

# **A Guide to Youth Justice in Scotland: policy, practice and legislation**

## **Section 4: Early and Effective Intervention & Diversion from Prosecution**

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## 1. Introduction

This section focuses on Early and Effective Intervention (EEI) and diversion, both of which form critical aspects of the continuum of responses to children at risk of, or who have come into conflict with, the law. EEI and diversion must be anchored in [Getting It Right For Every Child \(GIRFEC\)](#) and fulfil the aspirations of the [United Nations Convention on the Rights of the Child \(UNCRC\)](#) and [Child Friendly Justice](#). Article 40 of the UNCRC outlines that States shall promote and establish laws and procedures for measures for dealing with children who have infringed the penal law, without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

EEI is positioned within the context of the legal frameworks for children and criminal justice services, providing an opportunity to divert children from formal systems where appropriate for eight to 17 year olds in Scotland. Diversion as referred to in this guidance relates to those aged 16 and 17 years reported to the Crown Office and Procurator Fiscal Service (COPFS). Diversion forms part of the range of prosecutorial actions available to Procurator Fiscals (PFs), which may include fiscal fines, fiscal work orders, and fiscal warnings as opposed to being solely available as an alternative to prosecution in appropriate cases. This shift in practice allows for a more individualised response to the needs of a child reported to the PF by police that does not require prosecution in the first instance. This shift in diversion policy and implementation applies to diversion for both under and over 18s. It is important to recognise that children referred to EEI processes or diversion have not been convicted of any offence. The aim of EEI and diversion is to provide credible appropriate and proportionate intervention to address assessed needs and risks when a child comes into conflict with the law. EEI and diversion are both supported by UNCRC Article 40 (3) (b) “whenever and appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected” (UNCRC, 1989:12). Where children who come into conflict with the law are responded to through other systems and processes rather than those formal systems such as the Children’s Hearing System (CHS), the Committee on the Rights of the Child, General Comments 24 (United Nations Committee on the Rights of the Child, 2019, p. 24) highlights:

“(a) Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding;

(b) The child’s free and voluntary consent to diversion should be based on adequate and specific information on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure;”

“Articles 18 and 27 of the Convention confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time the Convention requires States parties to provide the assistance to parents (or other caregivers) necessary to carry out their child-rearing responsibilities” (United Nations Committee on the Rights of the Child, 2019, p. 24). The inclusion of parents within any EEI or diversion as alternative means of prosecutorial action processes can be critical to improved outcomes for children beyond any intervention, where intervention is required, and provides opportunity for a more collaborative and inclusive working partnership. The level of parental (and other caregivers)

involvement should also be expected to be proportionate to the child's age, agency and developing capacity (United Nations Committee on the Rights of the Child, 2019, p. 4).

In Scotland, a child is defined differently depending on the legal context:

- [The Children and Young People \(Scotland\) Act 2014](#), [United Nations Convention on the Rights of the Child](#) and the Council of Europe Guidelines on [Child Friendly Justice](#) defines a child as being under 18 years old.
- [The Children \(Scotland\) Act 1995](#) (section 93), [Criminal Procedure \(Scotland\) Act 1995](#) (section 307) and [Children's Hearings \(Scotland\) Act 2011](#) (section 199) define 'children' as a) under 16 years old; b) those referred to the children's reporter prior to their 16<sup>th</sup> birthday and c) those young people age 16 and 17 who are subject to a Compulsory Supervision Order (CSO) through the Children's Hearings System. The 2014 Act has not changed this definition.
- The [Adult Support and Protection \(Scotland\) Act 2007](#) defines an adult as someone over the age of 16 years
- The [Criminal Justice \(Scotland\) Act 2016](#), which came into force on January 25, 2018, refers to 'younger child', which is anyone under 16 years or aged 16 or 17 years, and subject to CSO, an 'older child' as 16-17 years and not subject to a CSO.

Article 1 of the UNCRC highlights that all under 18s are children and have all the rights of the convention. Therefore, all under 18 years within this section, as throughout this guidance, are referred to either as 'child' or 'children'.

### Prevention and early intervention

There is a degree of overlap between the terms **prevention** and **early intervention**. For the purpose of this section, the distinction between prevention and early intervention is informed by the following definitions, from Walker (2005) and from the [Framework for Action \(2008\)](#):

- Prevention refers to activities which stop a social or psychological problem arising in the first place
- Prevention services are available as part of universal provision
- Early intervention is activity aimed at halting the development of a problem which is already evident
- Early intervention is targeted assistance for vulnerability towards offending
- Whilst many children will cease offending behaviour without additional support there are some who require assistance to desist and develop a sense of self that is not associated with offending behaviour.

## 2. Key Findings from Research

A significant body of international research highlights the importance of a preventative approach to children's involvement or risk of involvement in offending behaviour. The Edinburgh Study Youth Transitions and Crime (ESYTC) by McAra and McVie (2010) became a seminal paper in shifting policy and practice within Scotland to a preventative approach as enshrined within the [Whole System Approach \(WSA\)](#), with four key findings of this study highlighting:

1. Serious offending is associated with victimisation and social adversity
2. Early identification of at risk children is not a watertight process and may be damaging in the longer term
3. Critical moments in the early teenage years are key to pathways out of offending;  
and;
4. Diversionary strategies facilitate the desistance process.

The findings of the Edinburgh Study strongly reflect the Kilbrandon philosophy that we should be responding to children's needs not deeds - that often children involved in offending behaviour are our most traumatised and victimised individuals (McAra & McVie, 2010), and should be responded to as children first (Case & Haines, 2015). The Children First, Offenders Second (CFOS) approach developed in Wales and England highlights four principles promoting:

1. **Promoting children's rights and adults' responsibilities** Children first positive youth justice prioritises children's rights, strengths, capacities and potentialities, making the facilitation and realisation of these the primary responsibility of the adults with whom they work.
2. **Promotion desistance and inclusion** Children first positive youth justice promotes children's strengths and capacities as a means of facilitating desistance, restoration and inclusion.
3. **Promoting diversion and systems management** Children first positive youth justice emphasises diversion and child friendly systems management as vehicles to promote positive behaviours/outcomes for children and to avoid the potentially criminogenic consequences of system contact.
4. **Promoting relationship-based partnerships** Children first positive youth justice is underpinned by children's participation and engagement, which is driven by positive relationships between the child and practitioner.

(Case & Haines, 2015)

Both the Edinburgh Study and CFOS recognise offending behaviour as normal within child development and whilst many children will be involved in offending behaviour of some kind, not all children who do so will come to the attention of the police and most will grow out of it. Thus, offending behaviour "should be responded to accordingly, rather than criminalised/exacerbated through risk, offence - and offender-focused formal intervention(ism)" (Case & Haines, 2018:11). A strengths-based approach that leverages and builds on existing strengths within the child and the systems surrounding them is crucial to shift away from a deficit-based model. Furthermore, the CFOS approach highlights the importance of the adults and systems around the child taking responsibility rather than seeking to responsabilise the child.

The factors which may increase the vulnerabilities of a child towards involvement in offending behaviour are well known and may vary across a combination such as personal, system, environmental, community and societal. However, they are not predictive, and it is crucial that responses are proportionate and bespoke, considering and understanding how the individual child and their family may experience these concerns. Whilst the concerns may be similar, the way a child experiences them will be very individual to that child and their wider situation. Formal system contact was found to be a significant indicator of future system contact; thus, the importance of having robust preventative responses that can

provide the right support at the right time without stigmatising and labelling children for normative behaviour (McAra & McVie, 2010) is crucial.

### Developmentally Informed

The application of a preventative and early intervention approach must always be developmentally informed and consider the evolving array of research regarding the impact and relationship between Adverse Childhood Experiences (ACEs), brain development, poverty and trauma to shape responses and processes (Liddle, Boswell, Wright, Francis, & Perry, 2016; McEwan, 2017; Vaswani, 2018). Practitioners working with children and families with emotional and behavioural difficulties and/or offending behaviour seek to understand the reasons why some children from similar backgrounds appear to have no problems within family, school, and community settings while others struggle to cope. Children who struggle to cope at home, school and/or in the community often display behaviours which the systems around them struggle to manage or respond to appropriately. This can result in the children becoming labelled and stigmatised by the systems trying to support them, which subsequently negatively affects the child, their opportunities, and their relationships.

Awareness and understanding of the various child development theories can provide practitioners with insight into the possible underlying drivers for behaviour, vulnerabilities and importantly the strengths of the child and the system around them. By drawing on a range of theories, this can assist in identifying the most appropriate interventions required to respond to that specific child's needs and risks and assist the systems around the child to take these forward in a meaningful, inclusive and collaborative way. Practitioners involved in EEI and diversion processes and delivery of interventions with children and their families must be familiar with a range of social work theories including resilience, attachment, brain development and desistance ([see Section 3](#)) as well as Speech, Language and Communication Needs and the impact of learning disabilities or difficulties ([see Section 9](#)).

## 3. Policy Context and Legislation

Both EEI and diversion focus on the needs of the child and recognise that by addressing underlying needs, building strengths and reducing vulnerabilities this will have a greater likelihood of positive outcomes for the child and their family as well as those harmed by the child's actions and wider society. The recognition of building capacity by addressing needs is at the heart of Scottish policy and legislation relating to children. For example:

- [The Kilbrandon Report 1964](#) underpinned the [Social Work \(Scotland\) Act 1968](#) and established the Children's Hearing System in Scotland. This emphasised the importance of early intervention to prevent the development of future problems, linking the needs of children involved in offending behaviour with those in need of care.
- The [Children \(Scotland\) Act 1995](#) with its focus on minimum intervention and providing support to children in need is mirrored as the underlying theme of EEI
- [Getting It Right For Every Child \(GIRFEC\)](#), which has been developed since 2006, is now in statute through the [2014 Act](#) (Parts 4 & 5 were never commenced and are not in law but remain in practice under GIRFEC policy), and emphasises the ethos of



Kilbrandon within current youth justice policy. The GIRFEC approach upholds that intervention should be appropriate, proportionate and timely. It prioritises acting early on concerns or in response to a crisis to prevent escalation of concerns or deterioration in wellbeing, recognising children and family pressures and understanding the impact of these, and building on strengths. It emphasises that where planning is required to meet a child's wellbeing needs through the delivery of targeted interventions, this will be done through the single planning framework of the Child's Plan, which links support and activities to desired outcomes and requires professionals to work together and share information proportionately and appropriately.

- [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) was passed unanimously by the Scottish Parliament on March 16, 2021. It is anticipated that it will commence in October 2021, six months after it has received Royal Assent. However, the UK Government has highlighted issues pertaining to specific sections 19-21 and are currently considering what action may be required to address the noted concerns. This may result in the delay of the Bill becoming law and its commencement.
- [Preventing Offending: Getting it right for children and young people who offend \(2015\)](#) includes EEI as part of its advancing WSA agenda. The emphasis is on supporting partners to integrate EEI with the 2014 Act and other relevant legislation such as [Data Protection Act 2018](#), [Human Rights Act 1998](#) pending legislation in the form of the [Age of Criminal Responsibility \(Scotland\) Act 2019, \(commencement date to be confirmed\)](#). Practice must continue to evolve in order to support and promote an improvement culture among national and local partners. The strategy also emphasises the need to maximise the opportunities for and encourage greater use of diversion from the Criminal Justice System (CJS) and formal processes, to respond swiftly and bring action on offending behaviour much closer to the offence.

## 4. EEI

EEI is a voluntary process in which children and their families must be provided with the information to enable them to make considered decisions about their involvement in any interventions offered to address offending behaviour. It should not lead to unnecessary interventions into the lives of children set out by [UNCRC Article 16](#) which stipulates that no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation and that the child has a right to the protection of the law against such interference or attacks. In addition, further formal action is not always required and the first consideration of EEI should be whether there is a need for any response or has the matter been sufficiently addressed and a police formal warning is sufficient. Any identified needs should be met through the offer of support from universal services including education, health and employment/training where possible. Given the potential impact offending behaviour can have on the lives of children, their families, the wider community and those harmed and affected by such behaviour, it is important that EEI provides a clear, consistent and credible response to such behaviour. Ultimately, it should lead to improved outcomes in the lives of children, not merely desistance from offending behaviour but also promoting their development into confident individuals, effective contributors, successful learners and responsible citizens.

The implementation and delivery of EEI must be in line with updates and changes in legislation to ensure compliance and identify any necessary adaptations or developments as required. Following the enacting of the [Data Protection Act 2018 \(DPA\)](#) which incorporates the [General Data Protection Regulations \(GDPR\)](#) from May 2018, it is crucial to ensure that all processes are in line with this legislation as well as the [Human Rights Act \(1998\)](#), particularly Article 8 right to respect for private and family life, and all articles of the UNCRC. For EEI, Information Sharing Protocols (ISP) should be checked with your organisational Data Protection Officer to ensure compliance with legislation. In relation to the Scottish Government's proposed Information Sharing Bill the Deputy First Minister [advised on 19/9/2019](#) that this Bill will be withdrawn and the [Children and Young People \(Scotland\) Act 2014](#) Parts 4 and 5 which had not been enacted in relation to Named Person Service and the Child's Plan will be repealed though remain policy. The Scottish Government had proposed to [develop a policy overview](#) and separate practice guidance which covers named person, assessment of wellbeing, Child's Plan and information sharing which was delayed by the impact of covid-19. However, this is anticipated to be progressed in 2021.

In addition, once the *Age of Criminal Responsibility (ACR) (Scotland) Act 2019* is enacted no child under the age of 12 years will be held criminally responsible. Whilst ACR has yet to be implemented, from November 29, 2019 SCRA will no longer refer any child under 12 years to a children's hearing on offence grounds. Until the ACR (Scotland) Act 2019 commences Police Scotland may still be referring children aged eight to 11 years to SCRA on offence grounds where they consider the necessary criteria to be met.

The pending increase in the age of criminal responsibility has been considered in relation to EEI and the updated EEI Core Elements (2020, pending publication). The position taken is that once the ACR has been increased to 12 years, those children (eight to 11) whose behaviour would have been responded to as offending behaviour prior to the increase may still be referred to EEI. Where EEI is deemed as the appropriate pathway to a proportionate response to such behaviours then it is vital these children are not viewed as having committed criminal offences (United Nations Committee on the Rights of the Child, 2019). Any subsequent assistance or services provided must be done so in a child friendly, multi-disciplinary manner which reflects the needs of the child (United Nations Committee on the Rights of the Child, 2019). It may be that existing local systems and universal services can provide an early response to any child or children that would fall into this category and EEI is not required. However, a flexible approach which allows the right service at the right time to respond to the needs raised by the concerning behaviour rather than waiting until a child has been charged reflects early intervention and may prevent future contact with formal systems. Recording and reviewing all such instances should be undertaken to uphold children's rights from the moment of contact with the system, prevent net-widening and identify gaps in response to younger children resulting as an unintended consequence of raising the ACR.

The individuals harmed by the behaviours and actions of children referred to EEI or diversion will have a range of emotions and experiences and are often other children. Developing appropriate processes to ensure those harmed and affected are considered within interventions, which may involve restorative justice approaches, should be integrated into EEI provision. Proportionate information regarding the outcome of the alleged offence referred to EEI, whilst complying with data protection legislation is crucial, and clarity as to who shares this information with individuals harmed is necessary. Presently this is the responsibility of Police Scotland.



## 4.1 General Principles

EI focuses on the wellbeing needs of children aged eight to 17 years using the principles of GIRFEC:

- Assessments and supports offered should take account of the age and developmental stage of each individual, building up the child's skills, capacity and strengths, and where appropriate promoting supports for children and their families that can be universally accessed.
- Children who become involved in offending behaviour come from a wide array of social backgrounds and cultures, and have often faced a range of difficulties and adversities, which may have affected them to varying degrees. Thus, the responses required to support them must be varied and individualised, recognising their strengths and vulnerabilities.
- The majority of anti-social behaviour and youth offending behaviour takes place in areas of economic and social deprivation, where there are fewer opportunities for pro-social activity than in wealthier areas, and where social controls are frequently poor (Sepulveda Carmona, 2010).
- What can sometimes be described as anti-social behaviour by a child may fall within the parameters of normal adolescent behaviour, rather than intentional criminal behaviour and it is the system response that criminalises them.
- Many children charged with an offence never commit any further offences. This can be due to family's parenting skills, emotional support, pro-social values, peer influence and the maturational process.
- Unnecessary involvement in formal systems such as the Children's Hearings System, Criminal Justice System and social work can result in continued anti-social behaviour through labelling and stigmatisation.
- Some children who begin to display offending behaviour will, without the appropriate intervention and services, continue to come into conflict with the law

## 4.2 Models of EI

The majority of local authorities have developed multi-agency EI processes as an early intervention response to a child charged with an offence that may otherwise have automatically resulted in a referral to the Children's Reporter. There are two main EI models across the country:

- A multi-agency group decision making forum
- A lead contact who screens referrals, making some individual decisions and referring other children to an EI or multi-agency group/ Team Around the Child meeting (TAC).

Some local authorities predominantly use the latter, reserving the option to hold a multi-agency group meeting for cases that are more complex.

The models across the country vary with respect to the nature of the referrals discussed. In some areas, the multi-agency group considers anti-social behaviour referrals alongside offending behaviour, and in other areas, low-level wellbeing concerns are also considered.

The most important feature in any EEI model is that decisions are based on all available, proportionate and appropriate information from a range of agencies, and are timely and in proportion to the wellbeing needs identified. Wherever appropriate, children should be diverted from formal processes and supported within their community. In addition, the inclusion of the child and their parents is integral to any decision making and respects the parent's role in parenting, supporting and addressing aspects of their child's behaviour. This must be meaningful; thus, merely notifying after a referral has been received, and the decision as to what if any response will be taken only usurps the parental role and does not encourage collaboration or engagement. Nor is this in line with the positioning of UNCRC that States have a role to support parents.

The agencies involved in EEI models tend to vary depending on local arrangements, though most have representatives from social work, police and education. Many areas also have representatives from health, community safety, housing and third sector partners (e.g. Sacro, YMCA, Action for Children, Barnardo's).

EEI disposals include:

- Police direct measures
- Current measures are appropriate, no further action required
- Single agency referral - third sector partners, social work, education, health, fire and rescue are only some examples and as appropriate could undertake specific intervention or support such as restorative justice or substance misuse work.
- No further action - for a number of reasons it may be appropriate to take no further formal action in response to an alleged offence
- Referral to Scottish Children's Reporter Administration (SCRA) - although this should not be an alternative to offering support through EEI if appropriate and timely, but an option where compulsory measures of care may be considered necessary.
- In exceptional circumstances, it may be appropriate to refer a child to COPFS; however, this is unlikely if agencies are working together to identify the right children for EEI.

It is important that agencies and services involved in implementing EEI are able to provide a range of interventions as appropriate and proportionate for the specific child or children being considered. The intervention should fit the child as opposed to the child fitting the intervention and be delivered by the most appropriate service or agency.

### 4.3 Core Elements

For EEI to be effective, it must be aligned with the principles of GIRFEC and uphold the rights of children. It should enable timely and proportionate responses to alleged offending behaviour by children, which understands their behaviour in the holistic context of each child and their surrounding systems. The understanding that EEI is a voluntary process, ensuring children and their family are aware of this, and that they have a choice, whether they wish to participate in any intervention offered or not, is paramount. This reflects the position regarding the [Named Person Service](#), which is also a voluntary scheme and there is no obligation on children and families to accept the offer of advice or support from a named person. EEI should provide a proportionate and effective multi-agency information sharing, assessment, and decision-making forum that focuses primarily on the needs of the child and actively includes children and parents from the earliest opportunity. Whilst the child's best

interests are a primary consideration, this is not the only consideration as this does not override the human rights of others, whether as individuals or groups. Therefore, a considered and balanced approach is required.

**Sufficiency of evidence:** Police Scotland is responsible for the examination of the evidence in each case and ensuring that there is sufficient evidence to proceed with a case. This does not mean that there must be an admission from the child to police. It recognises that often, when in contact with the police, responses from children and parents may be affected by shock and emotionally driven due to stress and initial denials to police may be expressed. However, a different agency approaching at a later point may receive a more engaging and open response. It must be remembered that if referred to EEI then it is voluntary whether the child and their family agree to participate in whichever form of intervention is identified to meet their needs, although this does not preclude them being considered in the first instance.

The child must be charged in person and as appropriate in the presence of parents or legal guardian. Every child that is charged has a right to prompt and direct information of the charges as per [UNCRC Article. 40\(2\) \(b\) \(ii\)](#). United Nations Committee on the Rights of the Child (2007) outlines that this right also relates to when authorities make the decision to address the case through processes other than judicial proceedings; the child must be informed of the charge that may justify this approach. This is part of the requirement of Article 49 (3) (b) that legal safeguards should be fully respected. "Authorities should ensure that the child understands the charges, options and processes. Providing the child with an official document is insufficient and an oral explanation is necessary. Although children should be assisted in understanding any document by a parent or appropriate adult, authorities should not leave the explanation of the charges to such persons" (United Nations Committee on the Rights of the Child, 2019, p. 9).

**Suitability of Offence for EEI:** It is the responsibility of Police Scotland to identify cases suitable for discussion/referral to EEI. All offences should be considered for EEI unless they are excluded under:

- [Lord Advocate's Guidelines](#) to the Chief Constable on the Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children for under 16s
- Crown Office Framework on the Use of Police Direct Measures and Early and Effective Intervention for 16 and 17 year olds; or
- Police deem a referral to SCRA is necessary as compulsory measures may be required

Decisions made as to the suitability for EEI are primarily based on the gravity of offence and whether compulsory measures of supervision may be required.

**Notification:** The police should explain to a child and their parent/legal guardian (where appropriate) that cases may be referred to appropriate local partners, what this involves, how long it should take and what information may be shared:

- If under 16 parent/carer must be notified
- Consent to an EEI referral being made by Police Scotland is not required. However, consent is required from any child aged 16-17 years and not subject to a CSO
- Initial denial of the offence should not prevent the offence being referred to EEI
- Attitude of the child to police/parents should be recorded where possible

- The child and family/legal guardian should understand what EEI entails
- If the child is subject to a CSO or has a Child's Plan, the **lead professional** must be notified of the EEI referral
- As part of the Recorded Police Warning process

**SCRA check:** If a child has been referred to EEI process and it becomes known that they are subject to an open referral with SCRA then the offence must be forwarded to SCRA to ensure they have all available information to aid their decision making. However, this would not preclude offer of support to the child and their family in the interim whilst the formal process is followed. Establishing whether a child is an open referral to SCRA or subject to CSO can be checked as long as this is in accordance with data protection legislation as referenced earlier in this section.

**Multi-Agency Group:** Where multi-agency meetings are in operation, these should be held at minimum fortnightly in order to fulfil the aims and objectives of EEI (ten working days from the child being charged to meeting). Each local EEI arrangement should ensure that an appropriate range of agencies are involved as is relevant to their knowledge of the child being considered and reflect a team around the child meeting (TAC). Those in attendance at these meetings should have the necessary level of authority to both provide agency information to the meeting and to receive referrals from the meeting. In addition, best practice and a process which upholds Article 12 of UNCRC would include discussion with the child and their parent/legal guardian as soon as possible following receipt of referral to EEI to explain the purpose and role of EEI, gather their response and views on the referral, what response would be helpful as well as their inclusion in any meeting and decisions. The minimum expected would be discussion and contact with them for their views in response to the needs identified from the referral and what they view as being helpful. Outcome of any multi-agency meeting should be discussed with the child and their parents as soon as possible, preferably in person and within five working days.

**Practitioners:** They must use their professional judgement when sharing information between agencies and ensure that the information shared is proportionate and relevant to the identified wellbeing concern. As stated, ISPs should be updated and reviewed to ensure compliance with legislation.

**Decision-making:** Decisions regarding children involved in offending behaviour should be made in a timely manner, if they are to be effective. The assessment of the child needs to be based on the GIRFEC national practice model. It should be holistic and needs led, while also being proportionate to the gravity of the alleged offence and level of concerns regarding the child.

If the disposal of the EEI process is that compulsory measures of supervision are required, the police should submit the Standard Prosecution Report (SPR2) to SCRA with additional information from EEI advising the reasons for the referral. This should be done within five working days. A disposal to SCRA from EEI does not preclude the offer of support to the child and family if appropriate. If referral to SCRA is required on welfare grounds solely then agency processes should be followed or the referral made by the lead professional, if there is one allocated to the child.

A child should not be re-referred to the multi-agency group/TAC for the same alleged offence, even if they have declined to engage with services offered. If the relevant agency

has concerns over the wellbeing of the child then they should follow their agency's protocols in deciding whether further referral is required to social work services, or SCRA if compulsory measures of care are necessary.

**Communication:** Best practice would be to gather the views of the child and their parent at the earliest opportunity regarding the alleged involvement of the child in the offence referred to EEI. [UNCRC Article 12 \(1\)](#) states that the child has the right to express their views freely in all matters affecting them, and these views being given due weight in accordance with the age and maturity of the child. Establishing their responses to the charge, opinions as to any needs where they feel assistance would be beneficial or why they feel this is not required should be ascertained. Inclusion in the multi-agency/TAC meeting would also be in line with ensuring clear and transparent processes or opportunity to discuss the outcome of any meeting where they have declined to attend. The child and their parents should be notified in person or in writing of the EEI outcome within five working days of the decision.

The outcome of the EEI process should also be reported to the person harmed with no information regarding the specific child or children involved but rather explaining the EEI process and possible outcomes, unless the provision of the information would be detrimental to the best interests of the child concerned (or any other child connected in any way with the case). This requires timely information being fed back to the Reporting Officer. It is the responsibility of Police Scotland to ensure this information is passed to the Reporting Officer.

**Information sharing:** Ensuring EEI complies with [DPA \(2018\)](#) is crucial and the [Information Commissioners Office](#) provides a range of guidance to support adherence with the legislation. A review of EEI processes against the legislation and consultation with the appropriate service/agency legal representative or Data Protection Officer for direction is recommended.

**Consent:** GDPR defines consent as “any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

The [Data Protection Act 2018](#) and [GDPR](#) are clear that consent should only be sought where it is the most necessary legal basis for sharing information and there is a genuine choice. Where information will be processed irrespective of consent then it is not appropriate to seek consent, as it is [misleading and unfair](#). Where there is a clear position of power, then such bodies (e.g. public bodies) should avoid relying on consent unless they can evidence that it is freely given. As stated within this guidance, checking your current practice against DPA 2018 for information sharing and consent practices will ensure adherence to the legislative requirements and where updating may be required. ICO provides detailed guidance regarding the [GDPR and consent](#).

#### 4.5 EEI - 16 and 17 year olds

With regard to EEI for this age group there is a more limited range of offences than those considered for the under 16 age group and this may go some way to explaining the continued low numbers of 16 and 17 year olds being considered by EEI. In addition to EEI, Recorded Police Warnings (RPW) are also available as a direct measure for 16 and 17 year olds not subject to CSO.



The present RPW Scheme was implemented in January 2016. RPWs can be issued to all adults, which include children aged 16 and 17 not on CSO. The scheme aims to address in a more proportionate and effective manner minor offending behaviour that previously was reported to COPFS and resulted in either a non-court disposal or no action being taken due to the minor nature of the offence and circumstances. Each time a RPW is issued it should be accompanied by the submission of a wellbeing concern form to relevant partners who may consider any concerns that have not been directly addressed by the administration of a RPW. It will be the decision of local partners as to whether further intervention is required and offered to address any wellbeing concerns identified. Again, it is important to ensure ISPs are in line with legislation.

For 16 and 17 year olds who are not subject to a CSO and commit an offence out with the guidelines for RPW and EEI, these children will be referred directly to the PF where Diversion from Prosecution may be an option and police should include this as a consideration within the remarks section of the SPR2.

#### 4.6 The Children and Young People (Scotland) Act 2014

As noted within this section, Parts 4 and 5 of the 2014 Act will not be enacted and will be repealed, however, there has been no change to the [GIRFEC](#) policy, which enshrines the Named Person Service (NPS) and Child's Plan. In some local authority areas, they will have been providing an NPS to children for some time, thereby having a point of contact for families to seek information, support and guidance in relation to their child if desired. There is no compulsion for families to engage with NPS and nor should any decision not to utilise the NPS be viewed in a negative light. The provision of an NPS is in line with the [UNCRC](#), which clearly states the role of the state in supporting parents and guardians in undertaking their roles and responsibilities to ensure every child has an upbringing that provides care and security and is respectful of their rights and individuality. It outlines how parents should fulfil their responsibilities and is clear that the state should provide parents with the necessary level of support they need to fulfil their role. Parents have legal rights and responsibilities that they have a duty to fulfil to support their child growing up.

It is also important to note that irrespective as to whether the NPS is offered through policy or legislation it does not replace existing statutory processes such as child protection, nor does it preclude referrals to social work services where there are welfare concerns in relation to a child.

The process of referring a child to the Children's Reporter is unchanged by [the 2014 Act](#). If a wellbeing assessment indicates that a child is in need of protection, guidance, treatment or control, and that it might be necessary for a compulsory supervision order to be made to ensure that the child's wellbeing needs are met, as specified in the [2011 Act](#), a referral should be made to the Children's Reporter.

## 5. Diversion

In Scotland, the decision to prosecute an individual for a criminal offence rests with COPFS. Decisions on how to respond to any allegation reported for consideration to the PF are stipulated in the COPFS [Prosecution Code](#) and include consideration of the overall



circumstances of the case, the nature of the alleged offence as well as the impact upon any victim(s).

Where the nature of an offence does not demand prosecution in court the PF has the option to utilise diversion as an option of prosecutorial action in order that a meaningful intervention can be delivered to address the identified needs and risks for that child. Diversion in the context of this section specifically refers to diversion as an option of prosecutorial action. 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 is a prosecutorial decision as to whether an individual and offence is appropriate for referral to diversion schemes; therefore it is inappropriate for local authorities to have exclusions based solely on the category of offence.

In relation to under 18s reported to the PF 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 will be given to referring the case for diversion.

For any child (which includes all under 16 years and those 16 and 17 year olds subject to CSOs and jointly reported) “there is a presumption that the child will be referred to the Children’s Reporter in relation to the jointly reported offence” (CoPFS, 2015, p. 8). Where the PF has decided that this presumption should be overridden and prosecution is in the public interest, the following factors are given careful consideration:

- Where a child is 15 years or over and a disqualification from driving may be the likely disposal of the court

In all cases:

- Where 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 their 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 of 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 developmental issues (e.g. the child has ADHD or learning difficulties) that may indicate the child’s needs and behaviour would be best met within the Children’s Hearing System.

When the decision has been taken that a jointly reported case will be prosecuted it would generally not be suitable for the case to then be considered for diversion from prosecution.

“However, in exceptional cases it may be that diversion is the best option for a jointly reported child” (CoPFS, 2015, p. 9).

### **Highlighting suitable cases**

Police and social work can highlight to the PF the cases they feel may be suitable for consideration of diversion. Police should add comments to the Standard Prosecution Report (SPR) antecedent details section, having considered a range of vulnerabilities such as whether the individual has a learning difficulty or mental health issues, their response to the current matter and parents where known, education/employment/ training and substance misuse issues. These are some of the issues which may be impacting upon the individual being reported and their alleged involvement in the current matter. In addition, police should record in the SPR remarks section whether, in their view, consideration for diversion may or may not be appropriate.

Social work practitioners may also have a number of opportunities to highlight a 16/17 year old to the PF for diversion such as:

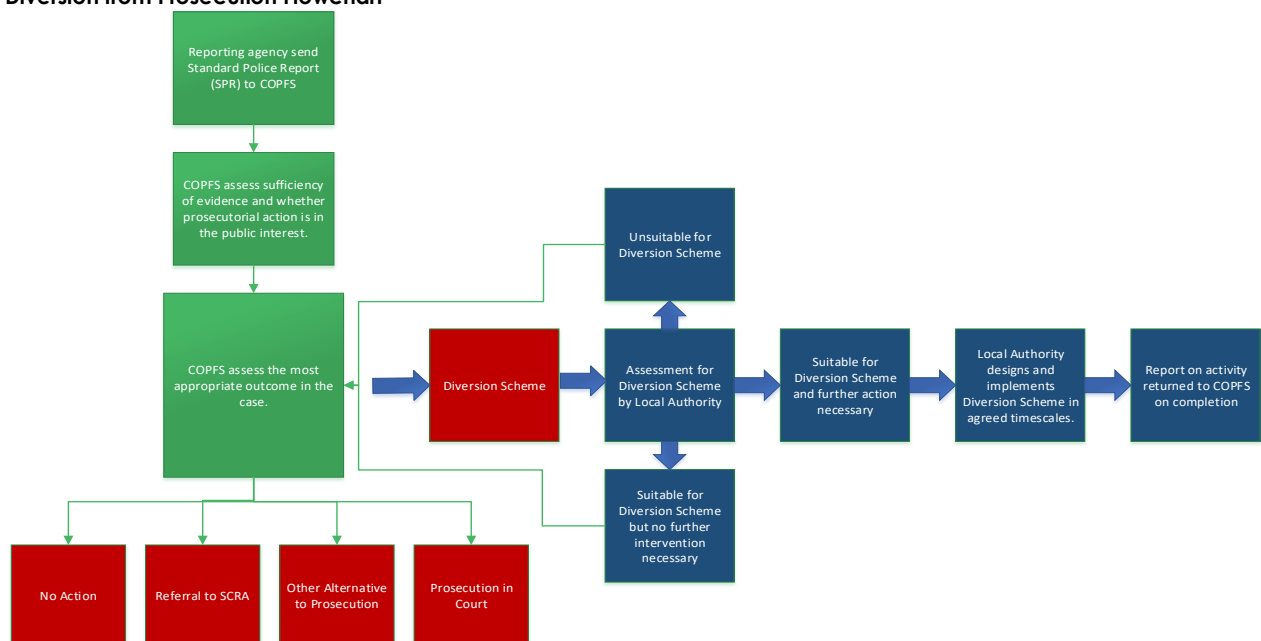
- when they have been held in custody to appear at court (direct phone contact to PF in this instance is recommended);
- working with individuals who advise they have been charged; or
- through information on Police Concern Forms.

In relation to the latter two scenarios, the PF youth diversion e-mail inbox [NationalCPSCRA-WSA@copfs.gov.uk](mailto:NationalCPSCRA-WSA@copfs.gov.uk) can be used to highlight possible cases for consideration of diversion for 16 and 17 year olds and discussion should take place with the diversion link in the appropriate local authority as to who should flag cases. This should include information to enable PFs to identify the case and, where possible, the PF number if known. HERE

The evaluation of the WSA (Murray, McGuinness, Burman, & McVie, 2015) recommended that diversion from prosecution should be the default position rather than prosecution for 16 and 17 year olds. Diversion can be a useful intervention with positive outcomes in respect of reoffending (Inspectorate of Prosecution in Scotland, 2018). In Scotland youth justice diversion schemes are often a collaborative approach where statutory agencies (mainly social work) will be responsible for the oversight and initial point of contact with COPFS and either specific or a range of third sector partners delivering the interventions on a bespoke basis.

## Diversion Process

### Diversion from Prosecution Flowchart



(Community Justice Scotland, 2020)

Once the PF has made the decision to divert that individual, they will write to them to explain and offer the opportunity to take part in the diversion from prosecution scheme. The local authority is not assessing the suitability of the offence but the individual child and their wider situation, as well as their agreement to participate. It must be noted that any information provided by the child in relation to the alleged offence of which they were charged during any part of the diversion process cannot be considered by the PF, should a decision to prosecute be taken at a later stage or if the individual declines to participate in the diversion scheme. PFs also have discretion in particular circumstances to waive the right to prosecution as soon as a diversion from prosecution is offered and accepted (Community Justice Scotland, 2020).

The PF may become aware of further information either following the referral to diversion scheme or during the period of diversion intervention taking place, such that they deem diversion to no longer be suitable and may withdraw this and take a different prosecutorial action. In such cases they will notify the individual involved and the diversion service of their decision and mark the case accordingly.

Prior to the individual consenting to participate with any diversion opportunity it is important they are provided with a full explanation of the process, the decisions they can make and the potential range of outcomes which must cover:

- It should be clearly explained that they can seek legal advice before deciding whether to participate in any diversion opportunity (United Nations Committee on the Rights of the Child, 2019, p. 5).
- The decision to engage with diversion is voluntary and they can choose not to participate
- Ensuring the child understands no information they give within the diversion process relating to the alleged offence can be used by the PF at any time should they decline, withdraw or the diversion be unsuccessful. Information provided in relation to other potential offences which is freely given may be used by PFs.
- For inclusion within the diversion scheme, whilst concepts of guilt or innocence are not required, the child should acknowledge some level of responsibility for their role within the alleged offence (United Nations Committee on the Rights of the Child, 2019, p. 5).
- The expectations of them should they decide to engage, the timeframe for intervention and the potential outcomes whether this is deemed successful or unsuccessful (United Nations Committee on the Rights of the Child, 2019, p. 5).
- That it is the PF's decision as to whether a diversion is successful or not, though the diversion worker will submit a recommendation within their report to aid the PF's decision making.
- Clear explanation regarding where information will be shared in respect of public protection and/or risk of harm to self and the action likely to be taken
- The impact on disclosure for the duration of the diversion and once completed.

All assessments for diversion with 16 and 17 year olds should reflect the GIRFEC practice model as outlined within this section and reflect a holistic understanding of the child and their wider situation. Assessments should also include:

- The child's understanding of the referral from COPFS and their views of this
- The child's circumstances, thinking and behaviour in relation to the alleged offence though details within the SPR must not be shared with the individual due to data protection.
- Understanding of impact upon others such as victims, family, community
- The individual's willingness to be involved in the diversion from prosecution process. This may include activities such as advice, support, intervention to address needs and risk, mediation, restorative practices and referral to other agencies.
- What support the child identifies that would be helpful for them to be included in any diversion
- The child's expectation of the process and outcome of diversion from prosecution (Community Justice Scotland, 2020).

### Diversion from Prosecution Assessment Report

Once the assessment has been undertaken there are three options available:

Diversion From Prosecution Assessment Outcomes (Community Justice Scotland, 2020)

Outcome	Issues/Circumstances (examples)	Case Pathway
Individual <b>NOT</b> suitable for diversion from prosecution	<ul style="list-style-type: none"> <li>Individual did not attend for assessment.</li> <li>Individual has changed their mind.</li> <li>Agency information indicates unsuitability.</li> </ul>	A report is compiled by the LA and returned to COPFS.
Individual <b>IS</b> suitable for diversion from prosecution, <b>BUT NO FURTHER INTERVENTION IS REQUIRED</b>	<ul style="list-style-type: none"> <li>The issue the individual was experiencing has been addressed and/or appropriate support is in place.</li> </ul> <p><b>NOTE:</b> 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>	
The individual <b>IS</b> suitable for diversion from prosecution.	<ul style="list-style-type: none"> <li>Diversion from prosecution assessment will indicate the proposed intervention to be undertaken with the individual and the timescales involved.</li> </ul>	

Once the assessment has been completed then an assessment report must be submitted to the PF within **20 days of receiving the referral**. The assessment report should include a view as to whether the child is suitable to participate in the diversion process or not as detailed within the table above. The report should also detail the reasons for this and when intervention is appropriate, what this will involve (including anticipated timescale) and the intended outcomes of any intervention. Where the assessment indicates a level of complexity that would suggest a longer period than the usual three months is required, this should be discussed with the PF prior to submission of the report.

Where a child has a Child's Plan, any referrals for services, such as diversion, need to be documented. If there is a Child's Plan in place and a lead professional, then communication and liaison with them is crucial, to determine who is best placed to undertake any diversion assessment or intervention and share appropriate information.

In practice, following the assessment report being submitted to the PF, where intervention has been identified this should be progressed. If there is any concern whether the PF is

unlikely to accept the assessment as suitable for diversion, then discussion should take place between the diversion coordinator and the PF prior to starting intervention. HERE

## **Diversion Interventions**

Diversion schemes should link with the available resources in local areas as identified by the needs of the individual child. Interventions and supports may be delivered on either an individual or group work basis. Intervention should be flexible and delivered in a manner that is effective and meaningful for that child and builds their capacity as well as seeking to reduce the likelihood of future involvement in offending behaviour. Although intervention may utilise a range or combination of methods such as cognitive behavioural therapy, mentoring, practical supports, and family systemic therapy, any intervention should be in line with the Good Lives Model and build on an individual's capacity and self-autonomy. The intensity and frequency should not be based on a set programme of time but reflect an individualised response that is proportionate to that child's needs and risks which will have been identified at the assessment point, in conjunction with the child as well as concerns that may become evident during the intervention period.

The delivery of any intervention may include one or more services which could be either or both universal or specialist, and this should be in response to the needs of the child. Where a child is already involved with services discussion should take place with any lead professional to identify and agree the most appropriate service and worker to take forward any diversion intervention. Any child aged 16/17 years old who is subject to a [Community Payback Order \(CPO\)](#) will have an allocated Criminal Justice Social Worker and a supervision requirement as part of their CPO. Being subject to a CPO does not preclude a child from being considered for diversion for other offences should the PF deem it appropriate as further intervention could be included within the existing interventions. In addition, where a child undertaking diversion becomes subject to remand in custody for other matters then discussion should take place with the PF as to the appropriateness and meaningfulness of the diversion intervention continuing. If agreed, then discussion should take place with the individual and where possible should be supported.

Consideration of victims should be included, whether this relates to actual or potential individual victims, community implications and where possible restorative justice responses should be considered which directly include those who have been harmed and those who have harmed. Not all local authority areas are able to access or utilise restorative justice interventions. Where this is not possible, then restorative justice approaches should be included within interventions. Please see [Section 13](#) for further information on restorative justice and restorative practices in youth justice.

Following completion of the diversion from prosecution intervention, a report evidencing the level of engagement and child's participation relevant to their developmental capacity should be submitted to the PF.

## **Completion Report**

Diversion interventions are in the main completed within three months of the assessment report being returned to the PF. There are three outcomes to any diversion intervention as outlined in the table overleaf:



Outcomes at conclusion of a diversion from prosecution (Community Justice Scotland, 2020)

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

**The completion report** should focus on the depth of engagement from the child in consideration of their capacity and ability to participate and engage. Reflecting on how the intervention was undertaken, and how the child's participation has addressed the areas of need and risk from the initial assessment is crucial. Stating the number of sessions attended provides no analysis or information as to what the child has taken from the intervention or contributed to it. Highlighting strengths, whether developing or existing, and evidence of application of any of the learning from the intervention out with sessions should be included. Noting areas of unmet need and attempts to address these or limitations to doing so should also be reflected, and where referrals to other services for support beyond the diversion intervention have been made is important. Completion reports or a progress report where a longer period of extension has been agreed with the PF should be submitted no later than three months after the diversion intervention started.

Not all those referred to diversion from prosecution will successfully complete the intervention easily and some may not engage at all. It is particularly important that every effort is made to support children to participate, whether that involves numerous home visits or repeated attempts to engage them, requiring persistence and tenacity on the part of the workers. Recognising they require additional supports merely by the fact of their being a child in an adult system is crucial. Their cognitive abilities are still developing and may be compounded by additional factors such as a learning difficulty (often undiagnosed); becoming homeless during their participation; being susceptible to peer influence; breakdown in family situations, and employment or college commitments; or ignoring the situation in the hope it goes away without an appreciation for the possible consequences which may include prosecution in court (McEwan, 2017). A flexible approach that is transparent by being clear about the expectations of the child's participation, what is acceptable and what is not and the consequences once the boundaries have been overstepped. is necessary. How this information is explained and the opportunity to remind the

individual are both important to their ability to process and remember and must consider the speech, language and communication needs of the child.

Where the decision to return a referral to the PF has been taken, the reasons why, reflection of any work undertaken by the individual and any possible solution should be fully outlined to the PF.

Once they have the completion report the PF will make a decision as to whether any further prosecutorial action is being taken or the case is closed. It is then the PF's responsibility to notify both the child and the diversion coordinator on the final outcome of the case. Following the completion of any diversion intervention the child should be supported to follow up the outcome of their diversion engagement where this has not been advised to them, as they may not feel comfortable or confident in contacting the PF themselves.

## 6. Conclusion

Both EEI and diversion provide opportunities to ensure children receive the right help at the right time in a proportionate and holistic manner, which can avoid labelling and stigmatisation. It is important that these opportunities take recognisance of the individuality of each child and responses are flexible and adaptive to their needs, rather than fitting the child into available services. Confidence in doing nothing where that is appropriate is required, as well as clear and transparent processes that uphold rights and build strengths. Collaborative working between and across agencies as well as meaningful inclusion and participation of children and their parents must be central to EEI and diversionary practice.

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