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Diversion from Court Pragmatic Efficiency or Bargain Basement Justice?

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A quiet revolution? 'The Brief'

- 'Rather than being prosecuted (or not) through court, most people who are thought to have committed an offence are now offered a form of settlement by the police or prosecutor in return for the reassurance that they will not receive a criminal conviction'.
- 'Is diversion from court a progressive and creative way of managing scarce resources? '
- 'Should there be a further expansion of these out-of-court ('direct') measures?'

Delivering progressive modes of justice: the moral challenge

‘The capacity to respond effectively and even-handedly to the harms and rights violations represented by criminal conduct without resorting to measures which in effect negate the democratic membership and entitlements of offenders’

(Lacey, 2008, The Prisoners’ Dilemma, p 7)

Empirical referent: the Edinburgh Study of Youth Transitions and Crime

- Funded by ESRC, Nuffield Foundation and Scottish Government
- Longitudinal study tracking 4,300 young people since 1998
- Explores pathways into and out of offending and their impacts on health and well-being through the teenage years and into adulthood
- Multiple data sources including: self-reports (age 12-17); semi-structured interviews (age 13 and 18); official records (social work, children's hearing, school, criminal convictions); parents/caregiver survey; pastoral teacher survey; Geographic Information System (police recorded crime and census data)
- Latest phase: following cohort at age 33 exploring longer term impacts of behaviour and experiences during the teenage years (including contacts with the criminal justice system)

Study team: Co-Directors – Lesley McAra and Susan McVie; Research Associates – Kirsty Arnott and Robert Bennett; Fieldwork Manager – Sarah Atkins

Structure of paper

- Part 1: The moral and empirical case for diversion
- Part 2: Ebbs and flows of diversion as policy discourse
- Part 3: Understanding ebbs and flows and their implications
- Concluding thoughts

Part 1: The moral and empirical case for diversion

What works: normative frameworks

United Nations Convention on the Rights of the Child

1. Article 3: In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the BEST INTERESTS of the child shall be a primary consideration.

Beijing rules

2. Rule 1.3 Juvenile justice shall be conceived as an integral part of the national DEVELOPMENT process of each country, within a comprehensive framework of SOCIAL JUSTICE for all juveniles

3. Rule 4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, THE BEGINNING OF THAT AGE SHALL NOT BE FIXED AT TOO LOW AN AGE LEVEL, bearing in mind the facts of emotional, mental and intellectual maturity

4. Rule 11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders WITHOUT RESORTING TO FORMAL TRIAL by the competent authority

5. Rule 17.1 (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be LIMITED TO THE POSSIBLE MINIMUM

	Just deserts	Welfare	Restorative	Actuarial	Desistance	Diversionary
Personhood	Child as rights bearer	Child as bearer of entitlements	Child as bearer of entitlements and rights	Child qualified bearer of rights	Child as bearer of rights	Child as bearer of rights
	Individuals constitutionally self-interested	Individuals a product of experience	Individuals constitutionally ‘good’	Individuals potentially ‘bad’	Individual identity product of interplay between structure and agency	Individuals product of social encounters
	Offender as rational and responsible	Offender as non-rational, irresponsible	Offender as rational and responsible	Offender as dangerous	Offender as self-determining	Offender adapts to ascribed identities
	The rational man	The patient	The penitent	The commodity	The flawed identity	The deviant status
Social relations	Core relationship: contractual, State vs. individual citizen	Core relationships: nested model of State, community family, child	Core relationships: inclusive: child, victim and community	Core relationship: adversarial community vs. potential offender	Core relationship: Inclusive: child and community	Core relationship: reflexive Regulatory practices shaping individual sense of self
	Didactic	Transformative	Integrationist	Protective	Redemption	Preventative
	Audience: Citizens	Audience: Offender and family	Audience: Community and victims	Audience: Public	Audience: Offender and community	Audience: The child
	Sensibility: Retribution (Vengeance)	Sensibility: Philanthropy (Paternalism)	Sensibility: Connection (Infliction of shame)	Sensibility: Fear (Hate)	Sensibility: Connection (Exclusion)	Sensibility: Rational calculus (Managerialist)
Intervention	Aim to deter and punish	Aim to diagnose and to rescue	Aim to support victims, to restore harm, to reconnect child to community, to build more cohesive peaceful community	Aim to diminish current and future risk, safeguard victims and the wider community	Aim to support recovery and establishment of the ‘real me’ identity, build effective practitioner-child relationships, asset based	Aim to diminish negative effects of regulatory practices and support inclusion
	Proportionality to deeds, parsimony	Proportionality to needs	Proportionality to harm caused	Proportionality to risk	Proportionality to need for value change and rediscovery of agency in the context of wider opportunity	Proportionality to pernicious consequences of agency impact

Evidence: diversion is effective/labelling exacerbates criminal careers

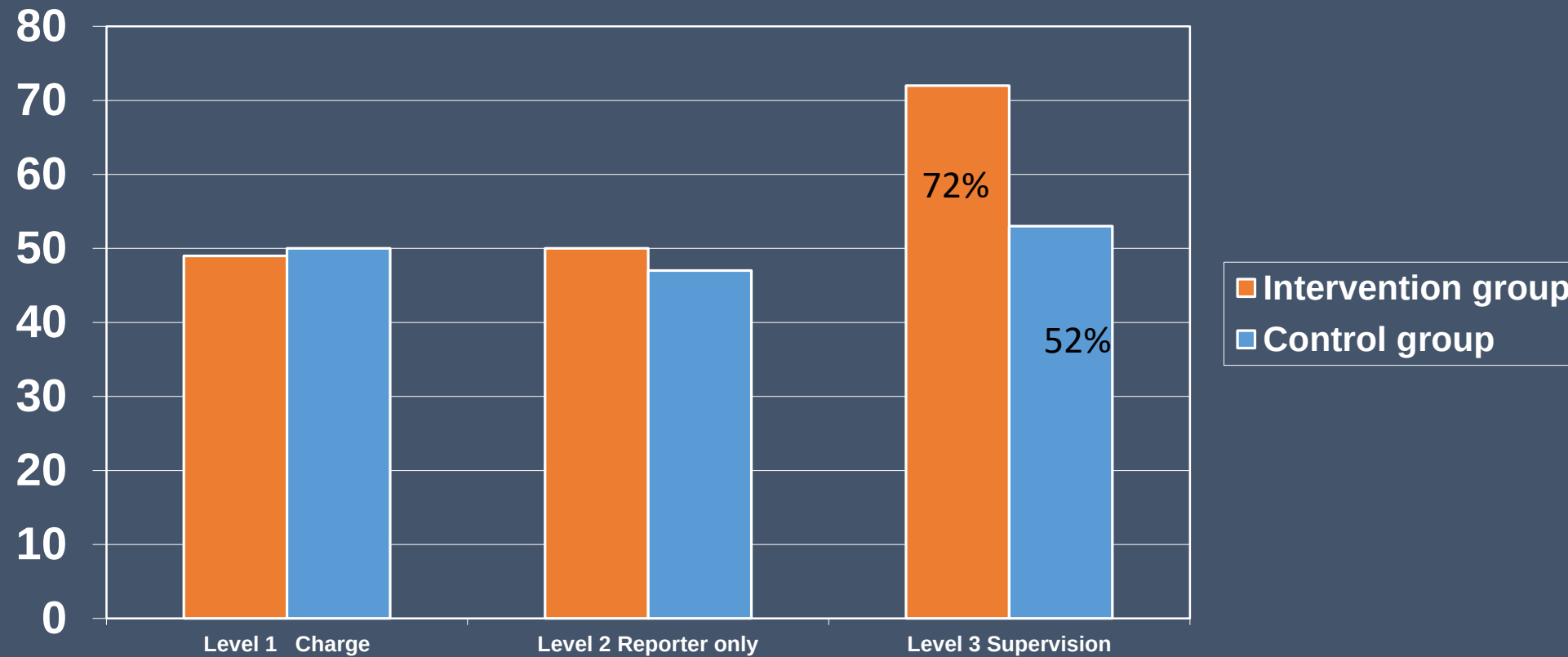
(McAra and McVie 2007, 2010, 2012, 2017)

Age 15	Intervention group	Control group
Level 1	'Charged' but then no further action	Other adversarial police contact but not charged
Level 2	Referred to Reporter but then no further action	Charged but not referred to Reporter
Level 3	Hearing held and put on supervision	Charged but not referred to Reporter

Variables on which intervention and comparison groups matched

- Volume of serious offending
- Gender
- Family structure
- Social deprivation (free school meal entitlement; neighbourhood deprivation)
- Hang around most evenings
- Persistent truant
- Illegal drug use
- Number of times in trouble with police

Outcomes: % involved in serious offending one year later



Within group % change in serious offending from age 15 to age 16:
the drop in offending is statistically *significant* for every group
EXCEPT for the group placed on supervision

	INTERVENTION GROUP	CONTROL GROUP
Level 1 Charge	-50 (.000)	-43 (.001)
Level 2 Reporter contact	-39 (.001)	-42 (.000)
Level 3 Supervision	-31 (NS)	-49 (.001)

Longer term outcomes for the youth justice 'client group'

	Supervision at age 15 %	Matched controls %
Pattern of chronic conviction by age 24	67	22
Custody by age 24	31	0
Early school leaver	91	58
Not in education, employment or training (NEET) at age 18	51	9

Part 2: The ebbs and flows of diversion as policy discourse (and their impacts!)

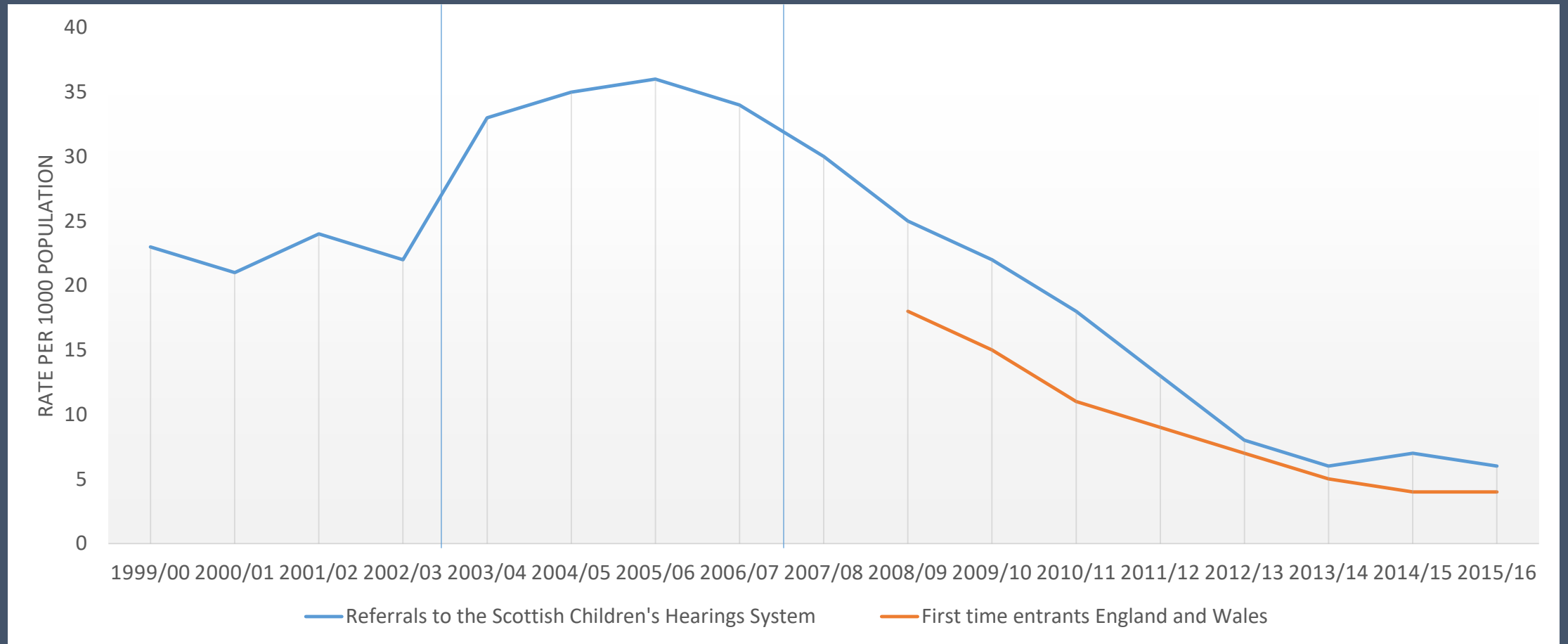
	England	Scotland
1970s	Retreat from welfarism	Full flowering welfarism – ‘avoiding criminalisation’
1980s	Punishment and <u>systems management</u>	
Early-mid 1990s	“The darkness”	
Late 1990s – mid 2000s	- Increased managerialism - Risk management, effective practice - Social inclusion elided with crime prevention, communities as stakeholders - Individual rights and responsabilization - Restorative justice, victims as stakeholders	Politicization of crime control and punishment (hyper-institutionalization) - New punitiveness - Moral panic over youth crime - Fast-tracking - Increased managerialism - Risk management, effective practice - Social inclusion elided with crime prevention, communities as stakeholders - Individual rights and responsabilization - Restorative justice, victims as stakeholders
Mid 2000s onwards	- Youth crime action plan to <u>reduce number of first time entrants</u> (2008) - ‘Non-negotiable support’ for 110K ‘high risk families’ - <u>Increased police discretion</u> re cautioning (2012) - Extension of curfew hours and duration of Youth Rehabilitation Orders - Payment by results (commodification of justice) - Shrinking of expenditure on programmes (austerity) - Children First (YJB)	- Getting it Right for Every Child - Compassionate justice - <u>Whole System Approach</u> - Early and Effective Intervention - Raising age of criminal responsibility

Systems management: England 1980s

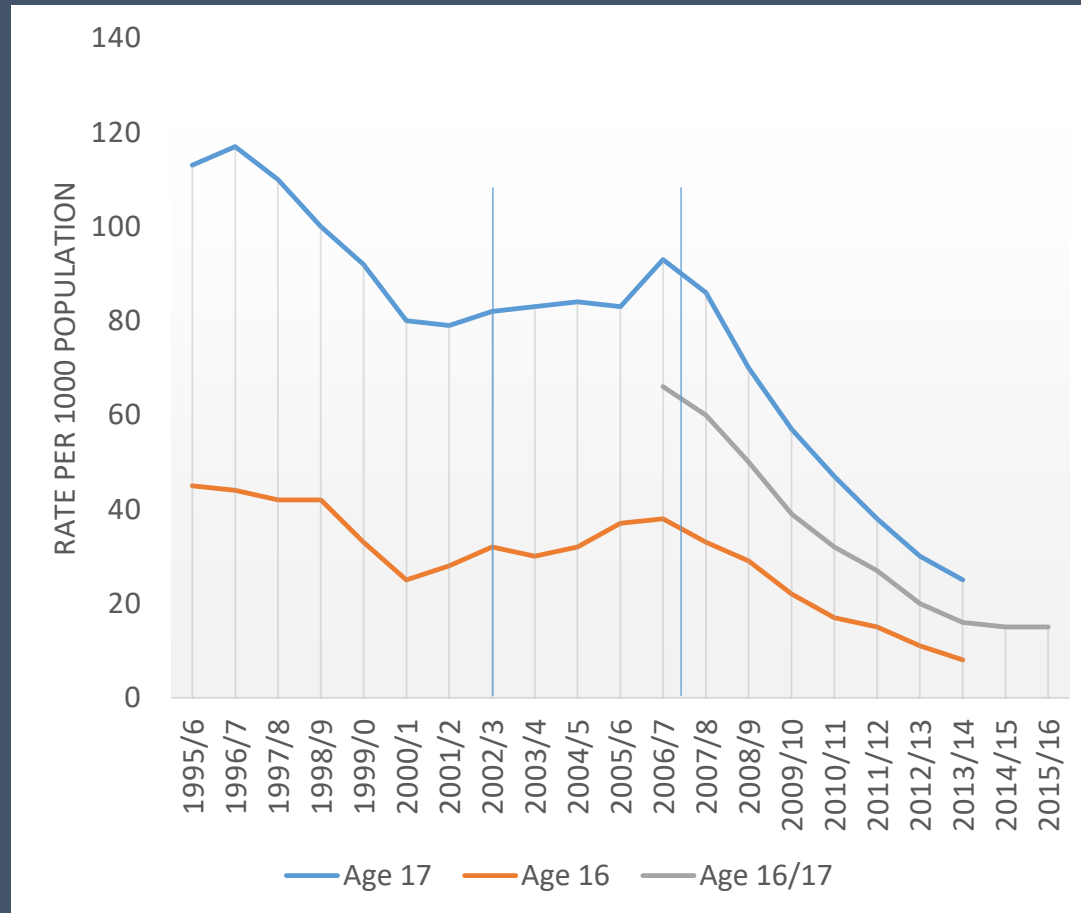
- Aimed at addressing the stocks (absolute number of entrants) and flows of young people through the juvenile justice system
- Systems analysis: how decisions at one point have repercussions at another
- Diversionary possibility at every stage (cautioning, prosecution, court disposal)
- Influence of 'Lancaster Group' (Norman Tutt, David Smith, David Thorpe)
- Impacts: major reductions in youth custody

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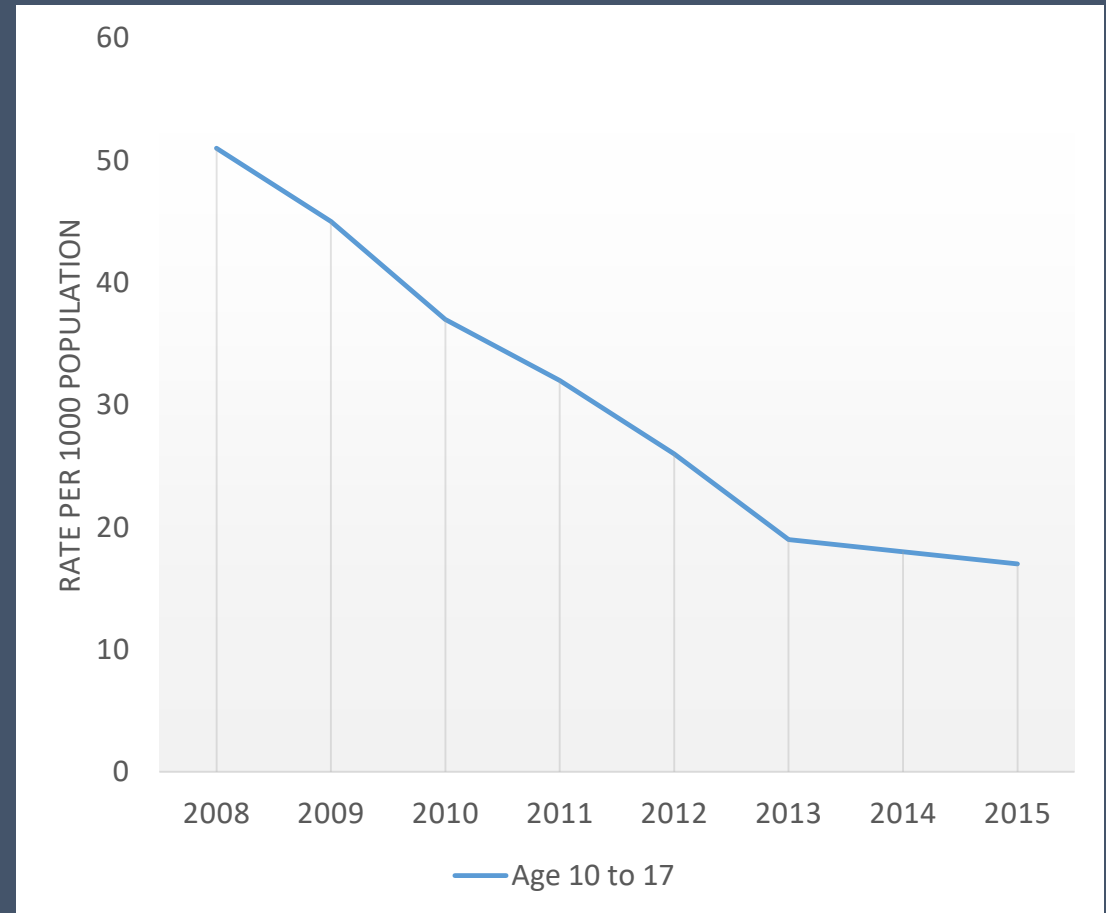
Impacts? Referrals into juvenile justice systems



Impacts? Criminal convictions

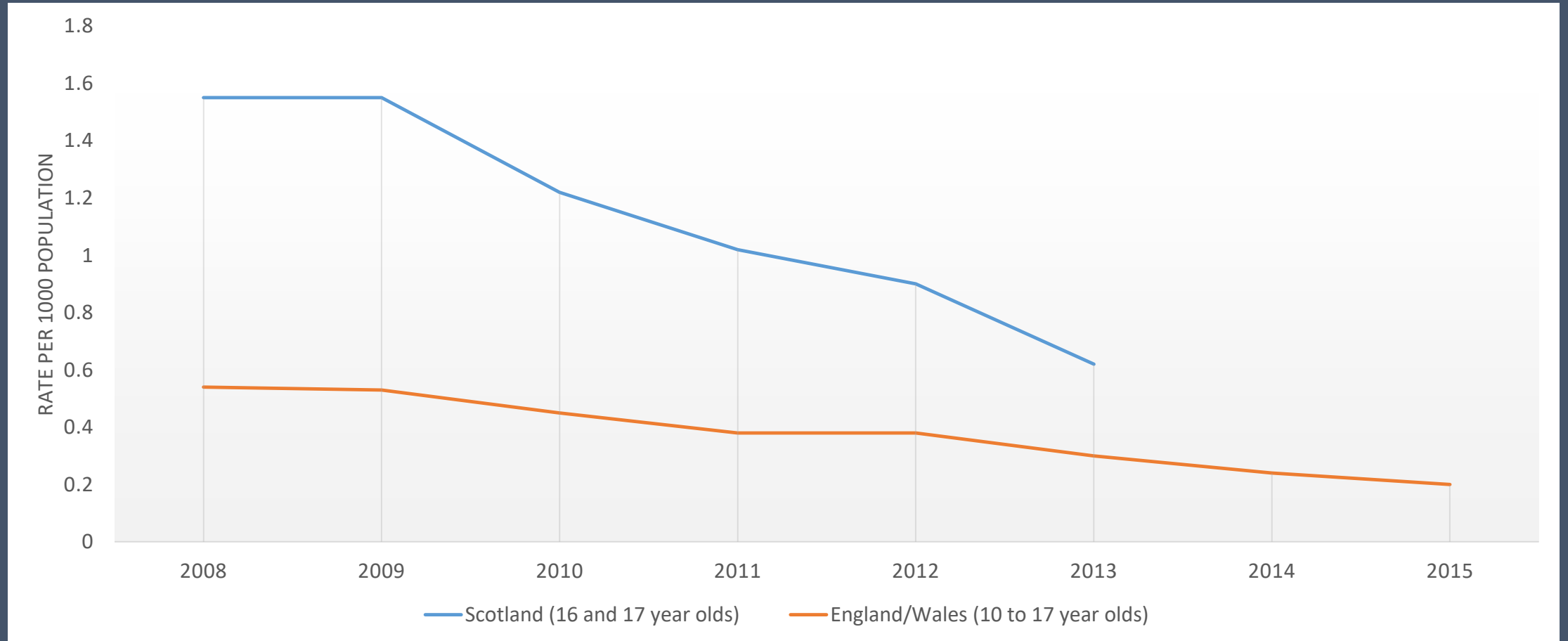


Rate of convictions per 1000 population, age 16 and 17 (Scotland).
Source: Criminal Proceedings in the Scottish Courts, Statistical Bulletins



Rate of convictions per 1000 of the population, age 10-17 (England and Wales)
Source: Youth Justice Board Statistics

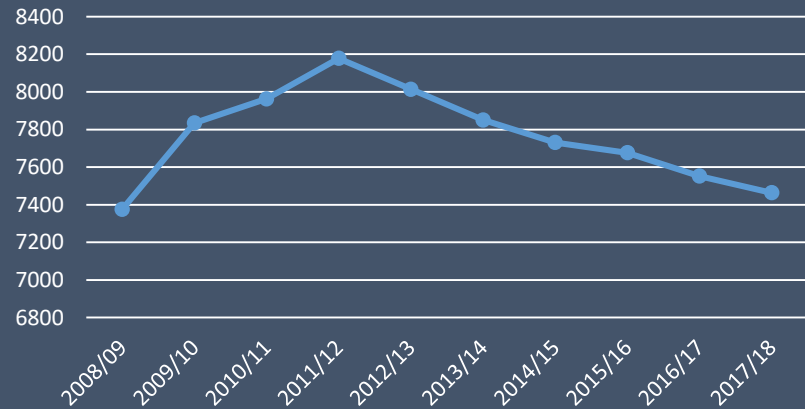
Impacts? Youth custody rates



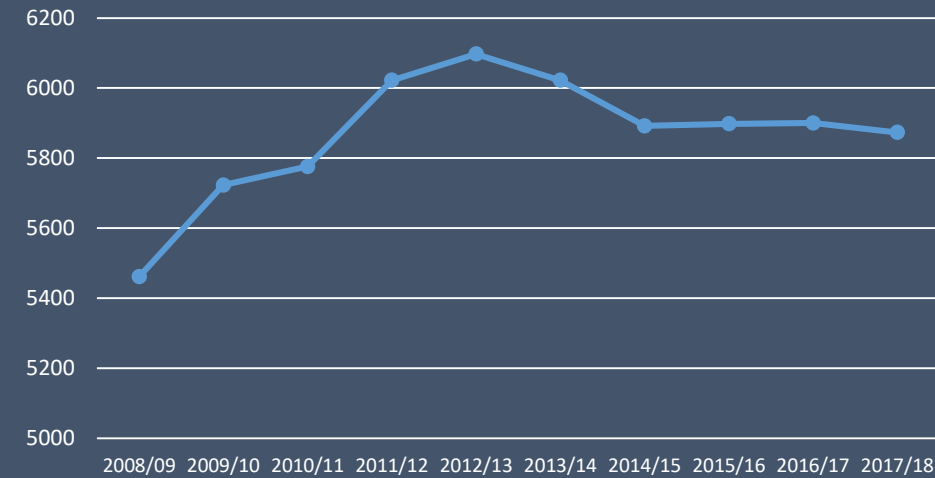
Rate of detention in secure accommodation or custody per 10000 population, age 16 and 17 (Scotland) and age 10-17 (England and Wales)
Source: Scottish Prison Statistics; Youth Justice Board Statistics. Rates calculated using national population data

Impact of 'Whole System': average daily population

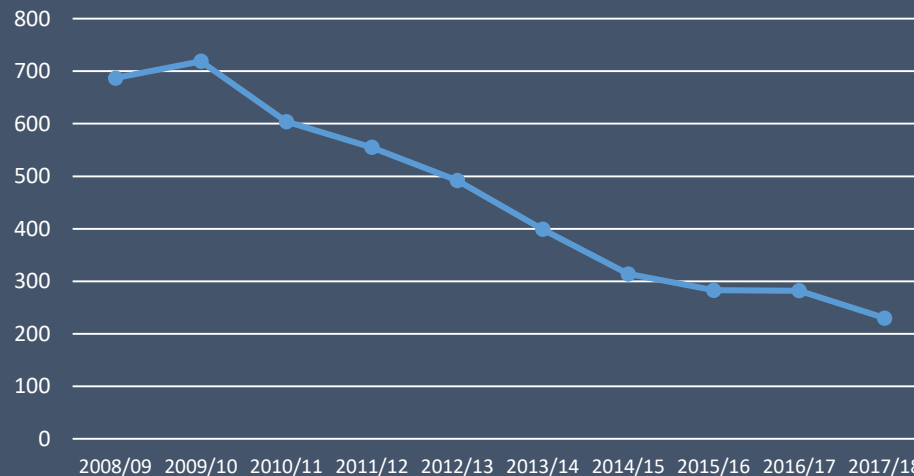
ADP total



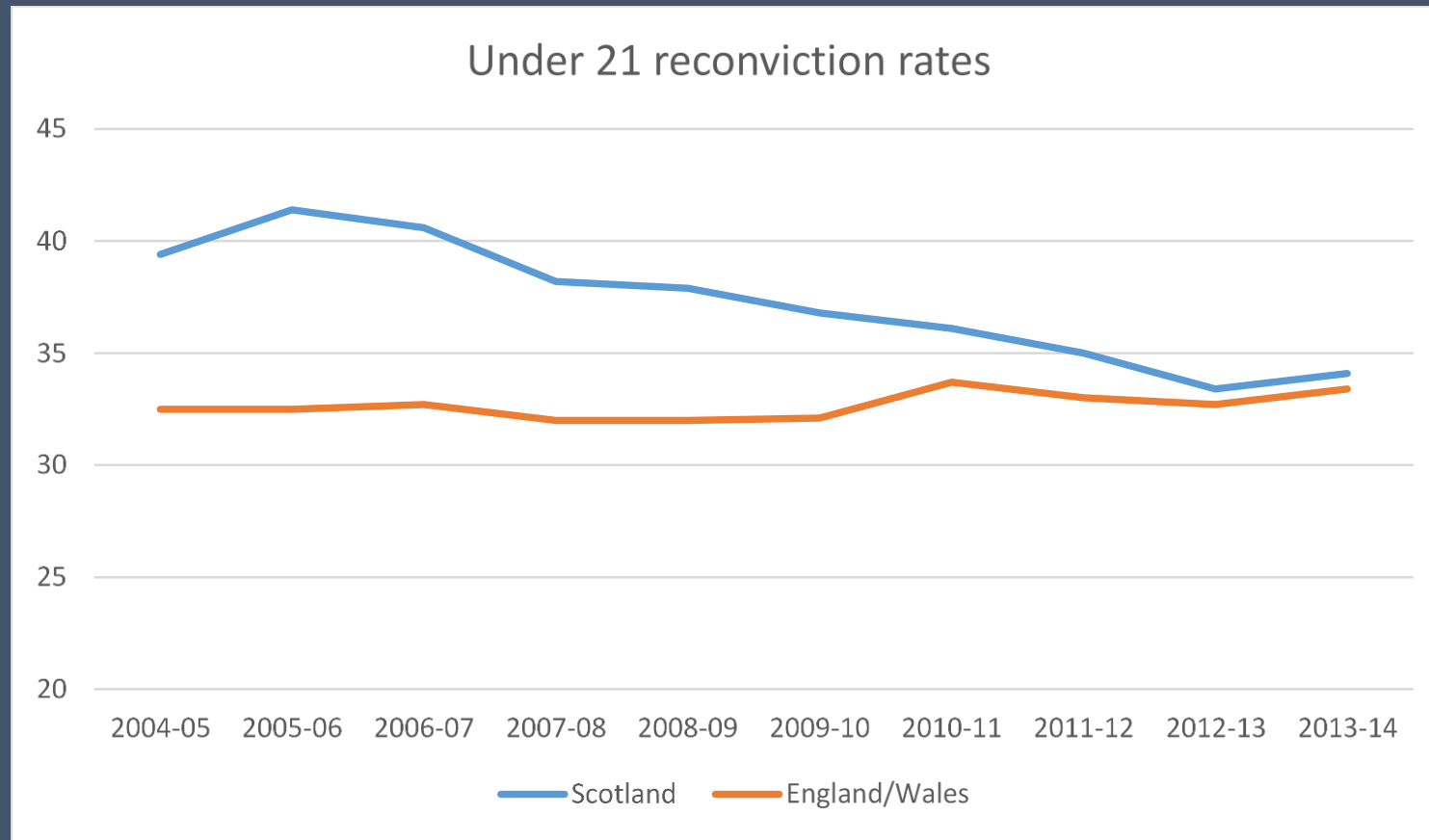
Age 21 +



Under 21



Impact of 'Whole System': reconviction rates for under 21s in Scotland and England/Wales



Part 3: Understanding ebbs and flows and their implications....

- Contexts
- Challenges for sustaining diversionary practice: normative, systemic, experiential

Contexts

- Diversion 'makes sense' at critical junctures in political cycle(s)
- Backdrop of economic crisis mediated by locally specific imperatives, examples:
 - England: 1908s - neo-liberal ideology (shrinking state, commodification of justice), mid to late 2000s austerity
 - Scotland: mid to late 2000s - polity building, austerity
- Challenges to sustainability.....

Sustaining diversion: the normative challenge

Crime control and penal practice central to State's claim to legitimacy

“The nature of justice, consisteth in keeping of valid covenants: but the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them: and then it is also that *propriety* begins”

(Hobbes, *Leviathan*, 1651)

Tensions -

Durkheim: The collective conscience strengthened by outrage, punishment enhances social solidarity

Elias: The civilising process, the transforming etiquette of punishment, abolitionism [and diversion] a marker of taste

Narratives of fear and risk AND narratives of intimacy and connectedness

Building social solidarity via inclusivity AND exclusivity

Sustaining diversion: the systemic challenge

What governments do

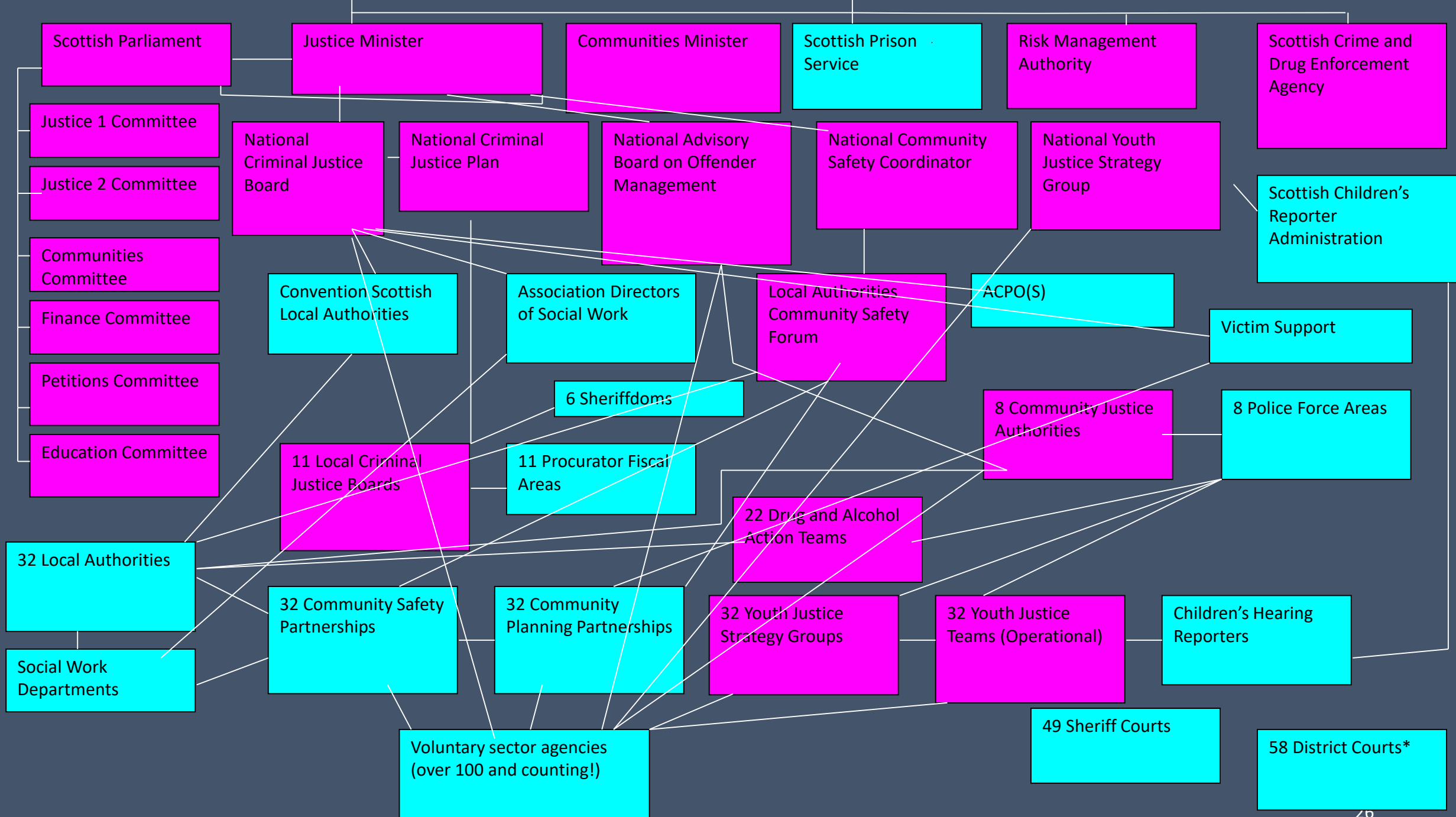
- Differentiation (from what went before)
- Constructing new architecture
- Re-constructing audiences (to whom policy 'speaks')
- Looping...re-presentation of old as new



What agencies do

- Differentiation (from each other)
- Looping – continuity in cultural practices
- Autopoietic (self-referential) tendencies





Malcolm Rifkind, Secretary of State for Scotland (Kenneth Younger Memorial Lecture, 1988)

- Whilst the use of imprisonment may be inescapable when dealing with violent offenders and those who commit the most serious crimes, we must question to what extent short sentences of imprisonment are an appropriate means of dealing with offenders. Prisons are expensive both to build and run and ***DO NOT PROVIDE THE IDEAL ENVIRONMENT*** in which to teach an offender how to live a normal and law abiding life, to work at a job, or maintain a family.
- Perhaps some of these offenders could be dealt with by a ***COMMUNITY BASED DISPOSAL*** without posing any undue risk to society providing the courts can be satisfied that the sentence imposed is sufficiently firm and ***ROBUST*** in view of the circumstances of the crime.

Michael Matheson, Cabinet Secretary for Justice (Apex Lecture, 2015)

- Short term prison sentences simply ***DO NOT WORK*** in terms of rehabilitating offenders or reducing the risk of the their re-offending. They disrupt families and communities and greatly affect employment opportunities and stable housing.
- That is why my vision is one which reflects the values of a modern and progressive nation in which prison, in particular short term imprisonment, is used less frequently as a disposal and where there is a stronger emphasis on ***ROBUST* *COMMUNITY SENTENCES*** focused on addressing the underlying causes of offending.

Sustaining diversion: the experiential challenge (negative effects of even intentionally benign systems)

Once you're involved you can never really pull away from it. People never forget, so you've got to watch yourself even if you're trying to move on. They'll remember you (Edinburgh Study Cohort Member at age 18)

Odds of NEET status at age 18 if....	
Ever made subject to compulsory measures of care	4 times greater
Ever referred on offence grounds	3 times greater
Low household economic status	2 times greater

Controlling for low attachment to school, poor relationships with teachers; low aspirations
Not significant: live in top quartile most deprived, early school leaver; truancy, exclusion, school punishments, bad behaviour at school, family structure; conflict families; crises within families

Concluding thoughts...

Last words.....

On entrance] they begin a series of abasements, degradations, humiliations, and profanations of self. [The] self is systematically, if often unintentionally mortified (Goffman, Asylum, 1961 p 24)

Young people are not really treated fairly - if they do one thing they're looked at for a long time. Just because they're young doesn't mean they're not human beings – they're still people and they still have rights (Edinburgh Study Cohort Member age 18)

Accepting that, in some cases, doing less is better than doing more requires both courage and vision on the part of policy makers. A realization of this vision in turn requires acceptance that criminal justice agencies cannot, by themselves, make the wider public feel safer nor can they mend broken families and remake shattered communities. To the extent that systems appear to damage people and inhibit their capacity to change, then they do not, and never will, deliver justice (McAra and McVie, 2007, EJC, p 340)