

Policy Refocus at COPFS

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Reflecting a number of recommendations made in the [Thematic Review on the Prosecution of Young People in Scotland](#), changes have been made to the way that the [Crown Office and Procurator Fiscal Service \(COPFS\)](#) initially process, mark and respond to cases they receive from Police Scotland and other [Specialist Reporting Agencies](#). These developments could have a significant impact upon the processes experienced - and ultimate disposal received - by those who come into conflict with the law, avoiding unnecessary criminalisation of children and young people. They could impact upon the organisational tasks, routines and structures of social work services, although this is yet to be seen.

In June 2019 COPFS issued internal guidance which refocused its approach towards diversionary measures, with specific referral to Diversion from Prosecution (DfP). The updated guidance reflects that:

- In all jointly reported cases - including where the accused is aged 16 or 17 and subject to a Compulsory Supervision Order (CSO) - there is a [rebuttable presumption](#) that all such accused will be referred to the Principal Reporter of [Scottish Children's Reporter Administration \(SCRA\)](#).
- In all cases where the accused is under the age of 18 (and not subject to a CSO) there is a rebuttable presumption that an alternative to prosecution will be in the public interest and, in cases where an identifiable need has contributed to the offending, active consideration should be given to referring the case for diversion.
- In all cases where the accused is 18 or over where an identifiable need has contributed to the offending and that need can best be met through diversion, consideration will be given to referring the case for diversion. A referral for diversion will be appropriate where, after assessment of the circumstances, and taking into account public interest, it is the appropriate outcome for the individual.

Of note within the guidance is further clarification that young people subject to a CSO can receive a DfP service, but that this would normally be dealt with by the Reporter.

Further details can also be found from paragraph 33 onwards of the newly refreshed agreement between COPFS and SCRA (see footnote) which outlines decision making procedures in instances of jointly reported cases. Of note is guidance on factors that will be considered in instances where there may be cause to override the presumption against prosecution in court by COPFS. The guidance states that in doing so, consideration will be given to the following:

- whether the gravity of the offence is such that the child should be prosecuted on indictment;
- whether there is a pattern of serious offending by the child;
- whether there are services within the Children's Hearing System that are currently working with the child in relation to the child's offending behaviour and offending related needs, and/or any programmes that the child is involved in that are addressing such behaviour or needs and the extent of the child's engagement with those services;

- whether any such services within the Children’s Hearing System could become involved in working with the child in relation to his/her offending behaviour or offending related needs;
- whether any possible decision open to the Children’s Reporter or a Children’s Hearing is likely to suitably address the child’s needs and behaviour and any risk that the child may present;
- whether there is likely to be an adverse effect on the victim if the child were to be prosecuted; and
- any health or development issues (e.g. that the child has ADHD or learning difficulties) that may indicate the child’s needs and behaviour would be best addressed within the Children’s Hearing System.

Given that children who are subject to a CSO have often experienced a [range of challenges and traumas](#) any move which might deliver support with unnecessary appearances before court, and therefore risking further trauma, is to be welcomed.

Notwithstanding the anomaly highlighted by [Dyer \(2016\)](#), Smith et al., (2014) and [Lightowler et al.](#), (2017) whereby their age equivalent peers may already be in the Children’s Hearing System, these changes could reduce the number of 16 and 17 year olds who appear before Scotland’s courts. In 2017-18 [6,371 under 21s pled or were found guilty in court](#), of which [854 children under the age of 18](#) required a Criminal Justice Social Work Report to be written. Whilst it is hypothetical at this stage to predict how many of these cases could have been dealt with through alternative measures such as DfP or referral to SCRA, it demonstrates the potential scale of impact caused by this refocus in practice. These changes could have beneficial effect upon the lives of young people, going some way towards respecting their rights under UNCRC and [other international protocols](#). Time savings on the part of practitioners could also be significant, affording them greater opportunity to engage in direct contact with young people and their families, whilst lessening demand upon court time.

As was recommended by [SCCJR](#) following [their evaluation](#) of the Whole System Approach in 2015, and by [Her Majesty’s Inspectorate of Prisons in Scotland](#) in 2018, this change could see DfP utilised far more often than has been the case in previous years. CYCJ has sought to support the development of practice in this area through practitioner forums and roadshows, both of which could be of benefit to those delivering services. Similarly, existing [practice guidance](#) may be of use. DfP is, of course, only one of a [number of options](#) available to COPFS and it may be that Procurators Fiscals adopt alternative measures. Guidance on which cases are prosecuted on indictment remain as they have been since 2014, and as outlined within paragraphs 1-3 of the [Lord Advocate’s Explanatory Notes to the Chief Constable](#) and with reference to the COPFS [prosecution code](#). The long established pathways from offence to disposal have been altered significantly by this revised guidance, and this development seems to be another step towards enhancing and extending the Whole System Approach.

References

The refreshed agreement between COPFS and SCRA can be found at:

<https://www.copfs.gov.uk/images/2019%2006%2013%20Joint%20Agreement%20COPFS%20and%20SCRA%20Decision%20Making%20in%20Jointly%20Reported%20Cases.pdf>