Edinburgh Council), Rape Crisis Scotland (RCS), Scottish Children's Reporter Administration (SCRA), Scottish Government, Scottish Women's Aid (SWA) and Victim Support Scotland (VSS)

Document review: A review of COPFS departmental protocols, policies and guidance, management information, current statistics, trends and profile of cases and academic research/reports.

Victim's Voice: We met with 16 victims of sexual crimes who had personal experience of the prosecution service and the criminal justice system (victim focus groups). Ten of their cases had proceeded to trial with varying outcomes, two concluded with a plea of guilty, there was a finding of guilty in five and findings of not guilty or not proven in three. Four cases are still proceeding and in the remaining two cases, it was determined that there was insufficient evidence for a prosecution. We are grateful to Rape Crisis Scotland for facilitating these meetings. All quotes from the meetings have been anonymised.



File reviews: We conducted three separate case reviews.

- We examined the outcome of all cases where the accused was placed on petition in 2014-15 where at least one charge was sexual, and where some High Court preparation had taken place.¹¹ This included cases where proceedings were discontinued or charges were conjoined¹² into another case.
- We examined a significant sample¹³ of the 567 cases where pre-petition investigation was instructed by the National Sexual Crimes Unit (NSCU) in 2014-15 (Pre-Petition review). The review considered decision-making, the focus and outcomes of pre-petition investigation, timescales and contact with victims.
- We examined a significant sample of cases from April 2016 where the accused was indicted in the High Court for a sexual crime.¹⁴ (Indicted cases review). The review considered the decision-making, the effectiveness of the investigation and contact and communication with victims.

¹¹ Source: COPFS Management Information Unit (MIU).

¹² Combining cases relating to different incidents alleged to have been committed by one accused person into a single case, enabling all the charges to be dealt with at one trial. This is commonly referred to as “conjoining” or “rolling up”.

¹³ Source: COPFS MIU – 82 cases.

¹⁴ Source: COPFS MIU – 50 cases.



ACKNOWLEDGEMENT

We wish to extend thanks to all who facilitated our visits and shared their experience and knowledge. We found many committed and dedicated professionals seeking to achieve the best outcome for each case, challenged by unprecedented numbers of serious sexual crimes in a climate of budgetary restraint and an increasingly complex criminal justice system.

We wish to thank in particular the victims of sexual crimes who, with great dignity and courage, shared with us their experience of the criminal justice system and the impact that it had and, in many cases, continues to have on their lives. Victims play a pivotal role in the investigation and prosecution of sexual crimes. Accordingly, it is important to listen to the victims' voice to ensure improvements are made within the criminal justice system to enhance public confidence and secure the engagement of future victims and witnesses in the investigation and prosecution of these crimes.



KEY FINDINGS

- ❖ The high number of victims who disengage during the criminal justice process, after taking the significant step to report the crime, infers that more could be done by the criminal justice system, in which COPFS is arguably the key organisation, to provide the necessary information and support to victims, many of whom have complex needs or vulnerabilities, to enable them to have the confidence to continue throughout the process.
- ❖ The high level of agreement between the specialist prosecutors and NSCU at the initial decision stage is reassuring and provides a high degree of confidence in the initial decisions made by specialist prosecutors.
- ❖ Premature reporting by Police Scotland is a contributory factor for instructing pre-petition investigation.
- ❖ Pre-petition investigation took more than ten months to conclude in 45% of the cases examined.
- ❖ Cases where there has been pre-petition investigation are not being expedited after the accused has appeared on petition. By and large, COPFS is indicting pre-petition cases in accordance with the statutory timescales that apply to High Court cases.
- ❖ The standard of communication where pre-petition investigation was undertaken, fell below what should be expected for 47% of victims.
- ❖ VIA updated victims of any significant developments in 93% of cases. There were, however, significant gaps between contacts from VIA.
- ❖ The frequency of contact provided by the COPFS Victim Strategy is not meeting the needs of victims.
- ❖ Victims commonly do not understand that VIA is part of COPFS.
- ❖ The use of legal terms when dealing with victims and witnesses creates barriers and enhances a sense of separation and detachment from the process.
- ❖ The COPFS Victim Strategy requires a more nuanced approach, tailored to victims' needs. For victims with identified vulnerabilities, such as mental health problems or learning difficulties, a bespoke strategy taking account of their particular needs, including whether more regular contact would assist, should be discussed and agreed at the outset.
- ❖ There is an unrealistic expectation by COPFS of victim and witnesses' understanding of the prosecution process and how the criminal justice system operates.
- ❖ The abolition of notices and applications for special measures would provide certainty for victims that they could give evidence in accordance with the standard measure of their choice.
- ❖ Asking the victim to engage pro-actively on special measures at the beginning of the investigation is premature. Many victims and witnesses do not have sufficient knowledge of court procedures and concepts such as TV link to make informed decisions. Decisions on special measures should be tailored to the individual needs of the victim following a face to face meeting.



- ❖ The criminal justice system places an onus on victims to seek updates, decide about special measures, find appropriate support, deal with the shifts and uncertainties in scheduling of trials and narrate what happened in an environment over which they have no control. For many dealing with the trauma of the offence, the process is too much and it explains why many simply disengage.
- ❖ Prosecution requests for sensitive, personal records are being tailored to the specific purpose for which records are being sought.
- ❖ Whilst cases involving child offenders/victims are being given some priority they are not being progressed to custody timescales.
- ❖ We found a significant gap in the availability of any advocacy or court based support for children. No agency or organisation provides such support on a national or systematic basis.



RECOMMENDATIONS

Recommendation 1:

COPFS should develop a policy of exception reporting to NSCU at the initial decision-making stage of the investigative process.

Recommendation 2:

COPFS should revise the target dates for the submission of the Investigative Agreement to Crown Counsel to enable a more detailed instruction on the direction of the investigation and of the case by Crown Counsel. The target dates should be monitored and rigorously enforced.

Recommendation 3:

COPFS should consider undertaking the indicting process prior to the case being reported to NSCU for a final instruction.

Recommendation 4:

COPFS should introduce a more sophisticated system of allocating cases for indicting to reflect the priority that is to be afforded to certain categories of cases.

Recommendation 5:

COPFS should restrict pre-petition investigation to only those inquiries that are essential to reach a decision on whether there is sufficient credible and reliable evidence.

Recommendation 6:

COPFS should take account of any period of pre-petition investigation when allocating reporting dates for cases to be reported to NSCU for a final decision.

Recommendation 7:

COPFS should ensure that VIA pro-actively offer to contact the victim every eight weeks, as a minimum, unless more frequent contact is required or requested or a victim expressly opts out.

Recommendation 8:

COPFS should ensure that there is a dedicated VIA Officer allocated to each case and provide victims with information on who to contact in their absence.

Recommendation 9:

COPFS should consider re-branding VIA to include a reference to “prosecution” in their title.

Recommendation 10:

COPFS should review all correspondence sent out by VIA.

Recommendation 11:

COPFS should discuss and agree special measures at the interview with the case preparer in the context of preparing the victim or witness for court.

Recommendation 12:

COPFS should ensure that a court management strategy is agreed with every victim and relevant agencies following service of the indictment as part of the Victim Strategy.



KEY TERMS

Accused: Person charged with committing a crime.

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

Appear on Petition/Committal for Further Examination (CFE): First appearance of an accused at court.

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

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

Case Preparer: Members of COPFS staff who interview witnesses and prepare cases for court in solemn (High Court) proceedings.

Child Offender: Child charged with committing a crime.

Corroboration: Requirement for each essential element of a crime to be corroborated by another source of direct or circumstantial evidence (i.e. the testimony of at least one other witness).¹⁵

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

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

Dedicated Floating Trial: Trial allocated to a particular High Court that can start on one of a number of days within the same week.

Indictment: Court document that sets out the charges the accused faces at trial in solemn proceedings.

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

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

Moorov Doctrine: Incidents sufficiently closely connected in time, character and circumstances that can be treated as a single course of conduct.¹⁶

National Sexual Crimes Unit (NSCU): A body of senior Crown Counsel specialising in the investigation and prosecution of sexual crimes.

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

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

¹⁵ See Annex A for more detailed explanation.

¹⁶ See Annex A for more detailed explanation.



Preliminary Hearing (PH): Procedural hearing in all High Court cases. The purpose is to determine the state of preparation of the defence and the prosecution and to resolve all outstanding issues prior to the trial commencing.

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

Solemn Procedure: The procedure for the prosecution of serious criminal cases before a judge and jury in the High Court or Sheriff Court.

Victim Information and Advice (VIA): The dedicated service offered by COPFS to victims, witnesses of certain crimes and bereaved relatives affected by certain types of death.

Victim

In law, the term complainer is used to describe the person against whom it is alleged a crime has been committed. Women and men who have experienced sexual violence, prefer to use “survivor”.

In this report, we have used the term ‘victim’ for the person against whom it is alleged a crime has been committed. It is the terminology used in legislation and is commonly understood. It makes no assumption about the veracity of the allegation(s).

A more detailed explanation of the law and procedure applicable to solemn sexual crimes is set out at **Annex A**.

List of abbreviations:

1995 Act: The Criminal Procedure (Scotland) Act 1995

2002 Act: The Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

2004 Act: The Vulnerable Witness (Scotland) Act 2004

2009 Act: The Sexual Offences (Scotland) Act 2009

2014 Act: The Victims and Witnesses (Scotland) Act 2014

2016 Act: Abusive Behaviour and Sexual Harm (Scotland) Act 2016



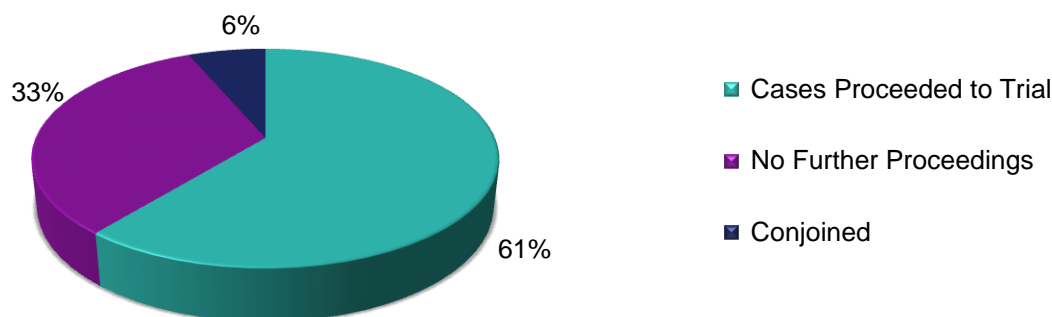
CHAPTER 1 – OUTCOME OF HIGH COURT SEXUAL CRIMES

1. We examined all cases reported by the police in 2014-15 where an accused appeared in court on a charge of a sexual crime and the case was identified as a potential High Court case.¹⁷ There were 643 such cases, of which 4 are still active.

Outcome of Cases

2. Of the 639 concluded cases, 61% (391) proceeded to trial, 33% (207) were discontinued by the prosecution and recorded as no further proceedings and 6% (41) were conjoined¹⁸ into another case involving the same accused.¹⁹

Chart 1 - Sexual Offences Outcomes 2014/15



Outcome of Trial Proceedings

3. Chart 2 provides a breakdown of the outcome of the 391 cases that proceeded to trial.²⁰ Of these, 65% (254) resulted in a finding of guilty²¹ or a guilty plea. A finding of not guilty²² or a not guilty plea was accepted in 29% (114) and in the remaining 6% (22) there was a finding by the court that there was insufficient evidence at the end of the prosecution case (a finding of no case to answer) or the case was discontinued by the court (deserted simpliciter) (1).

¹⁷ Source: COPFS MIU – April 2014 to April 2015.

¹⁸ Combining cases relating to different incidents alleged to have been committed by one accused person into a single case, enabling all the charges to be dealt with at one trial. This is commonly referred to as “conjoining” or “rolling up”.

¹⁹ These cases were not further analysed.

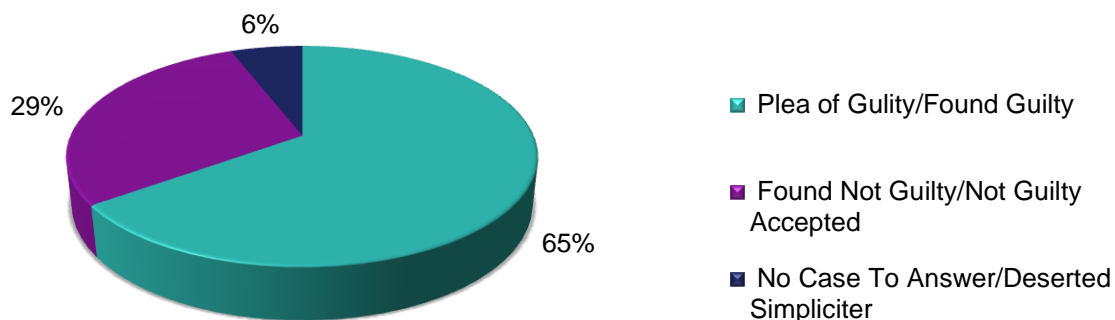
²⁰ In some cases there is more than one disposal.

²¹ Pleas of guilty and findings of guilty by a jury included pleas and findings of alternative and amended charges.

²² Includes ‘Not Proven’ verdicts.



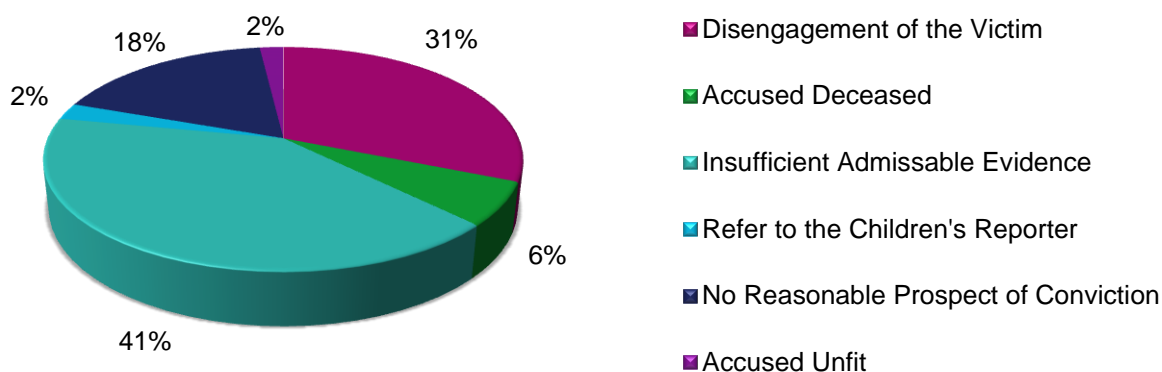
Chart 2 - Cases Proceeding to Trial



Discontinued Cases

4. We examined the 207 cases that were discontinued by the prosecutor after the accused had appeared on petition. Chart 3 illustrates the substantive reason for the case not proceeding. The three main reasons were: insufficient admissible evidence in 41% (85), disengagement of victims' in 31% (66), and no realistic prospect of conviction in 18% (37). In the remaining cases, five were referred to the Scottish Children's Reporter, in 13 the accused died during the course of the proceedings and in one the accused was deemed unfit for trial.

Chart 3 - Reason for No Further Proceeding Decision

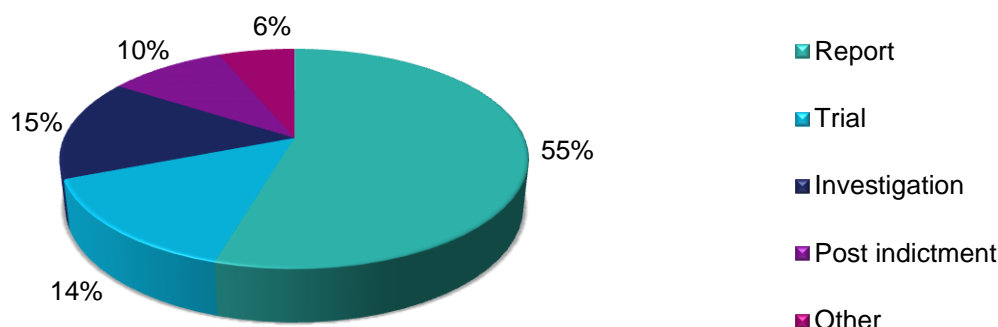




Stage of Proceedings where Cases Discontinued

- Chart 4 provides an overview of the stage of proceedings where the cases were discontinued.

Chart 4 - Stage of 'No Further Proceeding' Decision



Of the 207 cases:

- In 15% (31) a decision was taken not to continue with the prosecution during the initial investigation undertaken by specialist sexual crime teams;
- More than half – 55% (113) – were discontinued after the case was reported to NSCU for a decision on whether there was sufficient evidence (reporting stage);
- 10% (20) were discontinued after the case had been indicted but prior to the trial;
- 14% (30) were discontinued at the trial; and
- The remaining 6% (13) did not proceed due to the death of the accused.

Discontinued Cases

Disengagement of Victims

- Some of the 66 cases discontinued due to the disengagement of a victim, involved more than one victim, resulting in a total of 83 victims who withdrew, for a variety of reasons.
- 18 of the 66 cases were dependent on the application of the Moorov doctrine to provide sufficient evidence. As a result of the disengagement of at least one victim, these cases could no longer proceed, resulting in the charges involving other victims having also to be discontinued.
- 51 cases were discontinued when the case was reported to NSCU or later.
- As the victims' evidence is the lynchpin in the vast majority of cases involving sexual crimes, the inability in such a high proportion of cases to retain their engagement throughout the process is of concern and a significant factor in the high attrition rate of such cases.
- We conducted further analysis of the 66 cases, involving 83 victims, to identify specific reasons for disengagement.



Analysis of Reasons for Disengagement

11. Of the **83** victims:
12. **16** victims had made it clear from the outset that they did not wish to engage with any proceedings. In the circumstances, it is not surprising that proceedings were discontinued due to the non-engagement of the victims.
13. In six of the 16 cases, the police had proactively identified a former partner or partners of the accused and obtained statements regarding similar offending. This proactive approach is adopted by officers where there is intelligence that the suspect is a serial perpetrator, often violent and presents a risk of harm to victims, their families and is likely to re-offend. It has resulted in a number of convictions of high risk offenders.
14. There is a clear public interest in apprehending such perpetrators by identifying other potential victims who, if they participate, will provide a sufficiency of evidence where there is otherwise none or strengthen an existing case. However, care requires to be taken to ensure that such victims are genuinely engaged and accept that they may be required to attend court.
15. We were advised that Police Scotland has recently issued revised guidance on the use of proactive investigation as a tactic. The guidance highlights the requirement for an open, honest and transparent approach and specifically states that:

“Officers should ensure victims have a clear understanding that any statement provided by them may form part of criminal justice proceedings and may result in a requirement for them to attend court as a witness.”
16. This refreshed guidance is to be welcomed. Our findings confirm the importance of emphasising at the outset the consequence of providing a statement. It is likely to compound the distress of the victim who made the initial allegation, with all the consequences that flow from the accused being arrested and charged, if the prosecution has later to be discontinued due to the non-engagement of another victim who was never fully engaged.
17. In the remaining cases where the victims disengaged:
 - **21** who were identified as being vulnerable disengaged during the investigation stage;
 - **10** who were identified as being vulnerable disengaged at court as they were physically unable to give evidence;
 - **8** changed their initial account regarding an essential part of the allegation;
 - **25** opted out and refused to co-operate during the course of the investigation; and
 - **3** disengaged due to the length of time that the proceedings had taken stating that they just wanted to “get on with their life”.



Disengagement where Case Discontinued due to Insufficient Evidence

18. In addition to the 66 cases, there were **14** cases discontinued, due to insufficient evidence, where at least one victim had disengaged.
19. On reviewing these cases:
 - **4** who were identified as being vulnerable disengaged during the investigation stage;
 - **4** victims opted out and refused to co-operate during the course of the investigation;
 - **3** changed their initial account regarding an essential part of the allegation;
 - **2** refused to co-operate at court; and
 - **1** moved overseas.
20. **Thus the total number of cases where victims disengaged was 80, which was 12% of the total sample and 38% of all cases discontinued.**

Post Indictment

21. We conducted further analysis of cases that were discontinued after having been indicted (**50 cases**) in an attempt to gain some understanding why the decision was taken at such a late stage, and after the cases had been considered on a number of occasions.

Insufficient Admissible Evidence

22. We found that **20** cases were discontinued due to insufficient evidence.²³ The cases fell into four categories:
 - In **9** the evidence led at court did not meet expectation of the prosecutor resulting in there no longer being a sufficiency of evidence.
 - In **4** essential evidence was no longer admissible due to new information.
 - In **1** new evidence was obtained which resulted in there being insufficient evidence to proceed.
 - In **1** the complainer was too distressed to give evidence.
 - In **5** it was not possible from the case files to establish the reason for the late decision.

No Realistic Prospect of Conviction

23. There were **13** cases discontinued, after being indicted, because there was no longer a realistic prospect of conviction.²⁴
24. Two themes were identified:
 - In **10** cases, new evidence came to light which undermined the victims' account of what happened resulting in the case being discontinued as it was considered there was no longer a realistic prospect of securing a conviction. In five of the ten cases the evidence was the result of phone analysis or from communications using social media platforms.
 - In the remaining **3** cases, the quality of evidence given at the trial did not meet the expectation of the prosecutor and it was assessed that there was no longer a realistic prospect of obtaining a conviction.

²³ 8 were discontinued prior to the trial and 12 at the trial.

²⁴ 7 were discontinued prior to the trial and 6 at the trial.



Disengagement of Victims

25. **16** cases were discontinued as a result of victims disengaging from the prosecution. In 8 of these cases the prosecution was seeking to prove the case through the application of the Moorov doctrine, using the evidence of more than one victim.

Other

26. **One** case was discontinued due to the ill-health of the accused.

Overview

27. Of the cases that proceeded to trial, 65% either resulted in a plea or finding of guilty.
28. The main reason for the discontinuation of cases was insufficient evidence. It is a legitimate and proper function of the prosecutor to continue to review evidence throughout the life of a case and assess whether new evidence emerging, either before or during a trial, impacts on the decision to prosecute in the public interest.
29. Of more concern is the number of victims that disengaged at various stages throughout the process. 51 of the 66 cases where the victim disengaged occurred after the case had been reported to NSCU. In 16 of these an indictment had been served on the accused. This represents a significant number of victims that withdrew towards the end of the process and after considerable investigation work had been undertaken.

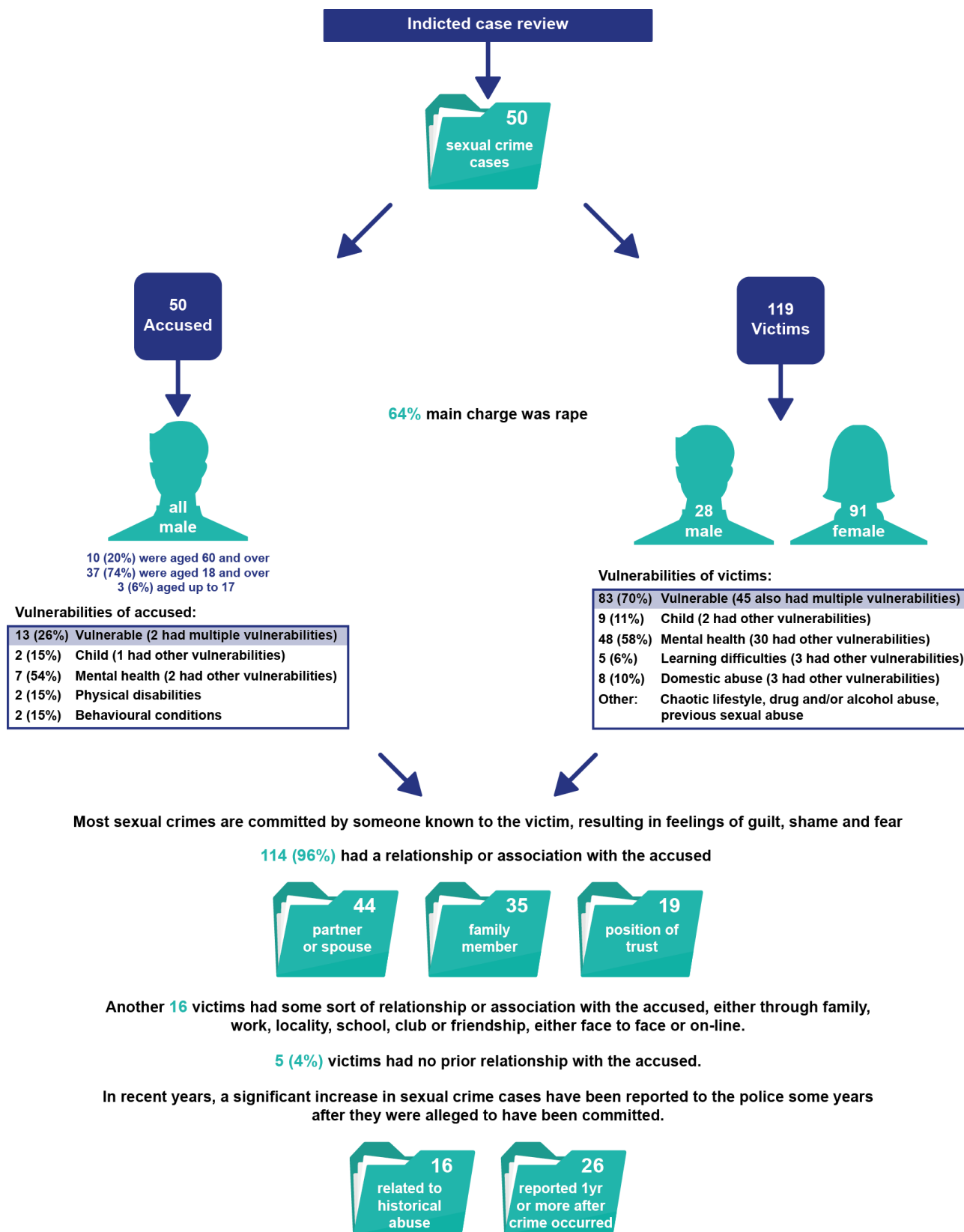
Key Finding

The high number of victims who disengage during the criminal justice process, after taking the significant step to report the crime, infers that more could be done by the criminal justice system, in which COPFS is arguably the key organisation, to provide the necessary information and support to victims, many of whom have complex needs or vulnerabilities, to enable them to have the confidence to continue throughout the process.

30. We examine what measures COPFS can introduce to mitigate and redress this level of disengagement in Chapter 4.



COHORT OF INVESTIGATION





CHAPTER 2 – INVESTIGATION AND PROSECUTION OF SEXUAL CRIMES

31. COPFS aims to deliver a world-leading public prosecution service which secures justice for the people of Scotland.²⁵
32. Integral to this aim is achieving operational effectiveness in serious cases, including sexual crimes, for which COPFS needs the right structures in place and prosecutors with the right skill sets.
33. The investigation of such cases has become more complex as the criminal landscape has changed over recent years. For example:
 - There has been a significant increase in historical²⁶ crimes being reported to the police;
 - Crime has become increasingly global resulting in more crimes being reported that transcend territorial boundaries, including internet crime;
 - Cases with multiple accused, victims and charges are more common;
 - More proactive policing, with establishment of the Domestic Abuse and Rape Investigation Taskforce teams and more sophisticated methods of police investigation being deployed; and
 - In many cases it is necessary to review detailed medical, education and social work records and instruct multiple specialist/expert reports.
34. The combination of these factors poses significant challenges for all those involved in the investigation and prosecution of such crimes and impacts on their ability to progress High Court cases expeditiously. The case study at page 33 illustrates the various lines of investigation routinely undertaken in such cases.

Current Structures

Leadership and Governance

35. In COPFS there is a well-defined governance structure providing clarity of roles and responsibilities in the investigation and prosecution of serious sexual crimes.
36. All serious sexual crimes reported to COPFS are dealt with by the specialist sexual crime teams located in Aberdeen, Dundee, Edinburgh and Glasgow, whose sole function is to investigate sexual crime cases that are serious enough to be prosecuted in the High Court.
37. The teams are headed up by a Senior Civil Servant (SCS) as Head of Sexual Crimes and report to the Operational Board,²⁷ which oversees all High Court cases and is responsible for the day to day management of the High Court teams. The Board monitors performance using a monthly health check of data including real-time data on work in progress, the age profile of cases and any areas of risk.

²⁵ COPFS Strategic Plan 2015-18.

²⁶ Cases reported to the police some years after the date of offence and where the victim was a child at the date of offence.

²⁷ Comprises of Senior Civil Service Head of High Court, Heads of specialist teams, including Head of Sexual Crimes, Business Managers and Senior Managers from the specialist teams.



38. The Operational Board is accountable to the COPFS Operational Performance Committee who in turn is accountable to the COPFS Executive Board.²⁸ The Executive Board is charged with implementing the vision and delivering the priorities set by the COPFS Strategic Board²⁹ and is accountable for key targets and standards of delivery of the COPFS strategic objectives.

National Sexual Crimes Unit (NSCU)

39. Cases investigated by the teams are reported to the National Sexual Crimes Unit,³⁰ which is a body of senior Crown Counsel specialising in the investigation and prosecution of sexual crimes. NSCU directs investigations from the earliest stages, provides advice and expertise on all aspects of the investigation and preparation of cases and conducts trials in court.

Specialism and Accreditation

40. All specialist prosecutors and case preparers working in the teams and supporting NSCU require to go through a system of accreditation and must complete this process within three months of taking up a specialist post.
41. Accreditation involves:
- Completion of mandatory e-learning and other training courses (see below); and
 - Demonstrating competency by submitting cases to be assessed against the required standards.
42. A central database has recently been set up to record all information relating to the completion of each requirement and the accreditation process has been refreshed to introduce an element of continuous assessment and re-accreditation.
43. Of the 77 members of the specialist sexual crime teams, 64 (83%) are fully accredited. 13 are partially accredited with 12 at an advanced stage of the process.
44. A rolling programme to ensure all those involved in the investigation of such crimes have completed all elements of the process is currently being given priority.

Training and Guidance

45. There are a number of national courses aimed at dealing with sexual crimes. These include:
- Sexual crimes e-learning³¹
 - Sexual crimes course³²
 - Evidential interviewing of children course³³
 - Abuse of children in institutions course³⁴
46. We found an extremely high take up rate within the teams for all of the courses, with all but one person from the specialist sexual crime teams having attended the sexual crimes course.

²⁸ Comprises of the Crown Agent and the Chairs of the Operational Boards attend as required.

²⁹ Comprises of the Law Officers and the Crown Agent. The Chair of the Audit and Risk Committee, the Chair of the Equality Advisory Group and the Senior Executive team (the three Deputy Crown Agents) also attend.

³⁰ Introduced in 2009.

³¹ 6 training modules.

³² 2-day course provided by COPFS People and Learning.

³³ 2-day course provided by COPFS People and Learning.

³⁴ 1-day course provided by COPFS People and Learning.



Guidance for Prosecutors

47. The Sexual Offences Handbook is a central repository for all guidance on sexual crimes. It is a valuable resource but in an area of law that is constantly evolving, we found that there is often a time lapse in updating the handbook and removing out of date material.
48. For ease and consistency, the handbook should be a 'one stop shop' where up to date information on all aspects of investigation of sexual offences is held.

Good Practice

COPFS should review, update and centralise all guidance and policies on the investigation of sexual crimes.

Process

Police Reporting

Lord Advocate's Guidelines

49. The Lord Advocate's guidelines³⁵ to the police about the investigation and reporting of sexual crimes provide that the police should:
 - Report all cases where there is sufficient evidence to the prosecutor for consideration. This includes cases in which there is a technical sufficiency but there are doubts over the quality of the evidence.
 - Report all cases where the question of sufficiency is finely balanced.
 - Include any available risk assessment information on the accused and/or the victim and any circumstantial evidence or other information which may support the allegation.
50. Cases are reported by way of a Standard Prosecution Report (SPR). The SPR sets out: the crime(s) with which the accused person has been charged; the circumstances of the crime(s); and information on the background of the accused and victims, including any vulnerabilities.
51. The accused person may be reported in custody or liberated on an undertaking³⁶ or for report.³⁷

Initial Decision-Making

52. On receipt of a police report alleging sexual crimes, a prosecutor, within a specialist team, considers the case and prepares a report for consideration of NSCU. The report will provide a detailed analysis of the evidence, including an assessment of whether there is sufficient evidence for the essential elements of the charge. Depending on the complexity of the case, this process can take anything between one hour to half a day or longer.

³⁵ Issued in 2010.

³⁶ Release on condition to appear at court on a certain date.

³⁷ Submission of a standard police report.



53. The report will include a recommendation on the action to be taken. There are four possible recommendations:
 - To prosecute – if so the accused will appear in court, usually on petition;
 - To instruct investigation prior to deciding whether to prosecute – known as pre-petition investigation;
 - To take no proceedings;
 - To use an alternative disposal, for example, refer to the Children’s Reporter.
54. Following consideration of the report, NSCU provides an instruction on how to proceed.
55. Prior to the introduction of specialist sexual crime teams the involvement of NSCU, with specialist Crown Counsel, was an important safeguard to ensure that appropriate decisions were taken at the outset. With the inception of specialist teams who investigate and prepare only sexual crime cases, prosecutors within the teams have now acquired a degree of specialism and expertise in dealing with such cases.

Case Review

56. We examined 50 cases where the accused was indicted in the High Court for a sexual crime.
57. We compared the recommendations made by the specialist prosecutor in the initial report to NSCU with the instruction issued by NSCU in the 50 cases where the accused was indicted.
58. In all but seven cases (86%) NSCU agreed with the recommendation of the prosecutor.
59. In five cases NSCU instructed pre-petition investigation rather than place the accused on petition as recommended by the prosecutor. After pre-petition investigation, proceedings were commenced in all five cases and all were subsequently indicted to the High Court.
60. In one case NSCU instructed prosecution at Sheriff and Jury level rather than the High Court as recommended by the prosecutor. Following investigation, the case was ultimately indicted to the High Court and resolved by a plea.
61. In the remaining case the prosecutor recommended pre-petition investigation whereas NSCU took the view there was sufficient evidence to commence proceedings. The case was subsequently indicted and prosecuted in the High Court.
62. Of note, there were no instances where the prosecutor recommended no proceedings and NSCU took a contrary view.
63. The findings accord, to a large extent, with those in the pre-petition case review,³⁸ where NSCU agreed with the initial decision taken by the prosecutor in 82% of cases. The high level of agreement on how to proceed between the specialist prosecutors and NSCU is reassuring and provides a high degree of confidence in the initial decision-making of specialist prosecutors.

Key Finding

The high level of agreement between the specialist prosecutors and NSCU at the initial decision stage is reassuring and provides a high degree of confidence in the initial decisions made by specialist prosecutors.

³⁸ Discussed at Chapter 3.



64. This finding begs the question, whether there is a continuing need for NSCU to consider **every** case at the initial decision-making stage and whether a more nuanced exception based approach can be adopted.
65. The safeguard of reporting to NSCU was introduced at a time when prosecutors were still regarded as generalists and the concept of specialist sexual crime prosecutors and the process of accreditation had only just been introduced.
66. At the initial decision-making stage, statements from all witnesses in the case are generally not available and decisions are taken on the information provided by the police. Given the findings of our case reviews and the experience and specialism that now exists in the sexual crime teams, there appears to be little value added by double handling at this stage.
67. Provided the system of accreditation and re-accreditation is retained and robustly monitored, we suggest that Crown Counsel's expertise may be better served by seeking their input at the initial decision-making stage only in cases where there are problematic legal or evidential issues.
68. Removing Crown Counsel's input at this stage would free them up to provide greater input at a later stage in the investigative process when they can add more value.
69. We advocate, therefore, that COPFS should remove the blanket requirement of all sexual crimes being reported to NSCU at the initial decision-making stage and introduce a system of exception reporting for complex cases or where there is greatest risk.

Exception Reporting

70. It would be for COPFS to establish the parameters of a system of exception reporting. Taking a risk-based approach such cases may include:
 - Any case where the prosecutor is of the view there should be no proceedings;
 - Cases involving children or other vulnerable accused;
 - Cases of institutional abuse or other high profile/complex cases; and
 - Cases where a novel area of the law has to be considered.
71. Additional safeguards include:
 - The continuing involvement of Crown Counsel at the Investigative Agreement (IA) stage – discussed below;
 - Strict adherence to timescales for prosecutors submitting the IA for consideration of Crown Counsel. This will ensure any evidential concerns continue to be addressed at an early stage of proceedings, to front load work.
 - A mandatory system of accreditation and continuous assessment through re-accreditation for all staff involved in the investigation and prosecution of sexual crimes.

Recommendation 1

COPFS should develop a policy of exception reporting to NSCU at the initial decision-making stage of the investigative process.



Investigation

Direction of the Investigation

The Pathway Document

72. The pathway document is an electronic “living” document, designed to record key milestones and the progress of the case in one place. For ease of use, the pathway document is accessible through an app that sits on the desktop.
73. As in all High Court cases under investigation, as part of the pathway process, an Investigative Agreement between Crown Counsel at NSCU and the specialist legal manager is prepared.

The Investigative Agreement (IA)

74. The IA is a “blueprint” for the investigation of a case. It sets out, at an early stage, a strategy agreed between the case preparer and Crown Counsel for the investigation and preparation of a case. It outlines the key matters of relevance to the prosecution, including the charges to be investigated with a view to prosecution, how these will be proved, the parameters of the investigation and how the evidence will be presented.
75. The intention of the early collaborative engagement is to front load the work, provide Crown Counsel with an opportunity to direct the investigation at an early stage, preventing unnecessary work being undertaken, and avoid requests for additional work after the case is reported to NSCU.
76. The IA allows for consistency of approach in the preparation and investigation of the case and ultimately provides an audit of all decisions taken in the case and a bespoke prosecution file for Crown Counsel.
77. Completing the IA is a time-consuming process for the SLM. Statements from all witnesses and all sources of evidence gathered by the police require to be reviewed and consideration given to what, if any, additional inquiries require to be instructed. The IA consists of a number of mandatory sections to be completed, including:
 - Precognition strategy – identifying which witnesses require to be interviewed and the matters to be covered by the case preparer at the interview.
 - Legal strategy – analysing and identifying any legal or evidential difficulties.
 - Victim strategy – identifying any vulnerabilities and assessment of special measures.
 - Case presentation strategy – to be used in complex and/or large cases where there is a high volume of evidence. This section will be used to obtain input and agreement from Crown Counsel on any tools necessary for the presentation of the case to the jury.
 - Experts – consideration of obtaining any expert reports.
 - Forensics – consideration of the need for analysis (including DNA, toxicology, phone and computer examination).
 - Sensitive records – consideration of obtaining records such as medical, psychiatric, housing and social work.



78. The SLM must complete an IA within either 7 or 21 days of the appearance of an accused in court, depending if the accused is in custody or on bail. The IA is then submitted to NSCU for consideration. The intention is for Crown Counsel to agree the direction of the investigation and instruct any additional inquiries that have not been identified by the SLM. By agreeing a joint strategy at this early stage, it was anticipated that requests for additional work to be undertaken after the case was reported for a final decision would be eliminated or significantly reduced.
79. We found, however, that this intention is not being realised. We asked those who use the IA why it was not achieving its envisaged objective.
80. SLMs told us that they find the IA to be a useful tool – it provides a comprehensive record of their thought process, provides an audit of their decision-making and records all inquiries instructed throughout the life of the case. However, due to a lack of sufficient information, they identified difficulty completing the IA to a meaningful standard within the target timescales. For example vulnerability reports, a report from the police providing information on the background of the victim, their needs, concerns, vulnerabilities and expectations, are often not available within the 7/21 day timeframe. Without this information, the victim strategy³⁹ cannot be completed.
81. SLMs and case preparers report that Crown Counsel has minimal input at the IA stage and that its introduction has made little difference to the number or frequency of last minute requests for work.
82. We found that there was a lack of clarity on the part of some Crown Counsel about their role in the preparation of the IA, with some advising that they do not have sufficient time to consider the IA in detail and that they rely on the assessment provided by the SLM.

Case Review

83. In our 50-case review we found only seven in which Crown Counsel, following consideration of the IA drafted by the SLM, requested additional investigations to be carried out.
84. In four of the seven cases, Crown Counsel instructed multiple additional investigations, including additional forensic and psychological reports, obtaining medical records, re-interviewing the victim and additional interviews of victims on specific points. In two, Crown Counsel instructed obtaining school records and a psychologist's report to assess special measures requirements. In the remaining case, Crown Counsel adopted a different legal strategy.
85. In the 50 cases, the IA was submitted within target in only 4% of cases. On average, the IA was submitted 28 days after the accused appeared in court in custody cases and 3½ months in bail cases. This may indicate that that the current targets are not the optimum timescales for the completion of a meaningful IA.
86. Clearly, it is not an efficient use of a SLM's time to try to complete the IA when they do not have all information needed to make an informed decision about further work required to complete the investigation. This also explains why Crown Counsel has identified that IAs add most value at a later stage, when the case is reported for a decision on whether to indict the case, often just before the expiry of the time limit.
87. As identified in our Management of Time Limits report,⁴⁰ late consideration of High Court cases, many approaching the time limit is a high risk strategy.

³⁹ Discussed at Chapter 4.

⁴⁰ Inspectorate of Prosecution, [Thematic Report on the Management of Time Limits](#), 24 February 2015.



88. The ethos of the IA approach in ensuring early and detailed consideration of the evidence is sound and, if achieved, should minimise the need for late instruction of additional lines of inquiry. Such inquiries place an unnecessary burden on COPFS and the police, who are often instructed to carry out work within extremely short timescales.
89. For the IA to be meaningful and fulfil its intent, Crown Counsel requires to take a more proactive role and assume ownership of the IA. Failure of Crown Counsel to consider the IA in detail defeats its purpose and renders it an additional process that, in many cases, is generating no additional value.
90. More meaningful involvement of Crown Counsel at the IA stage may also assist with the earlier identification of cases where, as a result of inquiries instructed, the evidence indicates that there is no longer a realistic prospect of a conviction or proceedings are no longer in the public interest.
91. Armed with more information in the IA, Crown Counsel should confirm the decision to prosecute or provide an alternative instruction.
92. To realise the potential of the IA its target submission dates should be revised to enable a more detailed instruction on the direction of the case and investigation by Crown Counsel. To realise the intention of front loading the work at the IA stage, the target dates must be rigorously enforced.

Recommendation 2

COPFS should revise the target dates for the submission of the Investigative Agreement to Crown Counsel to enable a more detailed instruction on the direction of the investigation and of the case by Crown Counsel. The target dates should be monitored and rigorously enforced.

Reporting

High Court Unit

93. The High Court Unit (HCU) is a specialised Crown Office unit that monitors all High Court cases, including sexual crime cases. Once an initial decision has been taken to proceed with a case in the High Court, the unit allocates a date by which the case should be submitted for consideration to the unit. This is known as the target report date.

Completion of Investigation

94. Following the agreement of Crown Counsel of the IA, cases are allocated to case preparers to undertake all lines of inquiry identified in the IA. Case preparers handle, on average, approximately 70/80 cases per year.
95. Once a case preparer has completed work on the case, their analysis and recommendations are considered by the SLM. The SLM will record if they agree or disagree with the assessment of the case preparer and provide an explanation for their reasoning. The case is then submitted to NSCU, along with a draft indictment, where proceedings are recommended. Each case is considered by Crown Counsel who make a final decision.



Indicting

96. Following an instruction by Crown Counsel at NSCU that a case is to be prosecuted in the High Court, it is passed to a team of indicters based in the High Court Unit. The indicter provides a quality assurance role to ensure that all evidential, legal and presentational aspects of the case are fully addressed. It is their responsibility to read the case, ensure that all relevant inquiries have been undertaken, identify any gaps where additional inquiries are necessary and check the accuracy and appropriateness of the charges on the draft indictment.
97. The indicter produces a note of outstanding issues that require to be followed up by the case preparer prior to the case being indicted.

Case Review

98. We found that indicters add most value to the drafting of appropriate charges. In 32 of the 50 cases reviewed indicters made material changes to the charges prior to the case being indicted.
99. Cases can often involve multi-accused, multi-charges and multi-victims. Of critical importance is identifying which accused appears on which charge(s), the victim(s) who relate to that/those charge(s), the dates of the charge(s) and evidence available to prove the charge(s). This can often be a hugely complex and time-consuming task.
100. In some cases involving multiple charges and crimes over a period of time, we found that the case preparer included, as part of the analysis, a specific paragraph setting out the evidential basis for the dates included in the charges. For example, it may refer to a particular statement or to documents such as housing or medical records to provide an explanation for the dates chosen. This is a practice that should be universally adopted.

Good Practice

In the analysis section of every case with charges spanning a period of time, the case preparer should include a section setting out the evidential basis for the dates selected.

101. Failure to number and describe labels and productions accurately and to deal with other administrative matters such as pagination is routinely flagged up by indicters. Indicters comment that they regularly highlight the same omissions and issues when revising cases. This is despite feedback being provided in each case.
102. It is unclear if the “safety net” of the quality assurance process provided by indicters results in a lack of detailed consideration by SLMs in relation to such aspects or if an increasing workload means SLMs have insufficient time to address such matters prior to the cases being reported.
103. To provide a greater understanding of the role of the indicter, some indicters, who specialise in sexual crimes, have met specialist teams to provide feedback and an insight to their role.
104. There would appear to be scope for more productive dialogue and interaction between indicters and the specialist teams and, in particular, the SLMs. A rolling programme of shadowing, or short secondments to the indicting team for SLMs or experienced case preparers would allow greater cross fertilisation of the skills that both possess.



105. Further, there is currently no mechanism to receive feedback from Crown Counsel on any issues they have identified during the course of a trial. As the case is prepared to enable Crown Counsel to present cases to the highest standard at court, their input to the preparation of the case is invaluable. One option would be for a representative of NSCU to attend the High Court Forum, a meeting of senior managers and representatives from VIA, the indicters and the specialist teams held quarterly to discuss all aspects of preparing and presenting High Court cases.

Good Practice

COPFS should introduce a rolling programme of shadowing, or short secondments to the indicting team for SLMs or experienced case preparers.

A representative of NSCU should attend the High Court Forum to provide feedback on any issues arising at court.

106. The indicting process currently takes place after Crown Counsel has read the completed case and issued a final instruction. The purpose of a quality assurance process is to address any deficiencies and enhance the final product. It would, therefore, make sense for the indicting process to be undertaken prior to the case being reported to the end user – Crown Counsel.
107. Indicters, working with the specialist teams, should revise the case and prepare a draft indictment prior to the case being submitted to Crown Counsel.
108. To avoid unnecessary work, if the indicter or the SLM concludes, after the investigation is complete, that a prosecution is no longer appropriate, the case should be submitted to Crown Counsel for a final decision, prior to the indicting process.

Recommendation 3

COPFS should consider undertaking the indicting process prior to the case being reported to NSCU for a final instruction.

Indictment of High Court Cases

109. The IPS Thematic Report on the Management of Time Limits and the subsequent Follow up Report⁴¹ identified a significant issue with High Court cases being reported close to their time bar. The evidence from our review of sexual crime cases suggests that this is still an issue.

Case Review

110. In 26 of the 50 cases we reviewed the indictment was served on the last date of service before the time bar. In 42 of the cases, the indictment was served within seven days or less of the time bar.
111. Due to pressure of business, cases are currently allocated to indicters by reference to the time bar. This means that any case reported to the High Court Unit earlier than its target date is not being indicted until close to its time bar.

⁴¹ Inspectorate of Prosecution, [Thematic Report on the Management of Time Limits - Follow-Up](#), 28 February 2017.



112. Acknowledging the necessity to ensure cases are dealt with within the time limit, the current system fails to prioritise cases that are supposed to take precedence, such as those involving children, or the age profile of cases, including any periods of pre-petition investigation. A more sophisticated system of allocating cases for indicting is required to facilitate the appropriate prioritisation of certain categories of cases.

Recommendation 4

COPFS should introduce a more sophisticated system of allocating cases for indicting to reflect the priority that is to be afforded to certain categories of cases.

Post Indictment

113. SLMs and case preparers have all commented that a significant amount of time is still spent carrying out last minute requests instructed by Crown Counsel in their preparation for the Preliminary Hearing and trial. This only adds to the strain on the specialist teams – in particular case preparers.
114. Case preparers have an existing workload of cases to prepare with reporting deadlines, and the requirement to juggle not insignificant requests for inquiries within very short timescales, adds to a pressurised working environment. In some instances, if the case has been reported timeously, it requires the case preparer to spend time re-familiarising themselves with the case, diverting them from their existing workload.

Case Review

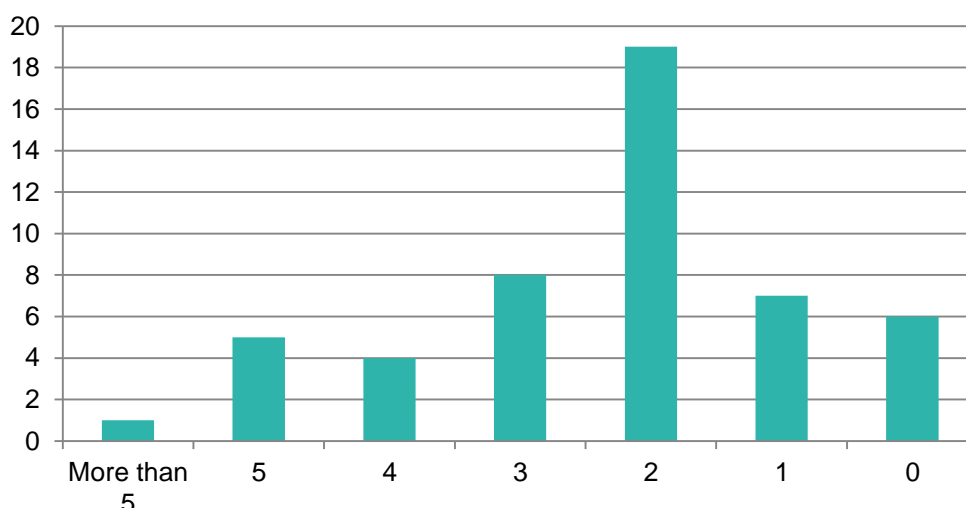
115. In our 50-case review, we found only 6 cases (12%) in which additional productions, labels or witnesses had not been added after the indictment had been served. Additional witnesses, productions or labels are added by means of a written notice,⁴² which may be objected to by the defence and/or refused by a judge. In one case, eight notices had been lodged adding items including forensic reports, books of photographs, medical records, expert reports, computer and telephone reports, and additional witnesses and labels. In essence the bulk of evidence on which the COPFS intended to rely on was added after the case was indicted.
116. On closer analysis, we found some types of evidence that were regularly added late, including:
- Forensic reports (18 cases)
 - Transcripts of the interview of the accused (9 cases)
 - Original witness statements (22 cases)
 - Expert reports (10 cases)
 - Medical, housing, social work and council records (15 cases), books of photographs (6 cases) and
 - Witnesses (35 cases).
117. Recognising that requests for further work and/or inquiries to be completed after service of the indictment is unlikely to ever be eradicated, due to factors that are not directly attributable to COPFS, such as the late submission of information from other organisations, the non-cooperation of witnesses or late requests from the defence, there is certainly scope for the work at this stage to be reduced.

⁴² S67 of the Criminal Procedure (Scotland) Act 1995 is a written notice lodged by either COPFS or the accused adding further witnesses, productions or labels to an indictment. It may be objected to by either party to the proceedings. The notice is referred to as a section 67 notice.



118. Productions such as transcripts of interviews, book of photographs and original statements should not routinely require to be added after the indictment has been served.
119. Of particular note, there was a pre-petition investigation in 11 of the cases where notices were lodged. In two of these cases there were five notices, adding forensic reports, books of photographs, transcripts, witnesses, statements and medical records.
120. There is an obvious risk, in relying on adding evidence in this manner, that the court will refuse to allow a notice, endangering the ability of COPFS to effectively prosecute the case.

Chart 5 - Number of notices in each case

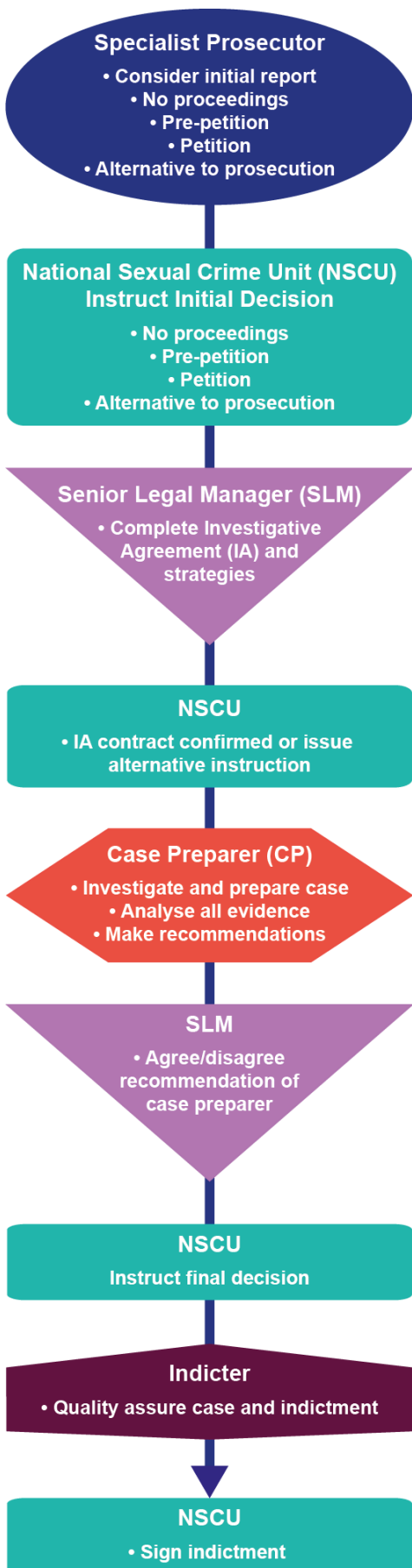


Overview

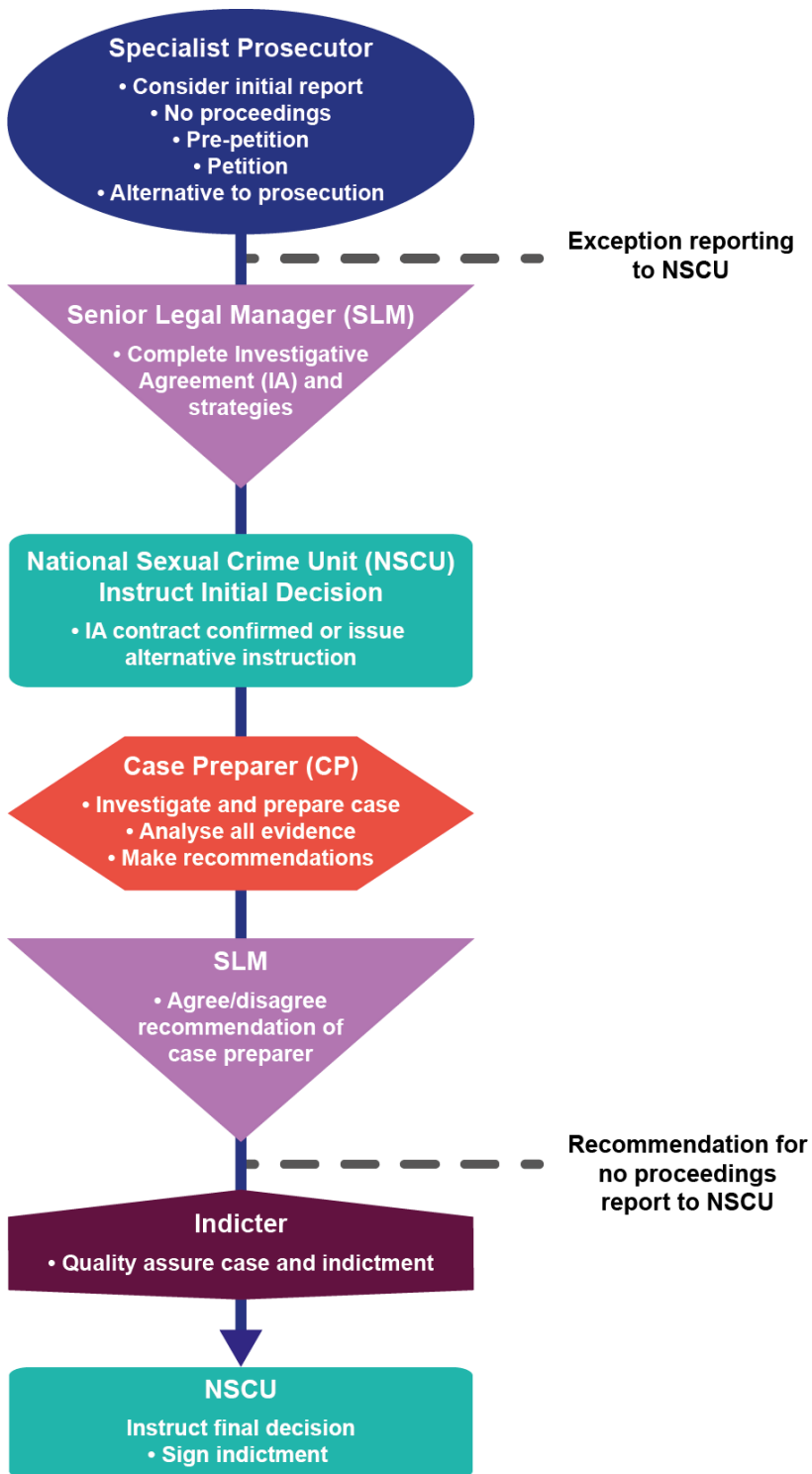
121. Within the existing system, as depicted in the process flowchart below, a case passes through nine stages prior to an indictment being served on the accused. At three separate stages, the case is considered by Crown Counsel and either the SLM or the specialist prosecutor.
122. The double handling impacts on the time taken to process such cases and has not made a discernible difference to the amount of evidence being added after the indictment has been served or the post-indictment work being instructed.
123. With the experience and specialism that now exists in the sexual crime teams, we advocate a more streamlined process as depicted in the process flowchart below. This seeks to reduce double handling and front load the work at the IA stage and bring the indicting process forward to improve the quality of the final product when reported to Crown Counsel for a final instruction.



Current Process



Recommended Process





CASE STUDY

Investigation

Inquiry into sexual and physical abuse of male children at an orphanage and school in the 1970's and 1980's.

Police Reporting	
<ul style="list-style-type: none"> • 6 accused reported • 50 sexual crimes, committed against 22 victims. Also charges of physical abuse 	
Prosecution Strategy	
Project Management Approach:	
<ul style="list-style-type: none"> • Early liaison between police and prosecutor • Early allocation of Crown Counsel • Dedicated prosecution team formed including: Case preparer, Fiscal Officer, VIA officer, Crown Counsel 	
Investigation	
Lines Of Investigation	
Witness Statements/Productions:	
Consideration of:	
<ul style="list-style-type: none"> • 3 police reports • 155 witness statements • 240 productions 	
Additional victims:	
Number of victims of sexual crimes rose to 31; 20 were older persons (over 60 years old)	
Interviews:	
All adult victims of sexual crimes in a potential High Court case are interviewed by prosecutors, here:	
<ul style="list-style-type: none"> • A meeting took place with all 31 victims of sexual crimes • 23 were interviewed by the case preparer (other witnesses did not engage or were medically unfit/dead) 	
Sensitive records:	
<ul style="list-style-type: none"> • 27 sets of social work records recovered • Medical and school records were obtained –some records held overseas were requested from foreign jurisdiction by International Letters of Request- a time –consuming process outwith the control of COPFS 	
Expert evidence:	
Expert opinion was obtained on:	
<ul style="list-style-type: none"> • Delayed and staged disclosure of victims • Continuing association with accused • Ability of some victims to give evidence 	
Evidential Considerations	
<ul style="list-style-type: none"> • Identification of accused - given the passage of time – the accused were identified from school photos • Applicability of Moorov doctrine – reviewed throughout the life of the case and reconsidered when any victim(s) disengaged • Dates of charges – records were obtained to assist with pin pointing dates 	
Victims	
Victim Strategy	
<ul style="list-style-type: none"> • Meetings held with all 31 victims of sexual crimes • Monthly contact made with 27 victims 	
Court Proceedings	
<ul style="list-style-type: none"> • 129 witnesses on the indictment • 67 given notice to attend for trial • 4 victims were not traced/not co-operate – resulting in a number of charges being withdrawn by the prosecutor • 19 Vulnerable Witness Notices lodged • 1 Evidence on Commission arranged 	<ul style="list-style-type: none"> • 29 witnesses gave evidence • All victims were met by the trial prosecutor prior to giving evidence • 10 victims attended for sentencing • All victims offered a meeting with the prosecutor to discuss the outcome



Procedural History

Accused	1	2	3	4	5	6
SPR	30/04/14 02/05/14	30/04/14 01/05/14	30/04/14	30/04/14	30/04/14	30/04/14
CFE	09/07/14	09/07/14	03/07/14	03/07/14	03/07/14	03/07/14
No of victims	19	18	5	2	1	1
Case reported to Crown Office	03/03/15	03/03/15	03/03/15	03/03/15	03/03/15	03/03/15
Service of Indictment	31/03/15	31/03/15	31/03/15	31/03/15	31/03/15	NFP
Charges on indictment ⁴³	43 charges	63 charges	16 charges	5 charges	10 charges	
No of victims ⁴⁴	28	38	13	5	10	
PH	20/05/15	20/05/15	20/05/15	20/05/15	20/05/15	
CPH	21/07/15	21/07/15	21/07/15	21/07/15	21/07/15	
CPH	16/09/15	16/09/15	16/09/15	16/09/15	16/09/15	
Trial	21/04/16	21/04/16	21/04/16	21/04/16	21/04/16	
Charges considered by the Jury	23 charges	28 charges	APNG	NCA	NCA	
Verdict (FG)	3 charges	6 charges				
No of victims ⁴⁵	3	3				
Sentencing	5 years imprisonment	10 years imprisonment				

SPR = Standard Police Report
 CFE = Continued for Further Examination
 PH = Preliminary Hearing
 CPH = Continued Preliminary Hearing
 FG = Found Guilty
 NFP = No Further Proceedings
 APNG = Accepted Plea of Not Guilty
 NCA = No Case to Answer

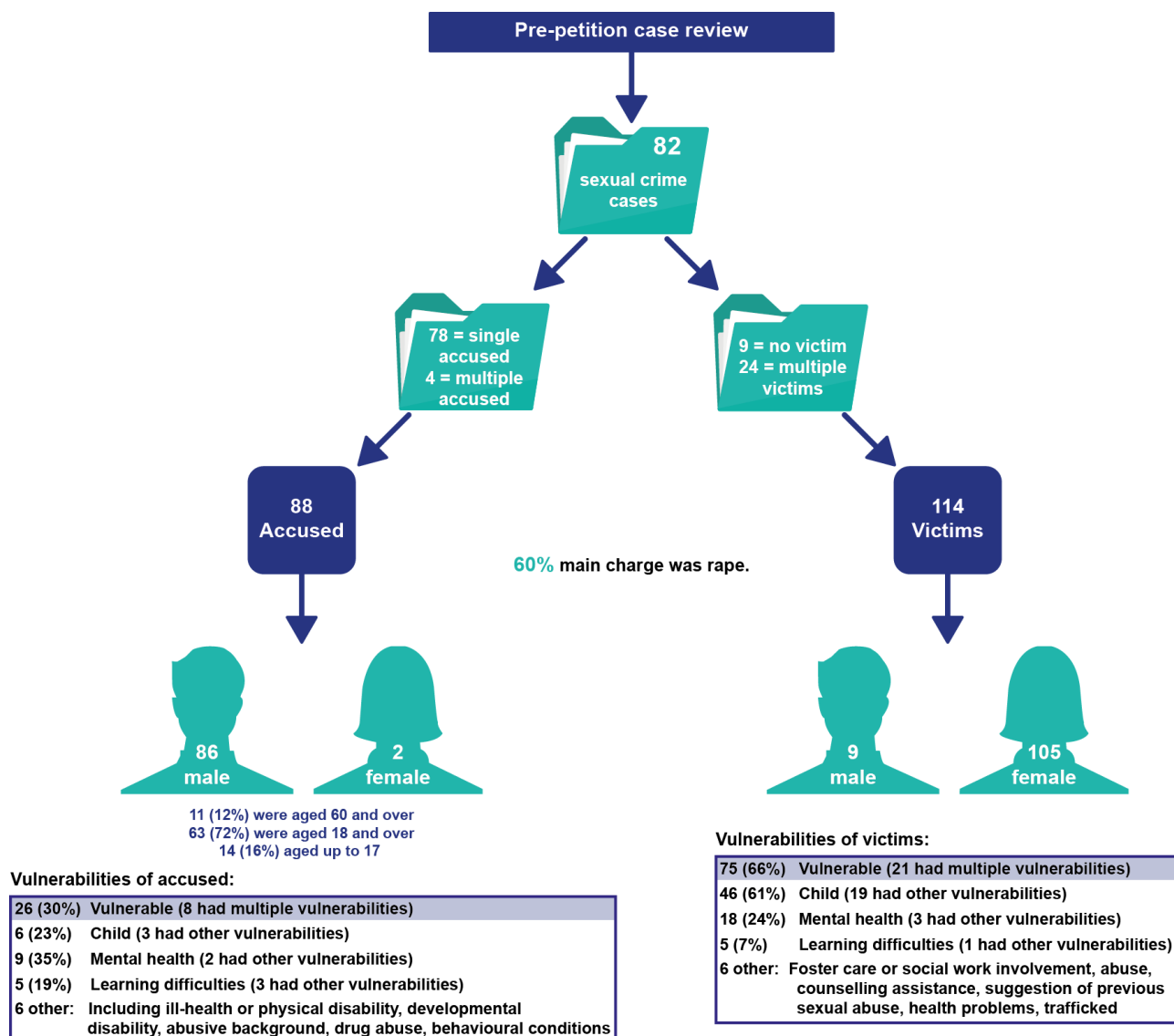
⁴³ Includes charges of physical abuse.

⁴⁴ Includes additional victims identified during investigation.

⁴⁵ Includes a finding of guilty for one victim in relation to both accused.

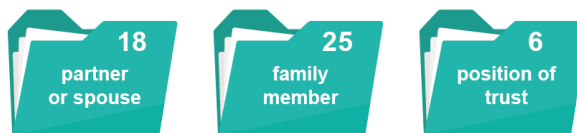


COHORT OF PRE-PETITION INVESTIGATION



Most sexual crimes are committed by someone known to the victim, resulting in feelings of guilt, shame and fear

95 (83%) had a relationship or association with the accused



Another **46** victims had some sort of relationship or association with the accused, either through family, work, locality, school, club or friendship, either face to face or on-line.

19 (17%) victims had no prior relationship with the accused, **8** victims communication through social media was key.

In recent years, a significant increase in sexual crime cases have been reported to the police some years after they were alleged to have been committed.





CHAPTER 3 – PRE-PETITION INVESTIGATION

124. Decisions on whether there is sufficient evidence in sexual crime cases are often finely balanced and on occasion it is both necessary and appropriate to conduct preliminary investigation – pre-petition investigation – prior to commencing proceedings.
125. The purpose of pre-petition investigation is two-fold: to establish whether there is sufficient credible and reliable evidence to prove the crime; and to determine whether proceedings are in the public interest.
126. The focus of pre-petition investigation is, therefore, to:
 - establish that sufficient evidence exists; and
 - address any grave or substantial concerns regarding the quality of any aspect of the evidence.

Police Reporting

127. Where the police submit a report, having remanded an accused in custody, swift decisions need to be taken on whether the accused should appear in court and, if so, whether the prosecutor should ask the court to remand the accused in custody or release the accused subject to bail conditions.
128. From a police perspective, the need to manage risks within the community and a desire to report cases of a serious nature as quickly as possible, encourages earlier reporting of cases. While the assessment of risk is a critical factor, if there is insufficient evidence, then regardless of risk, the accused must be liberated. Once a case is reported to COPFS, the prosecutor has a duty to explore all evidential avenues before reaching a decision. This inevitably results in pre-petition investigation being instructed.
129. Prosecutors identified premature reporting by the police – reporting cases where there are extensive outstanding inquiries or a patent insufficiency of evidence – as a contributory factor for instructing pre-petition investigation.
130. There were 37 cases in our pre-petition case review where pre-petition investigation took longer than 10 months.⁴⁶ Of those, there were seven where the police reports identified outstanding extensive inquiries including tracing/obtaining statements from additional witnesses; or were significantly lacking in detail to enable the prosecutor to determine whether there was sufficient evidence; or there was a patent insufficiency of evidence.

Key Finding

Premature reporting by Police Scotland is a contributory factor for instructing pre-petition investigation.

131. Several forums involving COPFS and Police Scotland have recently been established at various operational levels with the aim of improving the reporting, investigation and prosecution of sexual crimes. The meetings facilitate discussion on the quality of police reports, promulgate good practice, promote early liaison prior to reports being submitted and review outcomes to take forward learning points for future cases. Greater collaboration is a positive development that will hopefully reduce the need for pre-petition investigation.

⁴⁶ Discussed at paragraph 154.



Looking to the Future

Investigative Liberation

132. The introduction of investigative liberation⁴⁷ will provide an opportunity to reduce premature reporting. Investigative liberation will allow the police to release a person arrested, but not charged, and impose conditions, similar to bail conditions, for a maximum period of 28 days, while they complete their investigation.
133. It will provide a useful tool for the police to manage risk, while fully investigating the circumstances of any alleged crime, so as to provide the prosecutor with a more complete investigation, enabling informed decisions to be made, without the need for pre-petition investigation.

Case Review

Initial Decision-making

134. NSCU instructed pre-petition investigation in 567 cases in 2014-15. We examined 82 of these cases.
135. We compared the recommendations made by the specialist prosecutors in the initial report to NSCU with the instruction issued by NSCU in 82 cases where pre-petition was instructed by NSCU.
136. In 67 cases (82%), NSCU agreed with the recommendation of the prosecutor.
137. The **15** cases where the recommendation of NSCU and the specialist prosecutor differed fell into two categories:

Category one: In **11** cases NSCU instructed pre-petition investigation rather than placing the accused on petition as recommended by the prosecutor.

- In nine cases NSCU instructed additional lines of inquiry to clarify whether there was sufficient evidence, one of which was linked to concerns regarding the engagement of a victim.
- In one case there was agreement between NSCU and the prosecutor that there was insufficient evidence for a charge of rape, but NSCU wished clarification of the victim's attitude to prosecution for a less serious charge.
- In the remaining case NSCU requested the prosecutor to discuss the circumstances with the Children's Reporter, prior to making a decision on whether to prosecute.

After pre-petition investigation, the accused was placed on petition in four out of the eleven cases. In the other seven cases no prosecution was instructed for the following reasons:

- In 2 there was insufficient evidence
- In 3 due to the victims disengaging, there was insufficient evidence⁴⁸
- In 1 the accused was referred to the Children's Reporter
- In 1 it was determined that there was no realistic prospect of conviction

⁴⁷ Criminal Justice (Scotland) Act 2016, Sections 16-19, not yet in force.

⁴⁸ Includes case where the prosecutor and Crown Counsel agreed there was insufficient evidence to prove rape.



Category two: In **four** cases where the prosecutor recommended no proceedings, NSCU instructed pre-petition investigation. On completion of the pre-petition investigation, NSCU agreed, in all cases, with the initial recommendation that there should be no criminal proceedings.

We found a high level of agreement (82%), between the specialist prosecutors and NSCU on when pre-petition investigation was required. Where the initial decision differed, following pre-petition investigation, NSCU agreed with the initial recommendation made by the prosecutor in 8 of the 15 cases. In 3 of the other 7 cases the decision that there should be no criminal proceedings was due to the disengagement of the victim.

Of note, there were no instances where the prosecutor recommended no proceedings and following pre-petition investigation, NSCU took a contrary view.

The high level of agreement on how to proceed between the specialist prosecutors and NSCU is reassuring and provides a high degree of confidence in the initial decision-making of the specialist prosecutors.

The findings accord with those in the indicted case review and lend weight to the recommendation that COPFS should develop a policy of exception reporting to NSCU at the initial decision-making stage.

Increase of Pre-petition Cases

138. Pre-petition cases have steadily increased over recent years and during 2016-17 have, at times, constituted 40% of the national High Court workload.⁴⁹

139. To ascertain the reasons for the increased use of pre-petition investigation and to assess whether it is achieving its purpose, we examined:

- The reasons for and the focus of the pre-petition investigation; and
- The outcome of these cases.

Focus of Pre-petition Investigation

140. Invariably there are several strands of investigation required to enable a final decision to be reached. In our pre-petition review we found that by far the most common requirement was a review of all witness statements (68%). Requests to interview witnesses, often the victim, analyse phones, devices or computers and obtain forensic evidence were also frequently instructed.

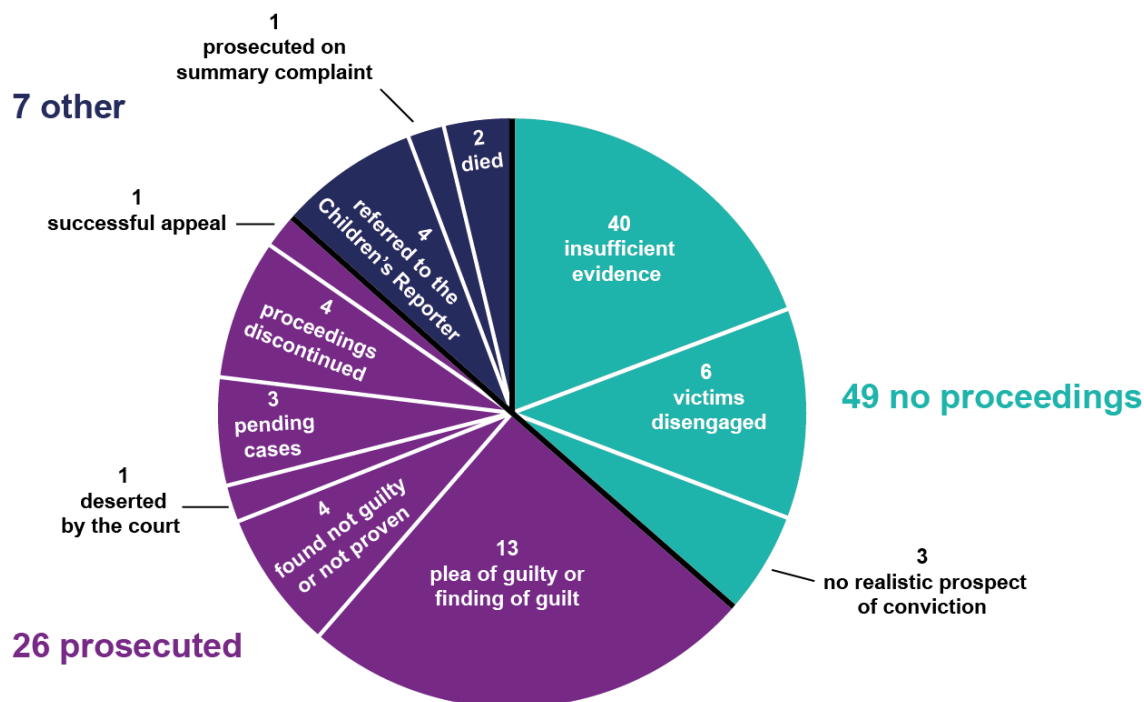
141. Other areas of investigation included obtaining; medical or other types of records, expert evidence, transcripts of the accused interviews, CCTV evidence and clarifying whether there were other victims and their attitude to proceedings and considering/instructing Joint Investigative Interviews (JII) of victims.

⁴⁹ Source: COPFS February 2017.



Outcome of Cases

142. Chart 5 illustrates the outcome of all 82 cases where pre-petition investigation was instructed.



143. Of the **82** cases reviewed:

In **49** cases (60%), no proceedings were instructed. Of the **49**:

- In 40 there was insufficient evidence.
- In 6 the victims disengaged and did not wish to participate in the prosecution
- In 3 it was assessed that there was no realistic prospect of conviction

In **26** (29%), the accused was placed on petition. Of the **26**:

Plea or Finding of Guilt

- In 13 there was a plea or finding of guilt. 9 accused pled guilty – 6 related to the possession of indecent images of children where there was no identifiable victim. In 4 the accused was found guilty after trial.



Acquittals/Discontinued Cases

- In 4 the accused was found not proven or not guilty
 - 1 was deserted pro loco et tempore⁵⁰
 - In 1 case there was a successful appeal by the defence which brought proceedings to an end
 - In 4 a decision was taken to discontinue proceedings after the accused had appeared in court
 - 1 has still to proceed to trial
 - In 2 cases arrest warrants are outstanding for the accused, one of whom requires extradition
144. We examined the four cases that were discontinued to identify whether the decision to discontinue proceedings could have been taken earlier.
145. In three the reason was the disengagement of the victim. In one there was insufficient evidence to proceed, following the provision of new information by the victim.
146. In the remaining **7** cases (11%):
- 4 were referred to the Children's Reporter
 - 1 was prosecuted on summary complaint; and
 - 2 accused died
147. The majority of cases (60%) involving pre-petition investigation resulted in no proceedings due to insufficient evidence.

Timeliness of Pre-petition Investigation

148. Pre-petition investigation is an important and necessary tool in the armoury of prosecutors, but in contrast to court proceedings there are no statutory time limits. This introduces a degree of uncertainty to the timescales for such investigations. To achieve certainty for victims and accused persons, such investigation should be focused and conducted expeditiously.
149. The Appeal Court in Scotland recently considered the use of pre-petition investigation and its relevance to time bars in the context of considering whether a decision taken by a sheriff to extend the time bar was justified.⁵¹ The court was critical of the sheriff's approach of only considering the period after service of the indictment. The judgement questioned what case preparation had taken place between the accused appearing at court and the service of the indictment, eight months later, given that there had been a period of 11 months of pre-petition investigation between the police report being submitted and the accused appearing at court.
150. The decision of the court makes it clear that the entire pre-indictment procedural history of the case has to be taken into account in any exercise of discretion to adjourn the trial and extend the time bar.
151. To maintain public confidence, it is important that those accused of having committed serious crimes appear in court at the earliest possible juncture and, where appropriate, are subject to bail conditions to secure public protection.

⁵⁰ Proceedings were brought to an end by the court.

⁵¹ RW v HMA 2017 SCCR, 203.



152. The case study below illustrates the value of pre-petition investigation when conducted expeditiously.

NSCU instructed pre-petition investigation in a case involving the rape of a child by an older child offender. The investigation was to be conducted within custody timescales. The focus of the investigation was to:

- (i) Obtain information from the Children's Reporter, on the likely outcome, should a referral be made to the Reporter; and
- (ii) Ascertain the attitude of the victim's family on prosecution/referral.

The case was duly prioritised with the victim's family being spoken to within a week, followed by a face-to-face meeting with the victim, their family and a social worker within a further three weeks.

Within the same timescale, there was a discussion with the Reporter on available options.

Within two months of the instruction for pre-petition investigation, the prosecutor provided a report to NSCU enabling an informed decision to be taken to refer the offender to the Children's Reporter.

153. We examined the time taken for the pre-petition investigation in the 82 cases. We found the time for the investigation was as follows:

- 31 cases (38%) took up to 6 months;
- 14 cases (17%) took 6-10 months; and
- 37 cases (45%) took over 10 months

154. Ten months is an important benchmark in the context of solemn proceedings. Where an accused has appeared in court on petition and been released on bail, COPFS must indict an accused within ten months to comply with statutory time limits. Ideally, any pre-petition work should not exceed this timeframe. We found that a final decision was made within ten months in 45 cases (55%). There were, however, 37 cases (45%) where pre-petition investigation took longer than 10 months.

155. We examined the 37 cases to identify any common themes. Of note, 13 involved at least one child victim and one involved a child offender.

Analysis of Cases exceeding 10 Months

156. Of the 37 cases:

- In 12 there were demonstrable justifiable reasons for the length of time taken. For example, in one case, involving allegations of historic abuse, the victim, accused and all relevant witnesses resided in the USA. To obtain statements from the witnesses, Scottish prosecutors are reliant on international co-operation, a matter over which they have no control.

157. Of the other 25:

- In 16 there was no obvious justification for the length of time taken by the prosecutor to progress the investigation.
- In 2 the focus of the further inquiries was to attempt to secure the engagement of the victim(s) – in both cases the victims had made it clear from the outset that they did not want to engage.
- In 1 the focus of the further inquiries was to ascertain the attitude of a victim to proceedings despite there being no suggestion of the victim not engaging with the prosecution.



- In 2 repeated requests for different lines of inquiry to be pursued added substantially to the timeline.
- In 1 case an unexplained delay of five months without any action being taken coupled with a further eight months, during which the prosecutor made extensive efforts to interview the victim and secure her engagement, contributed to an overall period of 13 months before a final decision was made.
- In 3 cases the delay in reaching a decision was due, in large part, to the need to obtain expert reports. While all three cases involved complex issues, and recognising that the timescale for obtaining such reports is not in the control of the prosecutor, delays of 17, 21 and 24 months respectively suggests a lack of oversight in seeking to progress matters.

Key Finding

Pre-petition investigation took more than ten months to conclude in 45% of the cases examined.

Key Performance Indicators (KPIs)

158. COPFS operates a policy of Key Performance Indicators (KPIs) for reporting pre-petition work. Depending on the nature and complexity of the work required, a KPI of two, four, six or eight months is allocated for the pre-petition investigation to be conducted. If necessary, extensions can be requested.
159. It was evident from our review that the KPIs issued were not being enforced. We were advised by the specialist teams and Crown Counsel that the increasing volume of pre-petition cases had impacted on their ability to adhere to KPIs. KPIs are still issued but only to provide an indication of the priority that should be given to each case.
160. The lack of governance may explain, at least in part, the 16 cases where there were no extenuating circumstances to explain the time taken to conclude pre-petition investigation. Without the operation of statutory time limits or robust implementation of internal targets, it is not surprising that such cases are not being prioritised.
161. We appreciate that it is essential to ensure all possible lines of inquiries are undertaken in such serious cases and that focused pre-petition investigation can enable informed decisions to be made regarding sufficiency. However, the more protracted the pre-petition investigation, the greater the risk, that the quality of evidence is diminished. There is a greater likelihood that victims or witnesses may disengage or their ability to recollect what happened is affected.

Recommendation 5

COPFS should restrict pre-petition investigation to only those inquiries that are essential to reach a decision on whether there is sufficient credible and reliable evidence.



Pre-Petition Cases that Proceeded to Trial

162. Where there has been pre-petition investigation resulting in a decision being taken to commence proceedings, the statutory time limits apply from when the accused appears in court.
163. Of the 82 cases reviewed, 15 proceeded to trial.⁵² In four, a period of 11 months or less elapsed between the decision to place the accused on petition and the trial. In the other 11, 12 months or more elapsed between the decision to place the accused on petition and the trial. In six of the 11 cases, the pre-petition investigation had already taken ten months or more to complete.

Key Finding

Cases where there has been pre-petition investigation are not being expedited after the accused has appeared on petition. By and large, COPFS is indicting pre-petition cases in accordance with the statutory timescales that apply to High Court cases.

164. There should be a correlation between the length of time taken for pre-petition investigation and the time required to prepare the case for court after the accused has appeared on petition. The more time spent on pre-petition investigation, the less should be required to prepare the case for court.
165. Pre-petition investigation requires to be taken into account by COPFS in its overall case progression. Failure to do so risks attracting criticism or, in light of the recent appeal decision, any subsequent application to extend the statutory time bars being unsuccessful.⁵³

Recommendation 6

COPFS should take account of any period of pre-petition investigation when allocating reporting dates for cases to be reported to NSCU for a final decision.

Communication with Victims

166. In its written submission⁵⁴ to the Justice Committee's Inquiry⁵⁵ Rape Crisis Scotland acknowledged the significant dedication and skills amongst COPFS staff in prosecuting this complex area of crime. However, it went on to state:

“Survivors tell us that they are going significant periods of time without communication from COPFS and are unaware of what is happening with their cases. This is particularly difficult for survivors where the case is pre-petition, where there are no bail conditions in place. Complainers often think that their case has been dropped, and may be unaware that the accused has been charged or that enquires are ongoing.”

167. VIA is responsible for contacting, by telephone, all victims referred to them, on the same day⁵⁶ where the accused has been released from custody. If VIA is unable to contact the victim, they should ask the police to make personal contact.

⁵² For these purposes “trial” includes preliminary hearing or first diet where the case has been resolved at this stage of proceedings.

⁵³ RW v HMA 2017 SCCR, 203.

⁵⁴ Written submission dated 19 October 2016.

⁵⁵ Scottish Parliament, [Role and Purpose of the Crown Office and Procurator Fiscal Service](#), 25 April 2017.

⁵⁶ Working Together for Victims and Witnesses – Joint Protocol between COPFS, Police Scotland, Scottish Courts and Tribunals Service (SCTS) and Victim Support Scotland (VSS).



168. We examined the pre-petition cases to assess the quality and timeliness of COPFS communication with all 114 victims.

We found:

- There was no record that **20** victims had been advised, within the target timescales, that the accused had been released for pre-petition investigation, nor was there a record that the police been asked to make contact with them.

169. Being advised of what happens in court following the arrest of an accused person, whether he/she is remanded in custody, granted bail or released without any conditions is of paramount importance for victims. In the absence of any evidence that contact had been made, we assessed that the standard of communication fell below what was expected.

- For 9 victims, the standard of communication was otherwise satisfactory.
- For 11, however, we identified other issues. For 8 there was a gap of at least six months, before any contact was made by COPFS. For many the subsequent communication was patchy and in some instances non-existent. In some cases, it was evident that victims or their families required to chase up information from COPFS.
- For a further **34** victims we assessed that the communication also fell below the expected standard. Initial contact with 19 victims took over six months with the longest period being 15 months. Subsequent contact was also either patchy or non-existent or failing in key respects, as illustrated by the examples below:

A victim who had requested monthly updates was not contacted as agreed as VIA had incorrectly noted down the contact details.

One victim was contacted by VIA despite the prosecutor advising that the victim should not be contacted due to their fragile mental health at that time.

- For **ten** victims, although a significant period of time had elapsed before initial contact was made (ranging from between five to nine months), contact thereafter was fairly frequent, resulting in the standard of communication being assessed overall as satisfactory.
- **46** victims received a satisfactory standard of communication from COPFS in that: they were told timeously when an accused had been liberated from custody, initial contact for all was under six months and contact thereafter was regular and provided the necessary information.
- In **two** cases we saw evidence of excellent communication. The case study on page 33 highlights the benefit of timely communications. Another case involved a victim with severe mental health/psychiatric problems. A bespoke strategy was employed involving, with her consent, communication with her family and consultant.
- In **two** cases it was not possible to assess the standard of communications with the victims due to the unavailability of the VIA minute sheet, which records such communication.

Key Finding

The standard of communication where pre-petition investigation was undertaken, fell below what should be expected for 47% of victims.



170. COPFS accepts that there was a period where the initial contact for victims in pre-petition cases fell below the expected standard. This appears to have arisen due to a lack of clarity between those dealing with the pre-petition investigation and VIA as to who was responsible for making initial contact with the victims when pre-petition investigation was instructed. Regrettably, those dealing with the pre-petition investigation erroneously assumed that VIA would contact victims and vice-versa. The lines of communication have now been clarified.
171. COPFS has also acknowledged the need to progress cases with pre-petition investigation more expeditiously.

National High Court Sexual Offences Pre-Petition Unit

172. To improve the overall effectiveness of such pre-petition investigations, the National High Court Sexual Offences Pre-Petition unit was established in April 2016. Senior management, in consultation with staff, has produced a pre-petition improvement plan.

Pre-petition Improvement Plan

173. The improvement plan⁵⁷ provides a clear strategy to tackle the backlog of pre-petition work, reduce the age profile of such cases and provide greater focus on the outcome of pre-petition investigation for future cases.
174. Measures designed to maximise the output of the unit, reduce current caseload and improve communication with victims include:
- Agreed caseloads and targets for reporting cases, with output being regularly monitored;
 - Improved monitoring of management information, including the age profile of cases;
 - A triage system designed to prioritise cases involving accused or victim(s) with a particular vulnerability or where children are involved;
 - Abbreviated reporting for cases only requiring full statements or clarification of the attitude of victim(s) to proceedings;
 - Liaison with Police Scotland to discuss any issues with the quality of police reports;
 - Provision of dedicated VIA resources to communicate with victims; and
 - Prioritisation of contacting all victims and the use of simplified letters.
175. On speaking with senior management and staff within the team we are confident of their commitment to expedite these cases.
176. Since the introduction of the plan there has been a significant improvement in the time taken to deal with such cases and communication with victims.
177. In October 2016, the unit inherited 632 pre-petition cases, requiring investigation. A year later this figure has reduced to 302. In addition, the age profile of pre-petition cases over 12 months old has reduced from 117 to 55 between June and October 2017.

⁵⁷ Introduced in October 2016.



178. Of all current pre-petition cases, there are only 20 victims where COPFS has not yet made contact. As part of an ongoing wider review of all correspondence,⁵⁸ the introductory letters, which were the subject of adverse comment from some support agencies, have been simplified and the content reduced to include essential information only. A three week target has been introduced to contact any victim where there is an indication that they may have reservations about the case proceeding, to establish the reason for their concerns and provide practical advice on measures that can be put in place to hopefully alleviate such concerns.
179. We heard that the impact of the improvement plan would have been more significant if it had not been for a significant increase in new sexual crime cases reported over the last five months – a 57% increase over the equivalent period in 2016.
180. We acknowledge the concerted efforts being undertaken to address some of the issues highlighted and the ambition to restrict pre-petition investigation to inquiries that will provide clarity on whether there is sufficient evidence to prosecute.

⁵⁸ Discussed at paragraph 238.



CHAPTER 4 – VICTIMS AND WITNESSES

181. The nature of sexual crimes, usually committed in the absence of any independent eye witnesses, presents particular evidential challenges. Critical to the prosecution, in almost all sexual crimes, is the evidence of the victim(s).
182. Recognition of the need to improve the experience of victims and witnesses in the criminal justice system has brought a succession of reforms and legislative provisions creating new rights for victims and witnesses.⁵⁹

Experience of Victims

183. Notwithstanding the plethora of legislative obligations, codes and standards, designed to support victims and witnesses through the criminal justice process, there is a body of evidence that many victims of sexual crimes feel marginalised and ignored rather than being placed “at the heart of the criminal justice system”.⁶⁰
184. Recent reports, informed by feedback from support organisations and first-hand accounts of victims, conclude that the system is not meeting victim’s expectations and needs.
185. The Justice Committee’s report stated:

“Evidence received over the course of this inquiry shows a divergence between the intentions of the COPFS and the experience of many victims. Victims can be re-traumatised by what can come across as a mechanistic process that does not always appear to have their interests at heart. Victims and witnesses are sometimes made to feel like an afterthought. This is a system-wide problem but the COPFS, as the key organisation within the prosecution process, bears its share of responsibility.”⁶¹

The report, ‘Review of Victim Care in the Justice Sector in Scotland’,⁶² published by Dr Lesley Thomson, QC, (Thomson report) was commissioned to explore what COPFS could aspire to deliver in the support and care of victims in Scotland. Its aim was to:

“Set a vision, for the 21st century, of how Scotland’s justice sector should respond to victims, witnesses and vulnerable accused.”⁶³

It found:

“We should be in no doubt that the experience for many victims can be of a system which does not recognise or accommodate their needs.”⁶⁴

Our findings lend weight to the views expressed in these reports.

⁵⁹ [Review of Victim Care in the Justice Sector in Scotland](#) - provides a detailed chronology of historical developments of services to victims and witnesses.

⁶⁰ Scottish Government, [Scottish Strategy for Victims](#), 18 October 2006.

⁶¹ [Role and Purpose of the Crown Office and Procurator Fiscal Service](#), paragraph 306.

⁶² COPFS, [Review of Victim Care in the Justice Sector in Scotland](#), by Dr Lesley Thomson, QC.

⁶³ [Review of Victim Care in the Justice Sector in Scotland](#), paragraph 1.8.

⁶⁴ [Review of Victim Care in the Justice Sector in Scotland](#), paragraph 1.1.



Justice in Scotland: Vision and Priorities

186. The remit of the Justice Board,⁶⁵ of which COPFS is a key participant, is to lead the justice system organisations to deliver person-centred, modern and affordable public services. Justice in Scotland: Vision and Priorities⁶⁶ sets out seven priorities including:

- Modernising civil and criminal law and the justice system to meet the needs of people in Scotland in the 21st Century; and
- Improving the experience of victims and witnesses, minimising court attendance and supporting them to give best evidence.

Victim's Code

- COPFS is a signatory to the Victim's Code.⁶⁷ The Code, having regard to a set of principles, sets out minimum standards of service that victims and witnesses should expect from the core criminal justice agencies.⁶⁸

COPFS Commitments to Victims

COPFS published commitments to victims and prosecution witnesses are to:⁶⁹

- Contact victims timeously and provide information when needed;
- Update victims on the progress of their case;
- Communicate clearly and effectively
- Identify vulnerabilities and obtain appropriate special measures; and
- Provide information on support agencies;

Victim Information and Advice

187. The Victim Information and Advice (VIA) Service is the dedicated service offered by COPFS to victims, witnesses of certain crimes and bereaved relatives affected by certain types of deaths.

188. The ethos of VIA is to increase victims, witnesses and bereaved relatives understanding of, and satisfaction with their experience of the criminal justice process.

VIA's Remit

189. When introduced in 2004, VIA's main function, for any case referred to it, was to pro-actively provide victims and witnesses with information on:

- Key aspects of the criminal justice system;
- The progress of the case with which they are involved; and
- Agencies that can provide practical and emotional support.

190. Over time VIA's role has expanded. The current categories of cases that are referred to VIA are set out at Annex B. It includes all victims of sexual crimes.

191. As a result VIA's caseload has grown considerably. In 2014-15 approximately 40,000 victims were referred to VIA compared to 27,559 in 2006-07, representing a 45% increase in referrals over the last seven years.⁷⁰

⁶⁵ Justice Board includes Scottish Government Directors and the heads of partner justice organisations.

⁶⁶ Scottish Government, [Justice in Scotland: Vision and Priorities](#), July 2017.

⁶⁷ Scottish Government, [Victims' Code for Scotland](#), 29 March 2017.

⁶⁸ COPFS, [Standards of Service for Victims and Witnesses 2017-18](#).

⁶⁹ COPFS, [Our Commitments to Victims and Prosecution Witnesses](#).

⁷⁰ [Review of Victim Care in the Justice Sector in Scotland](#), Paragraph 5.13.



Prosecutorial Independence

192. The independence of COPFS and their obligation to prosecute in the public interest is not always understood by victims and witness.

193. In his evidence to the Justice Committee, the Crown Agent stated:

“It is essential that COPFS do not claim to be able to do more for victims than we can. Our job, after all, is to prosecute crime.”

194. Many victims erroneously assume that their relationship with the prosecutor is comparable to that between the accused and his/her lawyer. This is not the case. The public prosecutor acts independently in the public interest. Assessment of the public interest involves consideration of competing interests, including the interests of the victim, the accused and the wider community. Prosecuting in the public interest prevents the prosecutor from discussing certain aspects of the evidence with the victim during the investigation or at any court proceedings.

195. VIA is part of the prosecution service. As such, it does not provide a victim support or counselling service. Its responsibility is to provide information on the availability of such services.

COPFS Victim Strategy

196. COPFS has implemented a Victim Strategy for all victims of High Court sexual crimes. An individual Strategy for each victim in each case should be completed. The Strategy is dependent on receiving vulnerability reports⁷¹ from the police.

197. The Strategy was revised in January 2017. It commits VIA to:

- Contact all victims, referred to them, within 24 hours of the accused appearing in court to advise them of the outcome and whether there are any bail conditions. If, for any reason, VIA is unable to contact the victim they should ask the police to make personal contact.⁷²
- Make contact by telephone within 7/21 days for custody/bail cases where the accused has appeared in court.

198. The telephone call should include:

- introducing VIA and the case preparer to the victim;
- the process and likely timescales;
- the victims' preferred method of communication and whether they would wish an early face to face meeting with the case preparer;
- an assessment of vulnerabilities and special measures;
- the victim's attitude to proceedings and to obtaining sensitive, personal records;
- managing their expectations;
- signposting the victim to support organisations, if appropriate;
- updating the victim following any 'significant event', such as when an indictment has been served on the accused; and
- contacting the victim in accordance with the level and type of communication that has been agreed.

⁷¹ Reports providing information on the background, needs, concerns, vulnerabilities and expectations of victims.

⁷² Working together for Victims and Witnesses – Joint Protocol between COPFS, Scottish Courts and Tribunals Service (SCTS), Police Scotland and Victim Support Scotland (VSS).



199. Victims should also be given the opportunity to see their police statement(s) and attend a meeting with the case preparer.

COPFS Commitments to Victims

200. We examined data from our 50 indicted cases review and sought feedback from the focus groups on each of the COPFS commitments.

Contact and Updating Victims

Case Review

201. We assessed the quality and timeliness of COPFS communication with victims. One case was excluded as there was no identifiable victim.

Was there timely communication of whether the accused was remanded or given bail and any bail conditions?	Yes	40
	No	9
Was a letter confirming the outcome of the accused's appearance at court sent to the victim?	Yes	48
	No	1
Was the victim invited in for a meeting/interview?	Yes	45
	No	1
	N/A ⁷³	3
Was victim offered access to their statement?	Yes	34
	N/A ⁷⁴	6
	N/K ⁷⁵	9
Did VIA contact to the victim following service of indictment or when S76 sent to High Court Unit?	Yes	45
	No	3
	N/K ⁷⁶	1
Did VIA intimate the outcome of the Preliminary Hearing to the victim?	Yes	47
	No	1
	N/A ⁷⁷	1
Did VIA contact the victim 7 days before the trial?	Yes	39
	No	6
	N/A ⁷⁸	4
Did VIA inform the victim of the outcome of the trial?	Yes	41
	N/A ⁷⁹	8
Overall evaluation of communication with victim? ⁸⁰	Met Commitments	35
	Exceeded Commitments	5
	Not met commitments	9

N/K = Not Known
N/A = Not Applicable

⁷³ One case involved a child victim, another victim was not a witness and the accused pled guilty in one case.

⁷⁴ Cases involved children or the victim had learning difficulties. Contact was made with parent or supporter.

⁷⁵ All victims were offered a meeting but it is not recorded whether they read their statement.

⁷⁶ Not recorded.

⁷⁷ Accused pled guilty prior to Preliminary Hearing.

⁷⁸ One case pled guilty prior to the trial, one trial did not call due to ill health of accused, one case was discontinued and one case is still to conclude.

⁷⁹ Four cases pled guilty before the trial, two cases were discontinued before trial, two have still to conclude.

⁸⁰ Met commitments if provided updates and made initial contact soon after accused appeared at court; Not met commitments if there were lengthy protracted periods without contact and updates not provided; Exceeded commitments if contact was more regular and had an element of assessing individual needs.



Communication of Outcome at Court

202. As discussed being advised of what happens in court following the arrest of an accused person is of paramount importance to the victim. If granted bail, receiving immediate notice of any conditions attached to the bail order designed to provide protection for the victim is critical.
203. We found that VIA made contact with the victim within 24 hours of the accused appearing in court, and sent a letter advising what happened, including notification of any bail conditions, in 40 (82%) of the cases examined.
204. There were, however, 9 cases (18%) where VIA failed to notify the victim of the outcome of the court appearance within the 24 hour period or asked the police to contact them. For many victims, who have taken the decision to report a person to the police, this is a time of extreme anxiety and only 100% compliance is acceptable.

Providing Updates

205. VIA contacted victims to provide an update following the:
- Service of indictment in 94% of cases;
 - Preliminary Hearing in 98% of cases; and
 - 7 days before the trial in 87% of cases.
206. VIA provided updates following the above significant events in 93% of cases.

Provision of Statements

207. The prosecution is entitled to provide witnesses with a copy of their statement(s) prior to giving evidence at trial.⁸¹ Having sight of their statement enables witnesses to address any inaccuracies or misunderstandings and mitigates any delay between giving a statement and attending court, which in some cases, can be years after the initial statement.

We found:

- 34 victims were provided with a copy of their statement. It was not appropriate to provide statements directly to six victims who had learning difficulties or were children. There was no record of nine victims being offered a copy of their statement.

Meeting with Victims

- There was only one case where the victim was not offered a meeting in accordance with COPFS policy.

Frequency of Contact

- After sending out an introductory letter advising what happened at court, there was, on average, four months between the accused's first appeared at court and any subsequent contact from VIA. In 15 cases, six months or more elapsed.

Key Finding

VIA updated victims of any significant developments in 93% of cases. There were, however, significant gaps between contacts from VIA.

⁸¹ The Criminal Justice and Licensing (Scotland) Act 2010, Section 54.



Victim Strategy

208. The revised Victim Strategy aimed to improve the content and timeliness of the initial contact with the victim. To assess whether it has achieved this outcome, we reviewed 30 case files, involving 61 victims, where the accused had appeared in court in May 2017 on sexual crime charge(s). This gives a snapshot of current performance⁸².

- We found that VIA contacted 48 victims (79%) to advise that the accused had appeared in court and of the outcome or contacted the police to convey this information within target timescales. There were, however, 13 cases (21%) where VIA did not contact the victim within target timescales.
- We found that the essential aspects of the strategy were covered with 41 victims. There were nine victims who refused to engage with VIA, one for whom VIA was awaiting contact details from the police and two where the circumstances made it inappropriate for VIA to make contact. There were, however, eight victims with whom VIA failed to make any contact.
- Only 20 victims were contacted within the 7/21 days target for custody/bail cases.

209. We found several examples of exemplary communication where the VIA Officer covered all aspects of the strategy comprehensively including, giving information on the likely timescale for the investigation, seeking to ascertain whether the victim had any particular concerns and inquiring whether they required more regular contact.

210. The failure, however, to make contact with eight victims, approximately five months after the accused has appeared in court, is concerning.

Victim's Voice

211. The lack of communication from COPFS was the main source of complaint from those who attended the focus groups. Feedback from victims and support agencies describe VIA as reactive rather than pro-active.

What we were told

212. Following the initial contact from VIA, it was not understood that there may be a lengthy period, often more than six or seven months, where there are no significant developments and thus no contact.

213. Victims were too intimidated or lacked confidence to contact VIA to ask for more regular communication.

We heard often:

“Your life is on hold, simply waiting for a phone call.”

⁸² As at 13 October 2017.



214. In the case study below, a period of 10 months without any contact from COPFS, led the mother of the victim to believe that the case had been “dropped”.

A police report was sent to the prosecution service in March 2016 containing an allegation of rape of an 11 year old child. It was decided that the case would benefit from pre-petition investigation.

The day after the police report was received VIA sent an introductory letter to the parents of the child. The letter advised that a report had been submitted by the police and explained that VIA would provide regular updates on the progress of the case. Following this initial contact, the mother contacted the Procurator Fiscal’s Office twice to seek an update.

Following a 10 month gap, with no contact from the prosecution service, a Rape Advocacy worker, supporting the family, contacted the Procurator Fiscal’s Office to seek an update. She was advised that the case was still being investigated.

Two months later, the investigator, dealing with the case, contacted the family to advise that a decision had been made to prosecute and a warrant to arrest the accused had been issued.

The accused appeared at court the following month. The provisional date for the Preliminary Hearing is January 2018 – almost three years after the alleged crime took place – and almost a quarter of the life of the child.

What would make a difference?

“I generally heard nothing from month to month.....it would be helpful to have had a phone call every few weeks, even if nothing much had happened, just to let me know it was still being dealt with.”

215. Every victim agreed with this sentiment. We were told that a phone call every six to eight weeks, regardless of whether there were any developments, would provide re-assurance that the case was still on someone’s radar.

Key Finding

The frequency of contact provided by the COPFS Victim Strategy is not meeting the needs of victims.

Recommendation 7

COPFS should ensure that VIA pro-actively offer to contact the victim every eight weeks, as a minimum, unless more frequent contact is required or requested or a victim expressly opts out.

Dedicated VIA Officers

What we were told

216. Having a dedicated VIA Officer, providing continuity of support, was highly valued.
217. The lack of a dedicated VIA Officer or point of contact made victims feel that they were being “passed from pillar to post”.



“A dedicated contact point saves you having to re-tell your story over and over and makes you feel as though someone is invested in your case.”

218. VIA Officers are allocated to individual cases in the North and East. In the West, however, cases are more usually allocated on a team basis.

Recommendation 8

COPFS should ensure that there is a dedicated VIA Officer allocated to each case and provide victims with information on who to contact in their absence.

What we were told

219. Being informed by a VIA officer that they had to consult the Procurator Fiscal before they could update the victim or provide certain information left some victims with the impression that VIA was not part of the prosecution service. The perception of VIA as a separate entity from COPFS may explain why some victims maintained that they had no communication with the prosecution service, yet their case file showed that they had been contacted by VIA.

Key Finding

Victims commonly do not understand that VIA is part of COPFS.

Recommendation 9

COPFS should consider re-branding VIA to include a reference to “prosecution” in their title.

Communicate Clearly and Effectively

220. The Justice Committee report referring to evidence it heard states that, “there was a tendency within the COPFS to over-estimate how much victims and witnesses understood the criminal justice system and the prosecution process”.⁸³
221. Feedback from support organisations and victims supports this assertion.

Victim’s Voice

What we were told

222. The language used in letters sent out by VIA is overly complicated and full of legal jargon. The use of terms such as “petition”, “preliminary hearing” and “cited to court” are unhelpful and confusing. The introductory letters contain too much information, at a time when you are struggling to deal with what has happened.

“The language is not understandable. I had to educate myself using Google.”

“You need a law degree to understand what was going on.”

223. Advocacy Workers at Rape Crisis Scotland and Archway advised that they are regularly asked to explain the content of letters from COPFS.

⁸³ Scottish Parliament, [Role and Purpose of the Crown Office and Procurator Fiscal Service](#), 25th April 2017 (Page 69, para 278).



224. The name of the accused highlighted at the top of correspondence in bold letters was distressing and unnecessary.

“On opening the letter the first thing I saw was the name of the person who attacked me in in black bold letters, it was very distressing.”

225. Getting communication right at the start is essential to building the confidence and trust of victims and to securing their engagement in the process. Standard letters can be helpful but communication needs to be tailored to the individual as demonstrated by the case study and correspondence below:

VIA sent out the standard pre-petition introductory letter to an adult victim with a learning disability, living in supported accommodation and receiving care on a daily basis. The letter discussed: interview by a “precognition officer”, obtaining “personal records” and explained that a “definitive timescale” could not be provided for a decision to be reached.

226. The following is an extract of letter sent to a 15 year old with mild learning disabilities:

“The accused was granted bail with special conditions. Please see the information at the end of this letter on standard bail conditions. In addition to standard bail the Sheriff told the accused that he does not enter nor seek to enter xxx or contact victim’s name. If you believe any of these conditions of bail are breached, you should contact the police immediately, and let us know too”.

“If you have to come to court, there are ways we can make it easier for you to give evidence. This is known as using “special measures”.

You are entitled to special measures to help you give your evidence in court. I would like to discuss special measures with you so that I can let the Sheriff know your preference. You may wish to look at the booklet “Being a Witness, The Use of Special Measures” on the COPFS website at the address given in the additional information paragraph of this letter. This booklet will tell you about the different types of special measures.

Please contact me on the number at the bottom of this letter to discuss the options for special measures. If I don’t hear from you I will apply for the use of: Screens and Witness Service supporter.

If you are cited to give evidence in court I will pass your details to the Witness Service to contact you. If you wish to contact them sooner, you can find their contact details on their website at www.victimssupportsco.org.uk”

227. Letters in similar terms were sent to the parents of the child and the victim with a learning disability. However, the use of terms such as “interview by a “precognition officer”, obtaining “personal records”, “bail with special conditions,” “cited to court” and “use of special measures” are not accessible terms for anyone unfamiliar with the criminal justice system may have caused confusion or even distress.

228. There were examples in our case review where the support from VIA made an enormous difference. In two cases with very vulnerable victims, VIA made numerous inquiries and calls to enable them to give evidence from courts in England rather than travel to Scotland. In several other cases, VIA went the extra mile to co-ordinate the travel and accommodation needs of victims.



Case Review

Right to be Understood

229. We identified equalities issues in 15 out of the 50 cases. In 13, VIA made arrangements to accommodate the individual needs of the victims and witnesses, including translating documents and proactively seeking out the best way to communicate with victims whose first language was not English.

A case of rape and physical abuse, involved sensitive religious and cultural issues. Many essential witnesses, including the victim, did not speak English. VIA arranged for the victim, who resided in England, to fly accompanied by a family member, to Scotland for interview. All interviews took place with the assistance of an interpreter and VIA translated all correspondence into the victim's first language, Urdu.

230. The other two cases involved victims with severe learning difficulties. VIA sent out standard letters to both victims, despite the difficulties being flagged up in the police report. Both victims required a tailored approach with consideration being given to identifying an appropriate intermediary who could assist them in a meaningful manner.

Key Findings

The use of legal terms when dealing with victims and witnesses creates barriers and enhances a sense of separation and detachment from the process.

The COPFS Victim Strategy requires a more nuanced approach, tailored to victims' needs. For victims with identified vulnerabilities, such as mental health problems or learning difficulties, a bespoke strategy taking account of their particular needs, including whether more regular contact would assist, should be discussed and agreed at the outset.

231. Assumptions are made that victims and witnesses have some understanding of the criminal justice system resulting in procedures and outcomes not being fully explained, leaving the victim unclear or confused as to what has happened.
232. In a case where the accused pled guilty, we were told that the victim was disappointed that the judge would not have heard about the circumstances of the crime. No-one had explained that the prosecutor would have narrated the circumstances to the judge prior to sentencing.
233. We saw examples where the consequences of a Not Proven verdict were not understood.
234. Concerns were expressed about the empathy of some communications.

“On asking why the trial was being put off for a third time, I was told there were other cases that had higher priority. This makes you feel that you do not matter.”

235. Cases may have to be given priority for several reasons, such as meeting strict time limits or because they involve child witnesses or a child accused, but without such context, the comment appears insensitive.

“I was phoned and told that it was a Not Proven verdict. I was on my own. I lost it.”

236. There are many aspects of the system over which COPFS has no control such as scheduling of courts or when a verdict is returned. It should not be assumed that victims are aware of why things occur or who is responsible.



Key Finding

There is an unrealistic expectation by COPFS of victim and witnesses' understanding of the prosecution process and how the criminal justice system operates.

What would make a difference?

237. An initial phone call, followed up with a letter, using easy to understand language, to confirm what was discussed was the preferred option of the victims and support agencies.
238. We understand that all VIA letters are currently being reviewed to make them more user-friendly. We support the review and recommend that COPFS takes account of feedback from support organisations.
239. We welcome the commitment of COPFS to deliver an updated programme of mandatory training for all staff on the impact of crime on victims as recommended by the Thomson report.

Recommendation 10

COPFS should review all correspondence sent out by VIA.

Identify Vulnerabilities and Obtain Appropriate Special Measures

240. Empowering victims to give their best evidence undoubtedly impacts on the overall quality of the case presented by the prosecution.
241. In almost all sexual crimes, the evidence of the victim is essential to the prosecution. If the victim is unable to give evidence or their ability is impaired by anxiety, fear, intimidation or a sense of isolation, it is likely to have a significant impact on the outcome of the trial. For that reason, the assessment of a victim's vulnerabilities and identifying the most suitable method for them to give evidence is essential.
242. Recognition of the need to provide an environment conducive to victims giving their best evidence led to a suite of special measures being introduced in the Victims and Witnesses (Scotland) Act 2014⁸⁴ (the 2014 Act).

Victims and Witnesses (Scotland) Act 2014

243. The 2014 Act represents a major landmark for victims and witnesses' rights. It provides a framework for support of victims and witnesses throughout the justice system and, creates new rights aimed at ensuring that witnesses are able to fulfil their public duty effectively.⁸⁵
244. The Act re-defines the categories of person that are to be regarded as vulnerable witnesses – referred to as “deemed vulnerable” – to include:
 - Children under the age of 18 at the date of the commencement of the proceedings (previously 16);
 - Adult witnesses whose quality of evidence is at significant risk of being diminished either as a result of a mental disorder, or due to fear or distress in connection with giving evidence;

⁸⁴Implemented to comply with minimum standards on the rights, support and protection of victims required by the European Directive 2012/29/EU.

⁸⁵Underpinned by the Victims' Right (Scotland) Regulations 2015.



- Victims of alleged sexual offences, human trafficking, an offence the commission of which involves domestic abuse or stalking who are giving evidence in proceedings which relate to that particular offence; and
- Witnesses who are considered by the court to be at significant risk of harm by reason of them giving evidence.

Special Measures

245. Being deemed a vulnerable witness automatically entitles the witness to the use of standard special measures when giving evidence. These are:

- use of a live television link;
- a screen to avoid seeing the accused; and
- a supporter.

246. Other special measures may be allowed if the court is satisfied that they are justified. These are:

- giving evidence via a commissioner;⁸⁶ and
- giving evidence by means of a prior statement.

247. The Act also creates new rights for victims and witnesses including:

- Right to a closed court;⁸⁷
- Right to ask for a decision not to prosecute or to bring proceedings to an end to be reviewed;⁸⁸
- Right to request and be given information about their case;⁸⁹
- Right to understand and be understood – this means that all communications are as clear and easy to understand as possible, taking into account of the individual needs of the person;⁹⁰
- Access to victim support services;⁹¹ and
- For criminal justice organisations to take reasonable steps to enable victims and their family to avoid contact with an accused in the course of criminal proceedings.⁹²

Special Measures Regime

248. The 2014 Act significantly increased the number of witnesses who are automatically entitled to special measures.

249. Written applications and notices for special measures are required regardless of whether a victim has an automatic right.

250. VIA prepared 2,110⁹³ notices or applications for special measures in 2014-15.⁹⁴ COPFS has estimated an increase of 20,000 applications as a result of the 2014 Act: 4,000 from the widened definition of a child witness and 16,000 from the new “deemed vulnerable” category.

⁸⁶ The court is empowered to appoint a commissioner to take the evidence of a vulnerable witness in advance of the trial.

⁸⁷ Excluding the public during the taking of evidence from the vulnerable witness.

⁸⁸ Section 4 of the 2014 Act.

⁸⁹ Section 6 of the 2014 Act.

⁹⁰ Section 3E of the 2014 Act.

⁹¹ Section 3D of the 2014 Act.

⁹² Section 3D of the 2014 Act.

⁹³ Includes all summary and non-sexual solemn cases.

⁹⁴ COPFS, [Review of Victim Care in the Justice Sector in Scotland](#), by Dr Lesley Thomson, QC.



251. VIA spends a significant amount of time drafting notices and applications for special measures; time which VIA Officers told us they would much prefer to spend communicating with and updating victims.
252. Feedback from organisations that support victims report that the increase in vulnerable witness notices has impacted negatively on VIA's ability to provide victims with information timeously and assess victim's needs to ensure that the appropriate special measures are sought.
253. If it is assessed that a witness or victim would benefit from special measures, the prosecutor is unable to advise whether they will be able to give evidence in the manner of their choosing until it has been granted by a judge.

What we were told

254. Victims want certainty that the special measures requested will be available, including a supporter of their choice.
255. Given that the intention of the 2014 Act is to provide automatic entitlement for standard measures for deemed vulnerable witnesses, including all victims of sexual crimes, it begs the question why notices and applications are necessary.
256. To give meaning to "putting the victim at the heart of the system" and to support victims and witnesses to give their best evidence, other than for taking evidence by a commissioner and giving evidence in the form of prior statement,⁹⁵ we advocate the removal of the requirement to lodge notices. This would empower victims "deemed vulnerable" to choose how they wish to give evidence. Confirmation that the special measures of their choice were guaranteed would provide victims with certainty and an area over which they had some control.
257. The abolition of the industry of drafting notices would also free up valuable VIA time that could be devoted to their core functions.
258. For practical reasons, the court would require notification of the measures in sufficient time to facilitate arrangements. Notices currently require to be lodged 14 days prior to the Preliminary Hearing. Given that the average period between the Preliminary Hearing and the trial is at least 3 months, there would be more than sufficient time to make the appropriate arrangements, if notification was given at the Preliminary Hearing.

Key Finding

The abolition of notices and applications for special measures would provide certainty for victims that they could give evidence in accordance with the standard measure of their choice.

Identification of Special Measures

259. Identifying appropriate measures for victims of sexual crimes is a key VIA responsibility.
260. The use of special measures is discussed by VIA as part of the initial call to victims and followed up in their introductory letter. The letter includes a link to a booklet "on the use of Special Measures" on the COPFS website, and advises that VIA will apply for the use of screens and a supporter from the Witness Service, if they do not hear from the victim.
261. Special measures are also discussed during the interview with the case preparer.

⁹⁵ The use of taking evidence by a commissioner and giving evidence in the form of prior statement is currently being considered as part of the Evidence and Procedure Review (EPR).



Victim's Voice

What we were told

262. We heard that there is an issue around the timing of discussing special measures.
263. At the time of the initial phone call by VIA, a final decision on whether there is to be a prosecution has still to be taken, and the focus of victims is on the investigation and its outcome. For many, the information provided during the initial discussion with VIA is overwhelming. This may lead many victims to accept the default position of a screen and witness service supporter.
264. A number of victims said that they did not understand what was meant by "special measures" until it was explained at a meeting with VIA or case preparer.

"It is hard to think of what special measures you want in the abstract."

265. One victim explained that she had difficulties with reading and only understood what was meant by the term "special measures" when it was explained by an advocacy worker.
266. Advocacy workers told us it was not uncommon for victims to later change their mind as the trial approaches, resulting in late applications for different special measures.

"Initially I thought I could cope with screens but the closer I got to the trial, I could not face being in the same place as the accused. I became physically ill at the thought."

What would make a difference?

267. Most victims said that the discussion on measures is more meaningful face to face. It provides a better understanding of what they are being asked and the various options.

*"I was pro-actively contacted by the case preparer requesting I attend the precognition with the victim. The case preparer explained very skillfully the evidential complications of a Moorov case and brilliantly explained the special measures available. This made the victim feel like they had a real choice in the process."
[Advocacy worker from Rape Crisis]*

Case Review

268. In our 50 case review, 100 of the 118 victims requested some form of special measures. 61 requested a screen and supporter. Of the 100 victims, 17 later sought to change the special measures that had been granted by the court. Three requested evidence on commission; five requested the use of a TV link; six requested additional measures of screens, supporters or a closed court. One decided they no longer required a screen and the remaining two victims decided that they no longer required any special measures.
269. It was evident from the records updated by VIA that the victims' focus on court and special measures crystallises after the indictment is served.
270. To meet the individual needs of each victim, the optimum time to discuss and assess special measures is at the face to face meeting. It, therefore, makes sense to draft any notices following that meeting rather than at an earlier stage. This should hopefully reduce any last minute requests for different special measures, avoiding the need for VIA to draft more than one application.



Key Finding

Asking the victim to engage pro-actively on special measures at the beginning of the investigation is premature. Many victims and witnesses do not have sufficient knowledge of court procedures and concepts such as TV link to make informed decisions. Decisions on special measures should be tailored to the individual needs of the victim following a face to face meeting.

Recommendation 11

COPFS should discuss and agree special measures at the interview with the case preparer in the context of preparing the victim or witness for court.

Provide Information on Support Agencies

271. The 2014 Act entitles victims to seek referral to providers of victim support services.⁹⁶
272. A wide range of voluntary and charitable organisations and principal victim support agencies provide a variety of services, including advice, counselling and advocacy. Some are tailored to particular demographic groups, such as children or victims of domestic abuse.
273. Police Scotland has a Scotland wide agreement with RCS, to offer to provide, at their request, details of any victim of rape or sexual assault, aged over 13, to RCS to facilitate a counsellor contacting them to offer support. As part of the referral arrangement, RCS provides feedback on the victim's experience of their interaction with the police. This provides a valuable source of learning for the police.
274. We understand that COPFS and RCS have agreed to introduce a similar feedback arrangement whereby Rape Crisis will provide anonymised and confidential feedback from any victim who has come into contact with COPFS. This is a positive development, demonstrating COPFS' desire to listen to victims and learn from their experiences.
275. One of VIA's functions is to signpost victims to an appropriate support group.
276. There is, however, no single support agency or single gateway to accessing such services. Rather there are numerous organisations and agencies, each with their own individual obligations and responsibilities, some of which overlap with each other.
277. As acknowledged in the Thomson report, the current system does not lend itself to the seamless provision of all victims' needs.
278. COPFS acknowledges that there is a gap between the service which it can provide and the service which it would like to see victims receive from the system, as a whole, but stresses that their effectiveness is intimately bound up with that of the police, the courts, and the wider legal profession.⁹⁷
279. COPFS supports a system of victim care in the form of a co-ordinated service with all criminal justice and third sector organisations working together, within a model that provides a single point of entry, as advocated by the Thomson report.

⁹⁶ Section 3D - it is the responsibility of the Chief Constable of Police Scotland to inform a person that they may request a referral to these services.

⁹⁷ COPFS response to Justice Committee.



280. The Scottish Government has agreed to facilitate discussion with justice agencies and representatives from victim support organisations, including RCS, Scottish Women’s Aid and Victim Support Scotland, to consider the recommendations of the Thomson report and develop proposals to improve the support provided to victims, including consideration of a single point of contact.
281. A system where services are co-ordinated and, ideally, co-located would address many of the concerns of victims.

Victim’s Voice

What we were told

282. Most victims want the equivalent of the accused’s lawyer to act as a single point of contact.

“The system is loaded in favour of the accused. The victim does not have a lawyer like the accused.”

283. Contact with different organisations causes confusion for victims and repeatedly having to re-tell their account is distressing and demoralising.

“You need someone to guide you through this alien system from end to end. There is an expectation that you have a greater knowledge of how the system works than you do.”

What would make a difference?

284. From an equality point of view many victims express the desire to have their “representative” guide them through the process – a victim’s advocate.
285. In absence of a cohesive single service, an independent “advocate or supporter” can act as a point of contact for the victim and provide support that is tailored to their needs, rather than those of the system.
286. An “advocate or supporter” can assist victims navigate the criminal justice system, keeping them central to the process and provide a ‘one stop shop’ for information and updates. The service provided by the advocate or supporter should complement that provided by VIA.
287. The recently published National Scoping Exercise of Advocacy Services commissioned by the Scottish Government observed that victims consistently report that advocacy services have improved their safety, wellbeing and quality of life.⁹⁸
288. For sexual crimes, the Scoping Exercise identified two existing models of advocacy:
- Rape Crisis Scotland National Advocacy Project – a relatively new resource with 15 advocacy workers based within a rape crisis centre, taking self-referrals and police referrals, supporting women to report to police, and through the pre- and post-court process.
 - Archway – support or advocacy workers taking some self-referrals and police referrals; conducts forensic examination; and supports victims all through the process.⁹⁹

It does acknowledge, however, that the availability of advocates or supporters is limited.

⁹⁸ Scottish Government, [National Scoping Exercise of Advocacy Services for Victims of Violence Against Women and Girls](#), 8 August 2017.

⁹⁹ This includes a male support worker to assist male victims who express this preference.



What we were told

289. We met with a number of victims, who had received some form of advocacy and/or emotional and practical support. All said that the support made a substantial difference to their willingness to engage with the criminal process and, for those who gave evidence, to their knowledge of what to expect, which made them less anxious.

Key Finding

The criminal justice system places an onus on victims to seek updates, decide about special measures, find appropriate support, deal with the shifts and uncertainties in scheduling of trials and narrate what happened in an environment over which they have no control. For many dealing with the trauma of the offence, the process is too much and it explains why many simply disengage.

290. Victims want someone who understands the system to guide them through it step by step. This is not a role for VIA but there is scope for VIA be more pro-active in referring victims to agencies who can provide advocacy, and/or emotional and practical support. For example, VIA should routinely offer, with their consent, to make direct contact with the agency, negating the need for the victim to make the call.

291. For those who decline such support or where such support is not available, for whatever reason, having a dedicated VIA Officer becomes more critical.

292. Volunteers from the Witness Service, or VSS, have traditionally been designated as a supporter. For many, they provide excellent support and their assistance and experience is invaluable.

293. However, for some victims who have received support from agencies such as RCS or Scottish Women's Aid, early consideration requires to be given to identifying the person that is best placed to provide support in court.

“It is illogical to get support from someone you have never met – it is counter-intuitive.”

294. With the expansion of the Rape Crisis advocacy service, victims who have received such support often request the advocacy worker as their supporter. Taking a victim-centred approach requires their wishes to be accommodated, where possible. The victim should, however, be made aware of the well-defined role of the supporter which can limit discussion and contact during the proceedings. For that reason, it may be preferable for the supporter to be someone other than the advocacy worker.

Court Proceedings

Victim's Voice

What we were told

295. The lack of information regarding the nature of the investigation and on decisions taken was a source of frustration for many victims, compounded by awareness that the accused is privy to all information about the case, including the victim's account, and has a legal representative acting on their behalf.

296. We found nervousness and uncertainty on the part of some VIA staff on what information can and should be shared.



A victim, who reported allegations of sexual and physical abuse was advised that there was only sufficient evidence to prosecute the accused on two charges of historical physical abuse.

She was told that she could not mention anything concerning the sexual abuse when she gave her evidence as it may prejudice the trial. With assistance from her advocacy worker, she sought information on which incidents/charges were being prosecuted but was advised that she could not be told – resulting in her having no idea what aspect of the accused’s offending she was going to be asked about in the witness box leaving her, in her words “to be ambushed in court.”

297. This inaccurate assessment of what the victim could be told contributed to her anxiety about giving evidence.
298. Of those who had given evidence, it was a common assertion that while the court process was explained by VIA or the case preparer, it did not fully prepare them for the hostile and intrusive nature of the questioning.

“I was not prepared, it was the most degrading and terrifying thing.”

299. Giving evidence for most people is a terrifying prospect. Being as fully prepared as possible can mitigate that fear and assist the witness to give their best evidence.
300. COPFS policy is to discuss possible lines of questioning that may be asked when interviewing witnesses. This includes exploring any inconsistencies in their account and potential questions about sexual history or character evidence where it is likely to be raised. In doing so, however, it is important that case preparer explain the context of such questions to victims. We heard from a support worker that case preparers do not always explain that they are asking questions that the defence may raise, leading to victims shutting down and disengaging with the process as they are left with the impression they are not believed.
301. Where for legal reasons, information cannot be provided, rather than a bald statement that it could prejudice the trial, victims/witnesses require to be given some information to explain why it may be considered prejudicial.
302. We found a lack of awareness on the part of many victims on the role of the prosecutor and defence counsel, suggesting that there is a need for more detailed discussion with victims at any interview on what will happen at the trial.

Giving Evidence

303. Many victims expressed anger at the manner and content of questions asked during the trial. Giving evidence at the trial was described as brutal, uncompassionate, and cruel.

“In our court system, you are totally humiliated. It was the most degrading experience I have been through.”

“Court was absolutely horrendous, it was worse than being raped.”

304. The regulation of conduct, including cross-examination, during a trial is a matter for the judiciary. The Lord President, during a case in 2015, emphasised the duty of the judge in this regard:

‘The right to cross-examination of an alleged sexual assault victim “does not extend to insulting or intimidating a witness” and trial judges should intervene where questioning ‘strays beyond proper bounds’



305. The prosecutor also has a role in objecting to questions that have no direct bearing on the charge(s).

Meeting the Trial Prosecutor

Case Review

306. It is COPFS policy for the trial prosecutor to meet the victim prior to the trial. If possible, it is preferable for such meetings to take place before the date of the trial but often, for practical reasons, the meeting takes place on the day of the trial.
307. Of the 50 cases reviewed the victim met the trial prosecutor in 25 cases. In the remaining 25 cases, five had been resolved by a plea, four were discontinued and in one there was no identifiable victim. Four cases have yet to conclude, the victim gave evidence by a remote TV link in one case and in two cases evidence was given on commission. In eight cases there was no record of whether the trial prosecutor met the victim.
308. In many cases following the trial, the trial prosecutor offered to meet the victims to explain the outcome, including cases where there was a not proven or not guilty verdict.
309. The feedback from those who met with the prosecutor was positive. For those who were not given the opportunity, it reinforced their perception that they were not valued, other than as a source of evidence. Meeting witnesses beforehand is often advantageous to the prosecutor as it provides an opportunity to establish a rapport with the victim and assess any particular communication needs.

“I met the prosecutor before the trial... meeting him made it more human and made me more relaxed.”

Safety at Court

310. The prospect of seeing the accused at court is a fear that looms large for many victims. It is appreciated that the antiquity of some of the courts estate causes difficulty in providing separate accommodation for victims and the accused and his/her entourage but the logistics of attending at court is an important consideration for providing re-assurance to victims.

“In two cases recently the victim walked in and saw the accused and left without giving evidence”. [Rape Crisis Advocacy Worker]

311. A protocol¹⁰⁰ between COPFS and the Scottish Courts and Tribunals Service has recently been amended to include in the Vulnerable Witness Notice any requirements for the witnesses' attendance at court, including addressing the anxiety of seeing an accused at court. In such circumstances, discussion of entrances and safe waiting areas should be routinely considered and discussed by VIA and court officials.

Effect of Delays and Adjournments

312. A common complaint was the time taken for cases to get to trial or trials being repeatedly adjourned.

¹⁰⁰ Working Together for Victims and Witnesses – Joint Protocol between COPFS, Police Scotland, Scottish Courts and Tribunals Service (SCTS) and Victim Support Scotland (VSS).



313. Victims were also adversely affected by their cases being transferred from one court to another, usually at short notice. The prosecutor is not responsible for scheduling trial dates or for delays in fixing trials but the distress caused often impacts on the quality of the victim's evidence.
314. The use of "dedicated floating trials" were universally criticised by all victims and support agencies. Almost all High Court trials for sexual crimes are currently being allocated to a dedicated floating trial – trials scheduled for a particular High Court which can start on one of a number of days within the same week. This leaves the victim waiting each day to get a phone call to learn whether the case is going ahead.

"Floating trial diets cause great distress for rape complainers. They are being told it's going ahead then it's not going ahead; the trial is in Edinburgh and then it's in Glasgow and vice versa. It is basically a system designed to get the worst evidence from people". [Advocacy worker]

"You build yourself up each time and then you are let down it turns you into an emotional wreck and you just feel let down by the system."

315. Until recently there could be five to six months between the Preliminary Hearing and the trial. With the addition of new courts, this period is reducing.¹⁰¹
316. For victims, there is a significant timeline from reporting the crime, being contacted by VIA, attending for interview at COPFS, reading their statement, having a court visit and actually giving evidence.

What would make a difference?

317. The treatment of victims and witnesses at court is a system-wide issue. When all the elements of the system work together, it can make a substantial difference to the victim's experience.
318. The case studies below demonstrate two very different experiences.
319. One victim who gave evidence at court, acknowledged that her experience was greatly enhanced by various agencies working together to address her concerns and minimise, where possible, the impact of giving evidence, all of which gave her strength and confidence throughout the proceedings.

As an adult, **A** reported a family member who had abused her when she was a child. Prior to reporting the offending, **A** received support from Rape Crisis Scotland.

The arrangements that greatly mitigated her experience of attending court were:

- Excellent support she received from Rape Crisis both before and at court;
- Arrangements agreed with VIA to enter and leave the court building by a rear door to avoid seeing the accused;
- Being met at court by a Victim Support Officer who took her to a witness room via a private stairway to avoid seeing the accused; and
- Meeting the trial prosecutor before the trial commenced.

¹⁰¹ 13 weeks as at October 2017.



320. In contrast, another victim had a much more difficult journey.

- I had to constantly chase VIA for information. I felt as though there was a black hole of information. The only time VIA proactively contacted me was to tell me that the sentencing had been delayed.
- I asked to meet the trial prosecutor but that did not happen.
- I was told that there would be a screen at court so I would not have to see the accused but I was taken through the wrong door of the court and the accused was there, so in reality there was little point in having a screen.
- I got a letter advising he had been found guilty and remanded in custody. Then I got another letter advising they had made a mistake and he was on bail pending sentencing.
- Although there was a guilty verdict, I would never go through it again. I felt I received no respect – it was a battle from start to finish.

321. The time, effort, energy and resource invested in investigating and preparing cases for court, arranging special measures and engaging with victims and witnesses is pointless, if the key witness disengages at court, is physically unable to give evidence or is so demoralised and emotionally spent that they are unable to give their best evidence.

322. Our review of 2014-15 cases identified 16 cases where the victim disengaged with the process after the case was indicted. There were also a significant number of cases where proceedings were discontinued as the evidence given by the victim did not meet the prosecutor's expectations which, in some cases, may be due to the stress and trauma of giving evidence.

323. While recognising that providing a safe and supportive environment for victims and witnesses is a system-wide obligation, as a key player, the prosecution has a vested interest in minimising, as far as possible, the traumatic effect of giving evidence at court. **It also has a duty to take steps to allow victims and witnesses to have confidence to participate in court proceedings.**

Court Management Strategy

324. There are a suite of practical measures available which, if implemented, can diminish the fear and trepidation of the unknown and assist victims and witnesses to give their best evidence. These include:

- A court familiarisation visit;
- Having access to their statement;
- Meeting with the trial prosecutor, preferably before the day of the trial;
- Pre-arranged plans to avoid seeing the accused at court, including agreed entrance and departure arrangements;
- Provision of a dedicated supporter – whether advocacy worker, or Witness Service;
- Provision of chosen special measures; and
- Agreement on how the verdict is to be communicated.

325. All of these measures are available and for many regularly put in place. However, they are dealt with in an incremental fashion. We observed many cases where arrangements fell apart for a variety of reasons including the unexpected absence of a member of staff, last minute changes to the designated court or a lack of communication.



326. Following service of an indictment and prior to any trial, to provide reassurance and certainty, we advocate a court management strategy, encompassing all of these measures, should be discussed and agreed with the victim. To provide reassurance the victim should be given a written copy detailing the arrangements that have been put in place.
327. The court management strategy will require co-operation from other criminal justice agencies, but as the victim is a key prosecution witness, VIA should take the lead in co-ordinating the provision of such measures.

Recommendation 12

COPFS should ensure that a court management strategy is agreed with every victim and relevant agencies following service of the indictment as part of the Victim Strategy.



CHAPTER 5 – SENSITIVE PERSONAL RECORDS

328. In **all** sexual crime investigations, consideration has to be given to whether any health, social work, educational or other sensitive, personal records will be relevant to the investigation/prosecution.
329. The purpose of obtaining sensitive, personal records, as with any evidence obtained during an investigation, is to consider whether the material contains information which supports or undermines the prosecution case or assists the defence.

COPFS Policy on Obtaining and Disclosing Sensitive, Personal Records

330. COPFS policy¹⁰² provides that sensitive, personal records should be obtained only where their recovery is necessary for the proper investigation and prosecution of crime.
331. Recognising, that the prospect of sensitive, personal information being obtained, disclosed and aired in the course of a trial is distressing for most victims, COPFS policy emphasises the need to have regard to victims' convention rights to a private and family life.¹⁰³ Victims are entitled to be told why the prosecution may need to recover personal records and have their views taken into account.
332. The need to obtain sensitive, personal records will depend on the circumstances of each case. In some cases, the records can be extensive. For example, children brought up in care, who do not disclose sexual abuse until they are adults, may have extensive social work, medical and educational records containing relevant information about their reaction to the crime or the impact it has had on their life.
333. Sensitive, personal records can provide evidence that supports the victim's allegation(s). For example, it may disclose a pattern of behaviour typical in cases of sexual abuse or include references to the abuse being disclosed to a third party, such as a doctor. Records can also provide independent evidence of the timing of historical crimes, such as dates when a victim resided at a particular care home, or attended at a school.
334. The defence may request records to attribute the cause of any medical findings to some event other than the alleged crime or to seek to draw an adverse inference from, for example, the absence of an injury.

Disclosure

335. The prosecutor is obliged to disclose any relevant information, including any potential exculpatory material, to the defence. Consideration of the need to obtain sensitive, personal records must be kept under review throughout the life of the case. In particular, it must be reviewed after the receipt of any new information from any source, including the defence or the victim.

¹⁰² Policy on Obtaining and Disclosing Sensitive Personal Records in the Investigation and Prosecution of Sexual Crime Cases ("the Prosecution Policy") published originally in July 2011 and in its current form in April 2014.

¹⁰³ Article 8 of the European Convention on Human Rights.



Process

336. In all sexual crime cases, proceeding or likely to proceed in the High Court, the IA, completed by the SLM, must include recommendations on what, if any, sensitive, personal records should be obtained.
337. Where it is considered appropriate to obtain records, the SLM must indicate:
- the nature of the records sought (health, social work etc);
 - the basis on which it is considered appropriate to obtain such records; and
 - the parameters of the records to be sought (dates, relevant school etc).
338. Crown Counsel should advise whether the recommendation is accepted and/or provide any relevant instructions. On receipt of Crown Counsel's instruction, the SLM will write to the solicitors acting for the accused and inform them of the nature and extent of the records being sought, or advise that no records are being obtained.
339. Any response from the defence will be considered by the SLM to identify whether there is a basis for further or different records being sought by the prosecution.
340. Concern about the increasing use of victims' health, psychiatric or other personal records, within the context of sexual crime prosecutions, has been raised by victims and support organisations such as RCS.
341. In response to such concerns, COPFS issued more detailed guidance, emphasising the importance of requests being tailored to the specific purpose for which records are being sought.
342. Prior to recovering records, enquiries should be made with the holders on whether the records contain anything that falls within the scope of the purpose. Where, for example, the purpose is to obtain records to show the victim previously disclosed being abused, it should be confirmed whether the records contain any disclosures and, if so, only records relating to the disclosures should be requested.

Case Review

343. We examined the 50 indicted cases to assess whether COPFS policy was being appropriately applied.
344. Sensitive, personal records were obtained in 18 of the 50 indicted cases. Health records were the most frequently obtained, featuring in 14 cases. Other types of records recovered were social work, educational, counselling, dental, psychiatric and psychological.
345. The purpose for obtaining records varied.
- In 14 cases, the records were requested for the purpose of confirming dates of historical abuse and/or whether the victim had made any disclosures relating to the crime(s). In all cases, the prosecution specified the reason and, where possible, the specific timeframe. For example, in one case, the doctor was asked for records relating to a broken leg to assist with identifying the dates of the crimes.
 - In two cases, the entire medical records were requested – one for the purpose of demonstrating a history consistent with domestic violence, and the other to illustrate behaviour consistent with child sexual abuse.
 - In two cases, records were obtained to assist an expert prepare a report – one relating to the capacity of a victim to give evidence and the other on the effect of intoxication on the victim's recollection.



346. Consent was obtained from all victims either by the police, the case preparer or VIA.
347. In 3 of the 18 cases, the defence sought sensitive, personal records of victims:
- In one, the defence sought psychiatric records. This was opposed by the prosecution and refused by the court.
 - In one case parts of medical records were obtained by the prosecution for one victim and following disclosure to the defence of specific extracts, the request by the defence was withdrawn.
 - In the final case, the prosecution had obtained extracts from records relating to non-accidental injuries and disclosures of any crimes. The defence sought recovery of more extensive psychiatric and medical records. Following a hearing for recovery of the records, the Court granted the defence request.

Key Finding

Prosecution requests for sensitive, personal records are being tailored to the specific purpose for which records are being sought.

Independent Legal Representation

348. Regardless of the prosecution's decision not to obtain records, the defence may seek their recovery. Ultimately decisions on what records can be recovered and used at trial are decided by the court.
349. The right of victims to challenge the recovery of such records was considered in a review of a decision to refuse to provide legal aid for a victim to be represented at a hearing for recovery of their medical records.¹⁰⁴ The records were being sought by the defence. The refusal of legal aid was on the basis that the victim had no right to be heard or represented.
350. The victim argued that recovery of such documents would infringe her convention rights to a private and family life.
351. The Court of Session, accepting that the victim's convention rights were engaged whenever there is an application by the defence for records of this kind, stated:
- “Any person whose rights to privacy may be infringed by an order for recovery of medical records and other sensitive documents must have the application for recovery intimated to them and be given the opportunity to be heard in opposition to the application before an order is made or, at least, before the documents are handed over to the party seeking them.”***
352. While the decision clarified the right of the victim to be heard, the manner in which an application for recovery of documents will be intimated to the victim; the provision of legal advice and the funding for legal representation was not addressed.
353. Concern has been expressed that some victims are not being made aware of such applications and how to source legal advice.
354. It is normal practice for the person making an application to intimate it to all relevant parties. This places the obligation on the defence to intimate such applications. However, this raises practical and handling issues which militate against such an approach.

¹⁰⁴ Judicial Review: F (Petitioner) v Scottish Ministers.



355. One practical obstacle is that the address of the victim is often not known to the defence. Furthermore, it is contrary to a victim-centred approach, for the solicitors, who act on behalf of the person alleged to have committed the crime, to contact the victim to advise that they are seeking access to their personal records, provide advice on the victim's right to be heard and how to go about it. Equally, as the prosecutor acts in the public interest and not on behalf of the victim, it is not appropriate, and is likely to cause confusion, to involve the prosecution in notifying victims of a defence application.
356. To overcome these issues, on receipt of such applications, one option would be **for the court to provide intimation of the application**, together with sufficient information to enable the person, whose records are being sought, to effectively implement their right to be heard.

Protections for Victims of Sexual Offences

357. The ordeal of giving evidence is a concern for any witness but particularly for victims of sexual crimes. Undoubtedly, much of the anxiety relates to the use of questioning about sexual history and character.
358. In 2002, new protections for victims of sexual crimes were introduced strengthening the rules on restricting the extent to which evidence can be led regarding the character and sexual history of the victim.¹⁰⁵ The aim was to ensure that the questioning or evidence is relevant to the issues of fact before the court, and strike a balance between protecting the victim from the distress of being asked irrelevant questions about their character and sexual history, whilst admitting evidence which is nevertheless so relevant that to exclude it would endanger the fairness of the trial.
359. To introduce sexual history or character evidence, a written application from the defence or prosecution (Section 275 application) must be submitted to the court, in advance of the trial.¹⁰⁶ Responsibility for determining whether to grant the application rests with the court.¹⁰⁷
360. Where a prosecution application is proposed, or a defence application is received, the victim should be made aware by the case preparer to allow them the opportunity to respond. Given the delicate subject matter, it should be explained that it is necessary to inquire into these matters as part of the investigation but that no assumption is being made regarding the veracity of the matters raised.
361. Victim support groups and legal commentators have expressed doubt that the rules are achieving their intended purpose. Their perception, supported by feedback from victims, is that the court and prosecution are not robustly challenging such applications and that such evidence is being routinely used to discredit witnesses and reinforce the prejudices and myths that are known to prevail around sexual crimes.

¹⁰⁵ Sexual Offences (Procedure and Evidence) (S) Act 2002, Sections 274 and 275.

¹⁰⁶ S274 sets out what must be specified in an application and S275 sets out the exceptions to the prohibition on leading such evidence.

¹⁰⁷ Section 275(2)(b)(i) and (ii) of the 1995 Act.



Case Review

362. Applications to lead evidence of sexual character or history were made in 12 of the 50 indicted cases. Two were made by the prosecution; six by the defence; and in four cases, by both the defence and prosecution.
363. The applications made by the prosecution sought to adduce evidence of: previous sexual abuse of the victim by a person other than the accused to provide context for the victim's behaviour; previous sexual abuse by a person other than the accused to explain how the accused and victim came into contact; a prior relationship between the accused and the victim; and post incident contact between the accused and the victim.
364. The court granted all applications made by the prosecution.
365. The applications lodged by the defence sought to adduce evidence of: a prior relationship between the accused and the victim; contact between the accused and victim after the alleged crime; a history of drug abuse by the victim; the absence of any disclosures in the personal records of the victim; the circumstances of how the accused and victim met; the victim having a sexual relationship with another person that had been disclosed to the accused; and that another person was responsible for injuries sustained by the victim.¹⁰⁸
366. The prosecution opposed one of the defence applications. Following submissions, the hearing was continued for the court to obtain further information before reaching a decision. In another, the prosecution objected to parts of the defence application to lead evidence of communications between the victim and the accused following the alleged crime. It was granted in part by the court.
367. The other applications were granted, unopposed.

COPFS Monitoring

368. To examine whether the prosecution was applying the law robustly, COPFS undertook a three month monitoring exercise¹⁰⁹ of the prosecution attitude to defence s 275 applications lodged at the time of the Preliminary Hearing and their outcome.
369. There were 14 applications.
- Five were granted, unopposed – all related to the accused and victim having a prior relationship and contact after the alleged crime.
 - In seven, although unopposed by the prosecution, the court questioned the scope and relevance of the applications. Four were continued for further consideration/information. One was granted in full. Two were granted on a restricted basis.
 - In the remaining two, the prosecution opposed parts of the applications. Following submissions, the court determined that references to abuse alleged to have been committed by two victims in one case and to sensitive medical information in the other were irrelevant.
370. The exercise did not capture defence s275 applications made at trial.
371. Other than providing some re-assurance that the prosecution and court are questioning the relevance and scope of such applications, where appropriate, the exercise is of limited value to assess the effectiveness of the legislation.

¹⁰⁸ In one case we could not ascertain the subject matter of the application.

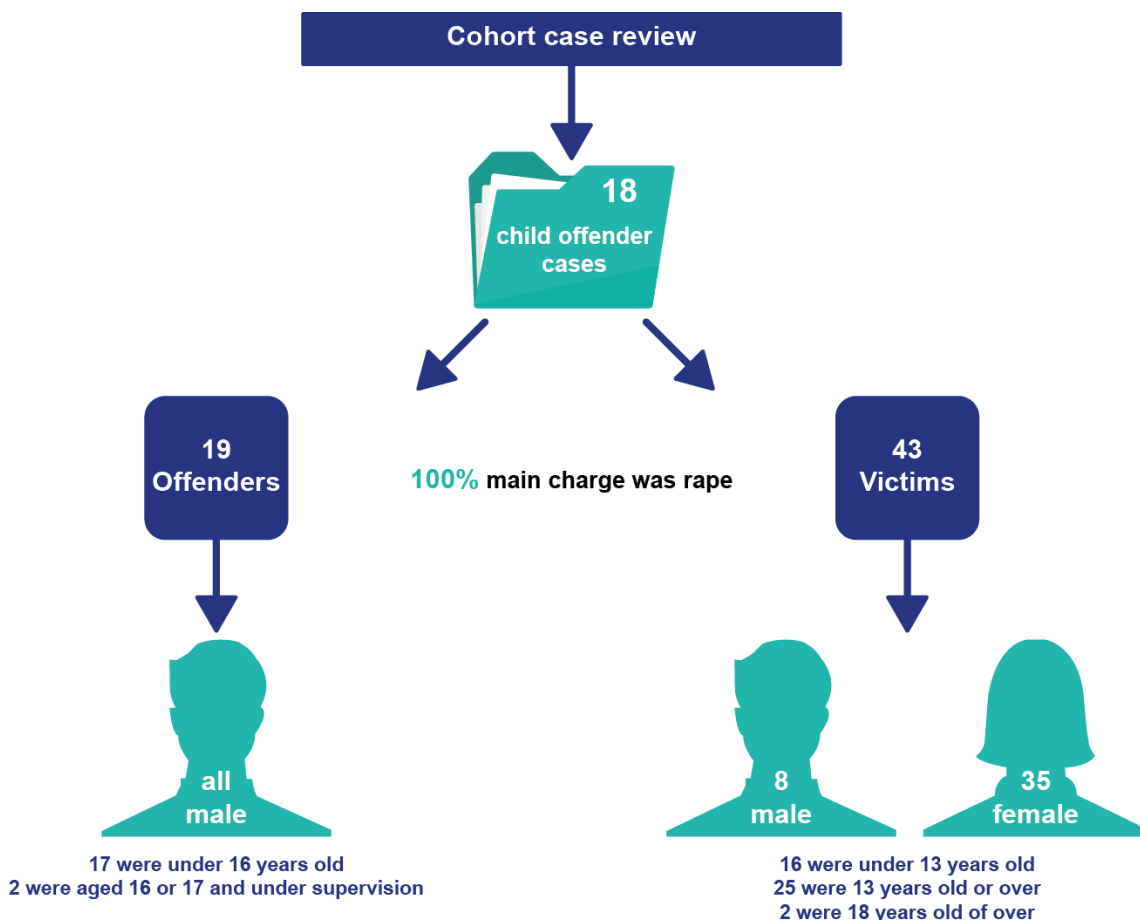
¹⁰⁹ From 12/12/16 to 12/03/17.



372. Our ability to assess the relevance of s275 applications from case records was limited. Such applications often follow detailed discussions between prosecution and defence counsel in preparation for the Preliminary Hearing which can result in the scope of such applications being narrowed. While the outcome is recorded in the court minutes the detail of the submissions are not routinely noted.
373. Without hearing the submissions and having a detailed knowledge of the case, it is difficult to assess the relevance. Further, in some cases, the Judge may initially limit the scope of the application subject to further submissions on relevancy at the trial or on receiving additional information. Applications can also be made at trial.
374. A robust and comprehensive review of the effectiveness of the legislation could only be achieved by including an assessment of the relevance and effect of this type of questioning in the context of the dynamics of the trial. This would require a consideration of transcripts from, or observations of, trials which was outwith the scope of our review.



COHORT OF CHILD OFFENDERS



Vulnerabilities of offenders:

12 (63%)	Vulnerable (3 had multiple vulnerabilities)
4 (33%)	Adopted / In care (2 had other vulnerabilities)
2 (17%)	Domestic abuse (1 had other vulnerabilities)
2 (17%)	Extensive social work involvement
4 (33%)	Other: Behavioural conditions / Sexual abuse

Vulnerabilities of victims:

41 (95%)	Child (13 also had multiple vulnerabilities)
2 (5%)	In care (1 had other vulnerabilities)
7 (16%)	Mental health (1 had other vulnerabilities)
2 (5%)	Domestic abuse
1 (2%)	Sexual abuse (1 had other vulnerabilities)
1 (2%)	Behavioural issues (1 had other vulnerabilities)

Most sexual crimes are committed by someone known to the victim, resulting in feelings of guilt, shame and fear

41 (95%) victims had a relationship or association with the offender



2 victims had no prior relationship with the offender.



CHAPTER 6 – CHILDREN

375. The increasing number of children subjected to, or engaging in, sexual behaviour that constitutes criminal conduct is of significant concern. Cases reported to COPFS, involving a sexual offence committed against a child by a child, rose by 34% between 2011-12 and 2015-16.¹¹⁰ Cyber-related crime through the use of electronic devices and the internet, including “sexting” – sharing intimate images without consent or possessing images of a person aged 18 or under – is responsible for much of the increase.

COPFS Policy on Juvenile Offenders

376. Where crimes are required by law to be prosecuted on indictment or are so serious to normally give rise to solemn proceedings, the police are required to report juvenile offenders, jointly to the procurator fiscal and the Children’s Reporter.¹¹¹ (the Reporter). This includes serious sexual crimes.

377. For jointly reported cases where a child is under the age of 16 but over the age of 12, there is a presumption in favour of the Reporter dealing with the offender and proceedings should only be taken where there are compelling public interest reasons; for children 16 and 17 subject to a supervision order¹¹² there is a rebuttable presumption that the procurator fiscal will deal with the case.¹¹³

378. In serious sexual crime cases, it has been agreed that the procurator fiscal and the Reporter will make contact at the earliest stage of proceedings to obtain the necessary information regarding the child and discuss who is best placed to deal with the case. Any discussions with the Reporter should be carried out as a matter of urgency to avoid any unnecessary delay in dealing with the case.

Case Review

379. Given the small number of child offenders in our 50 case indicted sample, we undertook a review of a significant sample of 18 cases¹¹⁴, involving 19 child offenders and 43 victims, where the offender was placed on petition, at least one charge was sexual, and where some High Court preparation had taken place¹¹⁵. As the review is concerned with cases likely to proceed in the High Court, the cases involve the most serious sexual crimes.

380. Of note, 35 of the 43 victims were female and 41 were aged under 18.

381. Where the crime involves an offence of rape of a younger child (under 13) by an older child (aged 13-15) – a section 18 offence in the 2009 Act – the initial report to NSCU must contain; information on the victim; the accused; the circumstances of the offending; and the discussions which have taken place with the Reporter including:

- Any views of the Reporter on whether referral is an appropriate disposal.
- What action the Reporter would/is likely to undertake, if there was a referral.

¹¹⁰ COPFS: Management Information Unit (MIU).

¹¹¹ Lord Advocate’s Guidelines on juvenile offenders.

¹¹² An order which means that a named local authority is responsible for supporting the child or young person.

¹¹³ Joint Agreement by SCRA and COPFS.

¹¹⁴ Cases where the offender was 16/17 and not subject to supervision were excluded as they do not fall within the definition of a child.

¹¹⁵ Source: MIU April 2014 to April 2015.



Initial Decision-Making

382. Of the 19 offenders:

- 16 were placed on petition; and
- 3 were liberated for pre-petition investigation – all were subsequently placed on petition.

Liaison with the Reporter

- In eight cases, involving nine offenders, information was provided in the initial report regarding discussions that had taken place with the Reporter and their attitude to prosecution/referral.
- In three, all involving section 18 crimes, there was limited information in the initial report on the attitude of the Reporter to accepting a referral.
- In one, there was a record of discussions with the Reporter but only after the IA was submitted.
- In two, where the offenders were aged 16 and 17 respectively and subject to a supervision order, there was no record of a discussion, although there is a presumption that the prosecution would deal with these offenders.
- In the remaining four, there was no information in the initial report on whether discussion had taken place between the prosecutor and the Reporter.

383. We recognise that a high proportion of the sample, 14 cases, were reported with the offender remanded in secure accommodation or police custody, restricting the time available for the prosecutor to make a decision on how to proceed and discussions often take the form of an urgent telephone call. Given the sensitivity of such cases, however, the absence of any record of discussion is unhelpful and contrary to COPFS policy.

Outcomes

384. Following investigation:

- 11 cases involving 12 offenders were indicted
- 5 were referred to the Reporter
- 1 was prosecuted by summary complaint
- In 1, due to the disengagement of the victim, there were no proceedings

385. Of the 12 offenders indicted:

- 5 were found guilty and received the following sentences:
 - 2 offenders received community payback orders and 3 years supervision
 - 2 offenders in the same case received 2 years and 6 years imprisonment respectively
 - 1 offender received 3 years imprisonment with an extension of 1 year¹¹⁶
- 1 pled guilty to several charges and was sentenced to 5 years 6 months with an extension of 4 years
- 3 were found not guilty or not proven
- For 3,¹¹⁷ proceedings were discontinued, one followed a decision of the court that essential evidence was inadmissible and one due to disengagement of the victim

¹¹⁶ Offender would be released subject to conditions for this period to enhance public protection.

¹¹⁷ For one we were unable to ascertain the reason the case was discontinued from the case records.



386. Of the five offenders referred to the Reporter:

- For two, the provision of additional information resulted in the Reporter accepting a referral;
- For one, following the initial decision to prosecute, NSCU, having regard to the young age of the offender and troubled history, sought additional information on what action the Reporter was likely to undertake if a referral was made. Following discussion, the offender was referred recognising that this would address the concerns of both offender and victim more quickly and probably provide the same outcome as any court disposal;
- For one, the Reporter had indicated that they would be content to accept a referral at the outset. After appearing in court, the offender was referred to the Reporter on another matter. He was progressing well and it was, therefore, decided to also refer this case.
- For one, the Reporter had indicated that a referral was not appropriate but, following investigation, the offender was referred for a less serious charge.

Timelines

387. COPFS policy is to prioritise cases involving child witnesses/offenders and manage such cases within the timescales that apply where the accused has been remanded in custody.

388. The average time taken to refer the five offenders to the Reporter was eight months.

389. For the eight offenders prosecuted, the average time from receipt of the SPR to serving the indictment was 8½ months and the average time to trial was 17 months.¹¹⁸ One trial still has to conclude.

Key Finding

Whilst cases involving child offenders/victims are being given some priority they are not being progressed to custody timescales.

390. In four cases that proceeded to trial, evidence was taken on commission from the victims. In all of these cases, evidence was taken on commission in close proximity to the trial, ranging between seven weeks before to the morning of the trial itself. In the latter, the victim was unable to give evidence resulting in the rape charge being deserted simpliciter by the court.

391. Exposure to the criminal justice system is a traumatic experience for adults but even more so for children whether as a victim or an offender. The timelines that apply cause distress and anxiety for adults but for children who measure time in sleeps, birthdays, holidays and special events such as Christmas, months and years form a significant proportion of their life time.

¹¹⁸ Includes a case where the court ruled essential evidence was inadmissible prior to trial.



Special Measures

392. COPFS has introduced a presumption in favour of taking evidence by way of a commissioner where the witness is aged 12 and under and the offence is sexual in nature. In contrast to our earlier observations regarding special measures for adults, consideration of whether a child should give evidence by way of commission should be addressed at the earliest possible stage as the preparation for the application and hearing involves a number of arrangements to be put in place. The time this takes is by far out-weighed by the benefits of reducing stress to the child victim and obtaining the best evidence. We recognise that current legal requirements mean that applications to take evidence on commission cannot be made before an indictment is served, however, preparatory work/discussions can and should take place as early as possible.

High Court Practice Note

393. To provide impetus for early consideration to be given by both prosecution and defence to whether a commission is necessary where there is a child witness, a Court Practice Note on Taking of Evidence by a Commissioner was recently issued by the High Court of Justiciary.¹¹⁹ As of 8 May 2017, all child and vulnerable witness applications seeking to take evidence on commission must comply with the requirements of the Practice Note. It emphasises the importance of early consideration of whether any witness is, or may be, a vulnerable witness and aims to encourage better preparation to allow child and other vulnerable witnesses to provide pre-recorded evidence in front of a person commissioned by the court, avoiding the need to attend court.

Way Forward

394. It is widely accepted that the arrangements for child witnesses and offenders in the criminal justice system are not conducive to obtaining the best evidence and thus securing justice.

395. The prosecution requires to implement practices that fast track such cases but longer term solutions require a wider criminal justice system response.

396. We found consensus from all support agencies that the future lies in the use of pre-recorded evidence to deal with certain types of cases, including those with children and vulnerable witnesses. The overwhelming view is that this would be a transformative change for the better.

397. The Cabinet Secretary for Justice during his evidence to the Justice Committee, stated:

“There is a compelling case for further action to be taken to allow child witnesses in criminal proceedings to be able to give pre-recorded evidence well in advance of the trial and to remove children from the court room setting.”¹²⁰

¹¹⁹ High Court of Justiciary Practice Note No. 1 of 2017: Taking Evidence of a Child/Vulnerable Witness by a Commissioner in terms of section 2711 of the Criminal Procedure (Scotland) Act 1995.

¹²⁰ [Role and Purpose of the Crown Office and Procurator Fiscal Service](#), page 62, footnote 296.



Evidence and Procedure Review

398. A recommendation of the Evidence and Procedure Review¹²¹ and the Next Steps Report¹²² is that:

Initially for solemn cases, the evidence of children or vulnerable witnesses should be captured at as close a point in time to the incident as possible and presented at trial in pre-recorded form, with any subsequent cross-examination also being recorded in advance of trial.

399. The Scottish Government is currently considering potential models for introducing pre-recorded evidence to avoid children and vulnerable witnesses having to endure the stress and anxiety of giving evidence in the formal court environment, whilst safeguarding the necessary rights of accused persons.

400. All support agencies we met fully supported the principles underpinning the Evidence and Procedure Review as their best hope of transformative change that will have a meaningful impact for child witnesses and offenders.

Advocacy Support for Child Victims

401. Any allegation of abuse of a child will trigger child protection procedures, of which the overriding consideration is to ensure the safety of the child. Social services and the police have a statutory duty to decide whether an investigation should take place. In cases of sexual abuse this will often take the form of a joint investigation involving joint interviews conducted by specially trained police officers and social workers. The purpose of such investigations is to share information to inform risk assessment; ascertain the need for any protective measures; establish the facts regarding a potential crime against a child and provide evidence for any legal proceedings that may follow, such as a Children's Hearing or a criminal trial.

402. Social services and charities and organisations, such as Barnardo's and Children 1st, provide a wide range of support services for children who have disclosed sexual abuse, including the provision of trauma and recovery services and dealing with issues arising from Child Sexual Exploitation (CSE).

403. However, we found little in the way of advocacy services or support to assist children going through the criminal justice system.

Victim's Voice

404. We met with the mothers of two children who had reported sexual crimes where COPFS had made a decision to prosecute the alleged perpetrator. They told us that, following the initial police investigation, they had been provided with no support and felt "cast adrift."

405. Through their own efforts they made contact with their local Rape Crisis Centre which had agreed to provide support, despite one of the children being younger than 13, the minimum age for referrals to RCS. Both parents advised that the support provided had been invaluable.

406. Children 1st and Barnardo's gave examples of providing support to children going through the criminal justice system and giving evidence, with positive outcomes. However, such support was an extension of the trauma and recovery services being provided to children, with whom they had prior contact, rather than as a systematic or routine service.

¹²¹ Scottish Courts and Tribunals Service, [Evidence and Procedure Review Report](#), March 2015.

¹²² Scottish Courts and Tribunals Service, [Evidence and Procedure Review – Next Steps](#), 26 February 2016.



407. We heard from many who support child victims of sexual abuse, that there is a vacuum when it comes to court based support for children. The main focus of social services is child protection rather than providing an advocacy service designed to assist children navigate the criminal justice system.

408. These findings concur with the research undertaken by the National Scoping Report.¹²³

“The most frequently mentioned gap in advocacy services from those we interviewed was for children and young people. The lack of specific advocacy services for children and young people is consistently identified as a problem for services and victims.”

Key Finding

We found a significant gap in the availability of any advocacy or court based support for children. No agency or organisation provides such support on a national or systematic basis.

¹²³ Scottish Government, [National Scoping Exercise of Advocacy Services for Victims of Violence Against Women and Girls](#), 8 August 2017.



ANNEX A – CRIMINAL LAW AND PROCEDURE

Criminal Procedure

There are two types of criminal procedure – “solemn” and “summary”. In summary procedure, a trial is held in the Sheriff or Justice of the Peace Court before a judge without a jury. In solemn procedure the trial, whether in the High Court or the Sheriff Court, is held before a judge sitting with a jury of 15 people.

Solemn Procedure

Solemn proceedings generally commence with the accused person appearing in court “on petition” or being “placed on petition”. The petition is the initiating warrant in such proceedings and sets out the nature of the criminal allegations. When the accused first appears at court, the most likely outcome is that s/he will be “committed for further examination” (CFE). The accused will then either be released on bail or remanded in custody. If remanded, the accused must be brought back to court within eight days,¹²⁴ when the most likely outcome is that accused will be fully committed (FC) for trial. Again the accused may either be released on bail at that point or remanded in custody, pending trial.¹²⁵

High Court

Time limits apply to all solemn cases prosecuted in Scotland. Time limits regulate the maximum length of time that can elapse between the first time a person appears in court charged with an offence and the start of their trial on that charge. Failure to comply with time limits has serious consequences. Time limits for cases prosecuted in the High Court are different for accused persons on bail and those who are remanded, as follows:

Custody

If an accused person is remanded in custody, the prosecution must serve an indictment – the document narrating the charges, witnesses and productions for the case – on the accused or their legal representative within 80 days of FC.¹²⁶ The indictment provides the accused with notice of a Preliminary Hearing (PH). The purpose of the PH¹²⁷ is to determine the state of preparation of the defence and the prosecution and ensure outstanding issues are resolved before trial. The PH must be held within 110 days of FC¹²⁸ and not less than 29 clear days after service of the indictment¹²⁹. The trial is fixed by the court at the PH¹³⁰ and must commence within 140 days of FC.¹³¹

Failure to adhere to any of these custody time limits results in the accused being granted bail and released from custody.¹³²

¹²⁴ Criminal Procedure Act 1701 (c.6); see also *Herron v A.B.C. & D.*, 1977 S.L.T.(Sh.Ct.) 24; also see Dunbar, Petitioner 1986 SCCR 602 – no more than eight days may elapse between committal for further examination and full committal but neither of the days on which one of the committals takes place counts towards that total.

¹²⁵ Criminal Procedure Act 1701 (c.6); see also *Herron v A.B.C. & D.*, 1977 S.L.T. (Sh.Ct.) 24.

¹²⁶ S65 (4)(a) of the Criminal Procedure (Scotland) Act 1995.

¹²⁷ S72 of the Criminal Procedure (Scotland) Act 1995.

¹²⁸ S65 (4)(aa)(i) of the Criminal Procedure (Scotland) Act 1995.

¹²⁹ S66 (6)(b) of the Criminal Procedure (Scotland) Act 1995.

¹³⁰ S72A (1) of the Criminal Procedure (Scotland) Act 1995.

¹³¹ S65(4)(aa)(ii) of the Criminal Procedure (Scotland) Act 1995.

¹³² S65(4)(a) and (aa) of the Criminal Procedure (Scotland) Act 1995.



Bail

If an accused person is CFE'd on bail, the prosecution must serve an indictment on the accused or their legal representative no later than 10 months after the date of the accused's first appearance at court¹³³ and not less than 29 days prior to the PH.¹³⁴

The PH must be held within 11 months of CFE¹³⁵ and the trial must commence within 12 months.¹³⁶

Time limits in solemn custody cases run from the date of the FC, whereas time limits in bail cases run from the date of the CFE.

In all cases, if the 11 and 12 month bail time limits are not complied with, the proceedings come to an end and the accused can never be prosecuted on those charges.¹³⁷

Legal Considerations

Corroboration

A distinctive feature of Scots law is the requirement for corroboration of evidence in criminal cases.

Corroboration was described by Lord Carloway¹³⁸ as:

“There must first be at least one source of evidence (i.e. the testimony of one witness) that points to the guilt of the accused as the perpetrator of the crime. That evidence may be direct¹³⁹ or circumstantial¹⁴⁰. Secondly, each “essential” or “crucial” fact,¹⁴¹ requiring to be proved, must be corroborated by other direct or circumstantial evidence (i.e. the testimony of at least one other witness).”

Generally, there are two crucial facts requiring proof in every crime: (1) that the offence was committed; and (2) that the accused committed it.

Corroboration is particularly problematic where the crime occurs in a private setting, as is very often the case with sexual crimes, as it is unlikely there will be any other direct eye witness evidence to support the victim's account of what happened. The prosecution will, of course, explore all possible avenues of evidence to provide corroboration, for instance: forensic/medical/scientific evidence; CCTV evidence; digital evidence from phones/devices/computers; any admissions made by the accused; any circumstantial evidence.

In many cases the prosecution will seek to rely on the application of mutual corroboration, known as the “Moorov” doctrine, and/or evidence of recent distress to establish a sufficiency of evidence.

¹³³ S65 (1) and s66(6) (b) of the Criminal Procedure (Scotland) Act 1995.

¹³⁴ S66 (6) (b) of the Criminal Procedure (Scotland) Act 1995.

¹³⁵ S65(1)(a) unless the hearing has been dispensed with under s72B of the Criminal Procedure (Scotland) Act 1995.

¹³⁶ S65(1)(b) of the Criminal Procedure (Scotland) Act 1995.

¹³⁷ S65 (1A) (a) and (b) of the Criminal Procedure (Scotland) Act 1995.

¹³⁸ The Carloway Review, published November 2011. Paragraph 7.2.6.

¹³⁹ E.g. eye witness evidence identifying the accused as the perpetrator of the offence.

¹⁴⁰ Otherwise known as “indirect”, i.e. evidence of a fact (e.g. fingerprint) or facts from which another fact (e.g. presence of accused at the scene) may be inferred.

¹⁴¹ Walker & Walker: Evidence (1st ed) para 380, p 402 et seq; (3rd ed) para 5.2.2.



Moorov Doctrine

The most complex aspect of the law of corroboration in modern times is mutual corroboration, or corroboration by similar facts, referred to as the Moorov doctrine, after the case of *Moorov*¹⁴² in 1930. The case was concerned with the sufficiency of identification evidence where a number of women, who all worked in a shop with the accused, gave evidence that the accused had committed indecent assaults on them.

No act of indecency was witnessed by any other witness, yet it was held that each separate act, spoken to by one of the women, could be corroborated by the testimony of another woman speaking to another such act; provided both incidents were sufficiently closely connected in time, character and circumstances. In such circumstances, the separate acts are treated as a single course of conduct. It is that course of conduct, if demonstrably perpetrated by the same person, that requires to be proved by corroborated evidence and not each separate incident.¹⁴³

This area of the law has evolved and consideration of whether the Moorov doctrine is applicable is often the pivotal question in many trials involving charges of a sexual nature. What constitutes a course of conduct is the subject of a substantial body of Scots law, particularly where two or more incidents are separated by significant time gaps.¹⁴⁴

Whilst there is no upper limit of time beyond which the Moorov doctrine cannot be applied,¹⁴⁵ there must be evidence capable of bearing the inference that the acts are not merely isolated incidents of similar offences but are component parts of one course of conduct persistently pursued by the accused.¹⁴⁶ Where there are a small number of complainers and significant time gaps exist between the incidents, there are significant challenges for the prosecution establishing to the criminal standard of proof¹⁴⁷ that this is a course of conduct persistently pursued.¹⁴⁸

Distress

The extent to which a complainer's distress, as seen by a third party after an alleged sexual crime, can corroborate the use of force,¹⁴⁹ or lack of consent,¹⁵⁰ has also evolved. Independent evidence of the reaction can lead to an inference that whatever happened did so against the will of the victim and was, therefore, something brought about by violence or, at least without the victim's consent and can thus corroborate lack of consent. It cannot, however, corroborate specific acts narrated in the charge, such as intercourse or particular acts of violence or indecency.¹⁵¹

Prosecution Test

Once the prosecutor is satisfied that sufficient corroborated evidence exists to prove the charge, the prosecutor then requires to determine whether it is in the public interest to proceed. This involves consideration of the question of whether there is a realistic prospect of a conviction.

¹⁴² *Moorov v HM Advocate* 1930 JC 68.

¹⁴³ See The Scottish Law Commission "Similar Fact Evidence and the Moorov Doctrine".

¹⁴⁴ *M v HM Advocate* [2011] HCJAC 6 doubting *Cannell v HM Advocate* 2009 SCCR 207; *Pringle v PF (Dumbarton)* 2011 SCCR 97; *ANM v HM Advocate* 2011 SCCR 47; *Hussain v HM Advocate* 2010 SCCR 124 and *CAB v HM Advocate* 2009 SCCR 216.

¹⁴⁵ *Dodds v HMA* 2003 JC 8.

¹⁴⁶ *AK v HMA* 2012 JC 74; *MR v HMA* 2013 JC 212; *KH v HMA* 2015 SCCR 242; *AS v HMA* 2015 SCCR 62; *CW v HMA* 2016 SCCR 285; *RF v HMA* 2016 SCCR 319; *JL v HMA* [2016] HCJAC 61.

¹⁴⁷ Beyond reasonable doubt.

¹⁴⁸ *M v HM Advocate* [2011] HCJAC 6 doubting *Cannell v HM Advocate* 2009 SCCR 207; *Pringle v PF (Dumbarton)* 2011 SCCR 97; *ANM v HM Advocate* 2011 SCCR 47; *Hussain v HM Advocate* 2010 SCCR 124 and *CAB v HM Advocate* 2009 SCCR 216; *HMA v ER* 2016 HCJ 98.

¹⁴⁹ As the law stood pre *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435.

¹⁵⁰ *Yates v HM Advocate* 1990 JC 378n, 1977 SLT (notes) 42; *Smith v Lees* 1997 JC 73.

¹⁵¹ *Smith v Lees (supra)*.



Law Relating to Sexual Offences

Scots law, on rape and sexual offences, was substantially reformed with the enactment of the Sexual Offences (Scotland) Act 2009 (the 2009 Act) which came into force on 1 December 2010. The 2009 Act essentially codified the substantive law of sexual offences in Scotland. In particular it:

- Repealed the common law offences of rape, sodomy and clandestine injury to women and a number of statutory sexual offences.
- Created new statutory offences of: rape, sexual assault by penetration, sexual assault, sexual coercion, coercing a person to be present during sexual activity, coercing a person to look at an image of sexual activity, communicating indecently, sexual exposure, voyeurism and administering a substance for a sexual purpose. These offences are committed when a person engages in any such conduct without the other person's consent, and without any reasonable belief that the other person consented.
- Broadened the definition of rape to include not only penile penetration of a victim's vagina without consent, but also penile penetration of the anus or mouth.
- Provided a general definition of consent as "free agreement" and supplemented this with a non-exhaustive list of factual circumstances in which free agreement, and therefore consent, is not present.
- Created new "protective offences" which criminalise sexual activity with a person whose capacity to consent to sexual activity is either entirely absent or not fully formed either because of their age or because of a mental disorder. Separate 'protective' offences were provided in respect of sexual activity with young children (under the age of 13) and older children (from age 13 to age 15).
- Made it an offence of "abuse of position of trust" for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person.

For sexual offences occurring after 1 December 2010, the Act provides that a sexual offence is committed when a person engages in sexual activity with another person without consent and where there is no reasonable belief that there is consent. There is no requirement that the offender must use physical force to overcome their victim, or that the victim must attempt to physically resist their assailant for an offence to be committed.

For sexual offences occurring before 1 December 2010, the pre-existing statutory and common law continues to apply. The application of two different legal regimes, for offences that occur both before and after 1 December 2010, requires prosecutors to consider and apply a complex landscape of charges and associated law.

Further legislative changes have taken place more recently with the enactment of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (the 2016 Act). The Act introduces:

- A new offence of non-consensual sharing of intimate images¹⁵²
- A requirement for specific directions to be given to juries in sexual offences about how to consider the evidence where certain conditions apply¹⁵³
- Amendments to sections 54 and 55 of the 2009 Act to extend the extra-territorial of Scottish courts to allow child sexual offences committed elsewhere in the United Kingdom to be prosecuted in Scotland¹⁵⁴

¹⁵² s2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2009.

¹⁵³ s6 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2009.

¹⁵⁴ s7, s8 and s9 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2009.



The 2016 Act creates three statutory jury directions.¹⁵⁵ It requires judges in sexual offence trials to provide juries with directions where evidence is led or elicited that: an alleged sexual offence may not have been reported until sometime after it was alleged to have been committed, of the fact that it is not alleged that the accused used physical force to overcome the victim, or that the alleged victim did not physically resist their assailant. The judge's directions must set out that there may be good reasons why that happened and that it may not necessarily indicate that an allegation is false.

The policy objective behind the introduction of the directions is to address concerns that certain ill-founded preconceptions held by members of the public, who make up juries, may exist about the nature of sexual offending and victims' responses to it.

¹⁵⁵ Section 6. It applies to trials where the indictment was served on or after 24 April 2017.



ANNEX B – VICTIM INFORMATION AND ADVICE (VIA) REMIT

The current VIA remit ensures that victims are provided with information in the following categories of case:

- Victims in all serious cases, where the nature of the offence merits solemn proceedings. If, however, a case is only to proceed on indictment because of the status of the accused, as opposed to any feature of the victim, that victim will not be eligible.
- The next of kin in cases involving deaths which are reported for consideration of criminal proceedings and death cases where a Fatal Accident Inquiry is to be held.
- The next of kin in all cases where there are likely to be, or it becomes clear after initial investigation, that there will be significant further inquiries, or where, in all the circumstances, it is considered that the assistance of VIA would be appropriate.
- Victims in cases of domestic abuse (not just assault but any incident of a domestic nature e.g. breach of the peace).
- Victims in cases with a racial aggravation and cases where it is known to the Procurator Fiscal that the victim perceives the offences to be racially motivated.
- Cases involving children (as victims and/or as witnesses).
- Victims in cases involving sexual offences.
- Cases involving vulnerable witnesses, i.e. witnesses who:
 - have learning difficulties
 - have physical disabilities
 - suffer from mental health problems
 - are Asylum Seekers or witness with language difficulties
 - are terrified of accused and/or of reprisals
 - are victims in cases where sexual orientation or gender identity may give rise to vulnerability
 - Victims of domestic abuse involving abuse by children against their parents or parents against adult children.
 - Victims and witnesses over the age of 60.

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About the Inspectorate of Prosecution in Scotland

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

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