



National Guidelines on Diversion from Prosecution in Scotland

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Preface

This document provides an updated set of guidelines which supersedes previous guidance and should be used by all agencies involved in diversion from prosecution as an alternative to prosecutorial action. The process of revision was facilitated by Community Justice Scotland who worked closely with partners, including Social Work Scotland, Crown Office and Procurator Fiscal Service, Scottish Government, Police Scotland and the Centre for Youth and Criminal Justice. Not only does this represent the culmination of a period of effective partnership working, this also demonstrates a high level of co-production and shared ownership of the process and acknowledgement of the benefits diversion from prosecution can bring to people, families and communities.

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1. Introduction

Diversion from prosecution is a process by which the Crown Office and Procurator Fiscal Service (COPFS) are able to refer a case to social work – and their partners – as a means of addressing the underlying causes of alleged offending when this is deemed the most appropriate course of action.

Diversion from Prosecution will be considered in any case where the individual reported to COPFS has an identifiable need and where it is assessed that diversion from prosecution is the most appropriate outcome in the public interest. There must be a sufficiency of evidence before COPFS can take action to refer an individual for diversion from prosecution.

Diversion from prosecution support and intervention should be made available to all individuals assessed as appropriate across the whole of Scotland.

Diversion from prosecution should respond to the needs of the individual. Those providing interventions could employ generic responses to the alleged offence in addition to bespoke, tailored interventions that match the circumstances and needs of the individual.

The frequency, content and mode of delivery of any interventions should remain the responsibility of the local authority (LA) (based on their assessment), acknowledging that for some people the duration of the intervention may be very short, but others may require an extended period of support.

2. What is Diversion from Prosecution

The aim of diversion from prosecution can be outlined as follows:

- To provide a disposal which, due to the circumstances of the individual and the circumstances of the alleged offence, provides an appropriate person-centred response;
- To enable a swift intervention, which can interrupt a cycle of offending and/or prevent further offending.

The benefits of a successful diversion from prosecution are three-fold.

- It allows the individual an opportunity for support to deal with the issues personal to them in the context of the alleged offence (from a desistance perspective);
- Avoiding unnecessary contact with the criminal justice system; and
- The individual does not receive a conviction for the alleged offence, which can impact on their longer-term employment opportunities.

COPFS (and ultimately the Lord Advocate) determine prosecution policy and they take into account a range of considerations in deciding what action is in the public interest.

In Scotland, prosecutors will usually defer any decision to take alternative prosecutorial action until the diversion from prosecution intervention has been completed. This decision will normally be taken about three months from the commencement of the diversion intervention. Where it is not successfully

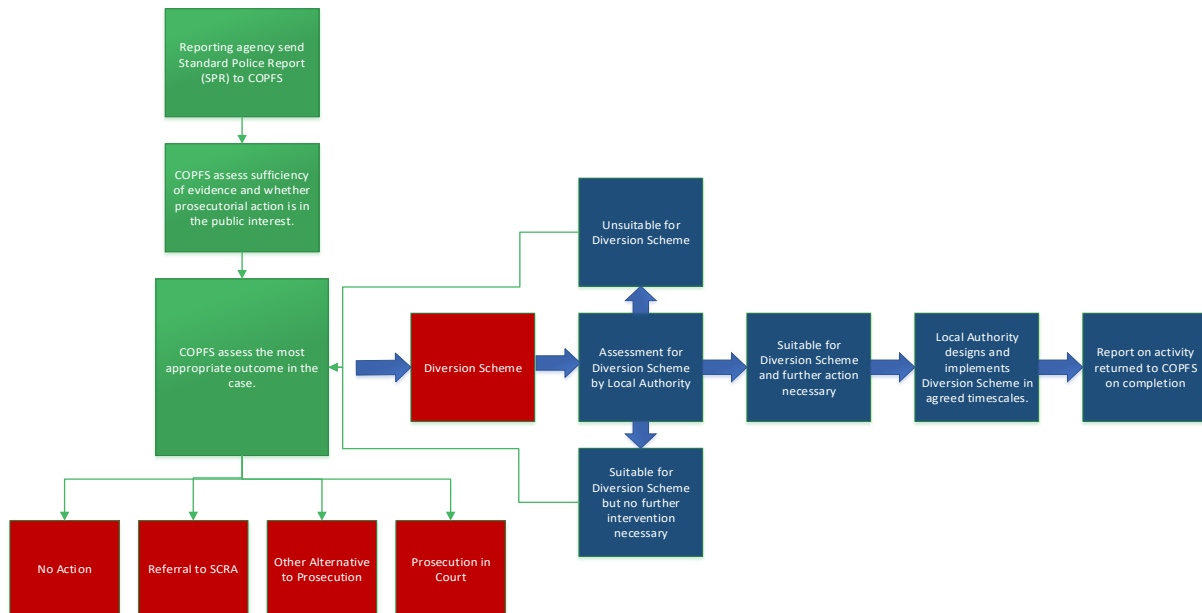
completed, COPFS may take other prosecutorial action unless it is not in the public interest to do so. Prosecutors have discretion, in particular circumstances, to waive the right to prosecute as soon as a diversion from prosecution is offered and accepted.

In deciding whether an individual is suitable for diversion from prosecution, prosecutors will assess the facts and circumstances of each case. This will include the nature of the alleged offence and the impact this has had on any victim(s). Where COPFS guidance requires it, prosecutors will seek approval from a senior manager for a decision to refer certain types of offences prior to proceeding to diversion from prosecution.

It would not be appropriate for any LA to decide that certain categories of offences are not suitable for diversion from prosecution as this is a prosecutorial decision.

3. Diversion from Prosecution Process

Diagram 3.1: Diversion from Prosecution Flowchart



There are three Phases of Diversion from Prosecution; Initial, Assessment and Intervention, and Conclusion.

Phase One: Initial – Roles and Activities

Police

The role of the Police as the first point of contact in the community is crucial, as this is where the potential for diversion from prosecution can be first considered. When attending an incident and undertaking the necessary enquiries, the officers involved

should not only note required case details, but give consideration to capturing any antecedent information in the following areas.

- Mental Health
- Alcohol/Drugs/Other
- Risk
- Vulnerabilities
- Disability
- Attitude to Offending
- Family Dynamics
- Education/Employment/Training

The Police should ensure that this information is included within the 'antecedent details' section of the Standard Police Report (SPR) when submitted to COPFS. There is also the opportunity for Police to give a view on the potential suitability for diversion from prosecution based on their knowledge of the incident and individual. This should be included within the 'remarks' section of the SPR.

Local Authority

If, in the course of their work, Criminal Justice Social Work (CJSW) staff believe that an individual they were already engaged with has committed a further offence, and would potentially benefit from diversion from prosecution, contact should be made with Police to discuss any inclusion of additional information within the SPR.

Crown Office and Procurator Fiscal Service

COPFS will consider all information provided by Police within the SPR, or by CJSW as outlined above, as part of the decision-making process in each case. In the first instance, the prosecutor will make a decision on whether there is a sufficiency of evidence, and what prosecutorial action, if any, is in the public interest. Where necessary, the prosecutor will seek further information and/or clarification on any aspect of the information available to them.

Where the prosecutor is satisfied that the public interest would be best serviced by an offer to undertake assessment for diversion from prosecution, they will write to the individual and advise that arrangements are being made for that assessment to be undertaken by the LA or agreed agency).

When writing to the individual, the prosecutor will emphasise that participation in the scheme is voluntary and that if they have any queries about the scheme then legal advice should be sought. The information will outline the potential outcomes if the individual does not engage with agencies involved in the assessment and any subsequent intervention.

The offer of engagement will make it explicit that the individual is giving free, fair and informed consent to the process, and will reference the fact that the prosecutor has referred the matter to their LA for assessment.

The processing of any information will be undertaken with reference to the Data Protection Act 2018 (DPA18) and the General Data Protection Regulation (GDPR), in

particular, DPA18 Part 3 which allows prosecutors to process information for a law enforcement purpose, Section 8(a) of the DPA18 and Article 6(1)e of GDPR.

In the referral to the LA the prosecutor should outline the key issues and reasons behind their decision to refer an individual for assessment of suitability for diversion from prosecution.

Phase Two: Assessment and intervention – Roles and Activities

Local Authority

On receipt of a referral from COPFS, the LA will undertake an assessment of the individual in the context of all available information. As assessments are, usually, undertaken by CJSW or youth justice services on behalf of the LA, the social work staff undertaking diversion from prosecution assessments should secure access to as much available information as possible, on the proviso that the sharing of information is lawfully undertaken (it must be necessary and proportionate). In particular, the information contained within the SPR should be reviewed and particular reference made to the prosecutor's reasons for referral.

Liaison with social work colleagues in other services such as residential care or children and families should take place in cases where the individual is supported by them.

If, in the interim period between a referral being made and prior to an assessment being undertaken, information is made available to the prosecutor (from any source) which results in a change to the proposed approach, the prosecutor will email the relevant Social Work office to confirm this and will mark the case accordingly, thereafter sending out a letter to the individual outlining the change to the proposed action.

When an individual is considered unsuitable for diversion from prosecution, e.g. where they have declined the offer of a diversion from prosecution or failed to engage with the assessment and/or intervention process, frontline services should submit an assessment report to the prosecutor indicating this.

It may be that some cases will require minimal, or no intervention based on the individual and/or the circumstances of the offence. This should be considered by the LA as part of the initial assessment, and the reasons for any such decision should be provided to the prosecutor.

The assessment report should be submitted to the Prosecutor within 20 working days from receipt of the request.

Table 3.2 – Diversion From Prosecution Assessment Outcomes

Outcome	Issues/Circumstances (examples)	Case Pathway
Individual NOT suitable for diversion from prosecution	<ul style="list-style-type: none"> • Individual did not attend for assessment. • Individual has changed their 	

	<p>mind.</p> <ul style="list-style-type: none"> Agency information indicates unsuitability. 	<p>A report is compiled by the LA and returned to COPFS.</p>
<p>Individual IS suitable for diversion from prosecution, BUT NO FURTHER INTERVENTION IS REQUIRED</p>	<ul style="list-style-type: none"> The issue the individual was experiencing has been addressed and/or appropriate support is in place. <p>NOTE: It is crucial the reasons for this are provided to COPFS and that these relate to the reasons for which the prosecutor initiated the diversion from prosecution suitability assessment.</p>	
<p>The individual IS suitable for diversion from prosecution.</p>	<ul style="list-style-type: none"> Diversion from prosecution assessment will indicate the proposed intervention to be undertaken with the individual and the timescales involved. 	

In some cases, the nature of the intervention deemed necessary may be outwith what the LA or their partners can provide as part of a diversion from prosecution. For example, the complexity of the intervention may require highly specialised services or extended timescales. In these rare cases, the LA ought to inform the prosecutor that an extended period of work may be undertaken, with consideration of referrals to universal services, in order to provide additional support for other presenting needs where necessary. This will allow the individual the opportunity to make longer-term changes in their lives, should they wish to, within the appropriate services. After considering all the facts if any disagreement occurs regarding the referral for diversion from prosecution this will be discussed and resolved between the prosecutor and the LA.

The diversion from prosecution assessment must be underpinned by the following key concepts;

- The SPR must not be shown to participants for reasons of data protection, although general exploration of the circumstances which led to the individual being reported to Police will be necessary.
- Every referral from COPFS will be subject to a diversion from prosecution assessment, in line with the three potential outcomes highlighted above.
- It must be clearly explained to the individual that diversion from prosecution is voluntary.
- The final decision on whether to take prosecutorial action lies exclusively with COPFS.
- It is unnecessary to consider concepts of 'guilt' or 'innocence' when contemplating the role of the individual in a particular incident. Broadly, there is

no requirement for an individual to accept guilt in order to receive a disposal of this kind. The key requirement is that they accept the offer of engaging with the relevant support.

- The content of any discussion which forms part of the diversion from prosecution assessment will usually be inadmissible in evidence against the individual for that offence. Where information is voluntarily offered in relation to other potential offences, this may be used by prosecutors.
- Issues relating to the protection of others should be given paramount consideration.

The assessment should focus on a range of aspects pertaining to the individual and their circumstances in relation to the incident and referred to by COPFS, and ought to be mindful of the particular vulnerabilities, needs and maturity of the individual. Although not an exhaustive list, the following areas are for exploration during the initial assessment.

- The individual's understanding of the referral from COPFS.
- The individual's circumstances, thinking and behaviour in relation to the alleged offence. This is particularly relevant for younger individuals.
- The individual's willingness to be involved in the diversion from prosecution process. This may include activities such as advice, support, offence-focussed work, mediation, restorative approaches and referral to other agencies.
- The individual's expectation of the process and outcome of diversion from prosecution.

On conclusion of the assessment a report is returned to COPFS outlining aspects of the assessment process. As a minimum, this should include the following.

- Whether the individual is suitable for the diversion from prosecution process (see Table 3.2).
- What the jointly identified issues are.
- What the proposed intervention will include, with indicative timescales.
- What the proposed outcomes of the intervention are.

Crown Office and Procurator Fiscal Service

In all potential outcomes from the initial assessment, as identified in Table 3.2, an assessment report will be provided to COPFS from the LA, and the prosecutor will then take that information and determine what action to take in the public interest. In some circumstances, this might mean the case is prosecuted in court or another prosecutorial action is taken.

Local Authority Intervention

Given the very wide range of alleged offences referred for diversion, interventions should be tailored to meet individual needs, risks and circumstances in a holistic and creative manner. The proposed programme of work should be agreed with the individual but afford sufficient flexibility to respond to other issues as they arise.

Interventions should both address the issues identified and agreed in the assessment, and lead to a positive outcome for the individual with regard to their own circumstances. The intervention may be delivered exclusively by one agency or by

adopting a mixed service provision. Specific consideration must be given, by all agencies involved, to victims including alleged, actual and/or potential individuals or groups.

Particular consideration should be given to the age, stage and characteristics of the individual in order that the mode and manner of the intervention is one which best suits them. Recognition must be given to the particular, additional needs that some groups of individuals may face. When doing so, use of universal and community supports should be considered.

Phase Three: Conclusion – Roles and Activities

Local Authority

Most diversion from prosecution interventions are based on work being completed by the LA within a three-month period from the return of the assessment to COPFS.

Similar to the three possible outcomes when making the assessment of suitability for diversion from prosecution, there are only three outcomes in terms of the conclusion of the intervention.

Table 3.3 – Outcomes at conclusion of a diversion from prosecution

Outcome	Issues/Circumstances (examples)	Case Pathway
Did not complete the intervention.	<ul style="list-style-type: none"> Individual did not attend. Individual did not engage appropriately with the intervention. 	A report is compiled by the LA and returned to COPFS detailing reasons for non-compliance at the earliest opportunity.
Completed the intervention in full.	<ul style="list-style-type: none"> All intervention activities completed to an agreed standard, and a successful outcome achieved. 	A completion report is compiled by the LA and returned to COPFS at the conclusion of the three-month period.
Further intervention required.	<ul style="list-style-type: none"> Most of the activity is completed, but the individual would benefit from a further agreed (and time-bound) period of intervention. 	A report is compiled by the LA and returned to COPFS outlining progress to date and rationale for any extension.

The completion report from the LA to COPFS should be concise and highlight the following aspects of the diversion from prosecution process.

- How issues identified by the prosecutor at the point of referral and the LA during assessment were addressed, including the nature of the intervention.
- The impact of the diversion from prosecution process on the individual, citing any evidence of change as is appropriate to the case.

- Any other factors which may be of relevance to COPFS in terms of proceeding to a conclusion in the case.

A progress / completion report should be submitted to the prosecutor no later than 3 months after the commencement of the diversion from prosecution intervention.

Crown Office and Procurator Fiscal Service

On receipt of any of the outcome reports detailed in Table 3.3, the prosecutor will determine the outcome of the case and either decide to take further prosecutorial action, or to take no further action in the matter. Following receipt of the completion report from the LA, COPFS will advise the individual and the LA on the final outcome in the case.

4. Statistical Information

Agencies responsible for the commission, intervention and completion of diversion from prosecution processes should enable particular data to be recorded and be made accessible for monitoring and reporting purposes. Annually, agencies are already required to provide the following data to Scottish Government Justice Analytical Services:

- a) Number of referrals
- b) Assessments undertaken
- c) Individuals with cases commenced
- d) Cases successfully completed
- e) Number of cases commenced

Data provided under (a) – (d) is broken down by gender; data provided under (e) is broken down by gender & ethnicity, gender & age group and gender & employment status. The collection of this data will continue.

Table 4.1 sets out on further data which it would be helpful to obtain for monitoring purposes. Some of this is similar to that already collected, and further consideration will be given, in discussion with partner organisations, to how far this can be incorporated within the existing Scottish Government data collection process.

Table 4.1 – Performance Data

Data	Supplementary data	Agency Responsible
The total number of individuals marked for diversion	The nature of the charge for which individuals marked for diversion were reported.	COPFS
The total number of	The reasons for which	Local Authority

individuals rejected following assessment.	individuals were rejected following assessment.	
The total number of individuals progressing to diversion from prosecution intervention.		Local Authority
The total number of individuals who failed to complete diversion from prosecution intervention.	The reasons for which individuals failed to complete diversion from prosecution.	Local Authority
The total number of individuals who completed the diversion from prosecution intervention.	Referrals to partner agencies (and the reason for referrals) and the agencies to whom those referrals were made.	Local Authority
The total number of individuals subject to an extended diversion from prosecution intervention of beyond three months.	The reason an extension was required.	Local Authority
The number of individuals referred for diversion who were subsequently marked for prosecution		COPFS

It would be helpful if, where possible, data could include age, gender and employment status breakdowns.



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