

Effective practice in Diversion from Prosecution

Ross Gibson, CYCJ

Why divert?

Evidence for the efficacy of diversion (in its broadest sense) can be found through the Edinburgh Study of Youth Transitions and Crime, where longitudinal studies of criminal behaviour have consistently pointed to the limited impact that prosecution and contact with judicial systems has upon desistance. Furthermore, Hartzell and Novak (2022) and McAra and McVie 2007, 2014, 2022 each highlight the negative, criminogenic effects of contact with formal judicial processes. These not only increase likelihood of further conflict with the law, but result in stigma which leaves young people feeling unable, or unwilling, to engage in society.

Diversionary practice can be rights-respecting practice. Obligations under Article 37 of UNCRC are not the only human rights issues relevant to this area of practice, and other international treaties are of note. Practitioners should remain mindful of General Comment 24 (2019), which calls on swift and diversionary methods of addressing alleged criminality. Section 58 of the Riyadh guidelines similarly calls for the availability of diversionary measures, whilst Rule 11 of the Beijing Rules goes further by expressing the right for juveniles to receive holistic supports in lieu of prosecution, as well as the need for non-interventionist approaches to be considered.

The policy refocus at COPFS and Diversion from Prosecution's (DfP) inclusion within both the youth justice vision and action plan and the Scottish Government's vision for justice in Scotland have each contributed towards a growth in DfP being utilised. Data from 2022 points to a substantial increase in the frequency of this measure with 40% of participants aged 16-20 years old, yet this still lags far behind the use of similar measures on the continent where prosecution is used far more sparingly (Dünkel, 2022). This trend in some parts of Europe is perhaps a contributing factor in their reduction of the youth justice population (McAra and McVie, 2018), with diversionary approaches resulting in lower rates of recidivism. In light of this, the case for the increased and efficient DfP is evident.

What does effective practice look like?

DfP could include a wide variety of interventions including mentoring, practical support, motivational interviewing and much more. In some instances, a very light touch approach may be merited, and indeed there is evidential basis for this. Regrettably there is limited research into the efficacy and benefits of these supports within the context of DfP, and - as has been argued elsewhere - specific guidance on what effective diversionary policy practice ought to consist of is limited.

However, Thomas et al (2016) propose a flexible and creative service that responds to the needs of the individual. Like existing DfP guidance, they favour a bespoke care plan rather than a predetermined suite of interventions. Their research also calls on education to feature within diversionary practice. Drawing on existing literature, a number of features should be incorporated within the distinct model of DfP in operation in Scotland:

- Maximum diversion to universal services: mindful of the corrosive impact of contact with formal systems, practitioners should promote the greatest support from universal, non-stigmatising services possible. Moreover, DfP need not be delivered by social work or third education providers and health partners may be best placed to offer the help that is required.
- Minimum intervention: when intervention is required this should be the least intensive or intrusive approach possible, and for the shortest period of time necessary.
- Address unmet need: in line with national guidance, interventions and support offered should respond to the underlying factors that have contributed to the individuals coming into conflict with the law. Poverty and other issues relating to deprivation should be addressed. Yet practitioners should be mindful that a time-limited intervention such as DfP is unlikely to be able to address all areas that require attention; signposting to universal services may be necessary.
- Respond to risk: with an increase in the number of people receiving DfP following an allegation of violence or sexual harm, there may be instances where a more comprehensive approach to risk is required within DfP. Whilst this must remain proportionate, principles underpinning risk management should be considered.
- Link to pro-social lifestyles and activities: promoting and supporting engagement in activities which provide healthy, age appropriate means to enjoy a good quality of life
- Avoid net widening: inclusion criteria for inclusion in DfP services should be robustly adhered to in order to ensure that children and young people are not unnecessarily pulled into a quasi-formal judicial process which replicates the stigmatising effects of the formal judicial system. Liaison between local authorities and COPFS may be required in order to achieve this.
- Avoid labelling: mindful of the labelling effect of contact with justice services, DfP should seek to both minimise contact with the justice world (by using alternative venues, for example) and encourage a non-criminal identity for those experiencing DfP, by building on strengths, talents and other resources.
- Respect and uphold human rights: those coming into conflict with the law have often faced barriers to this happening. Practice within DfP should seek to minimise and mitigate this. For example, use of CYCJ's new guide to the WSA may help children understand what to expect from DfP.
- Collaboration and communication with partner agencies: as highlighted within CYCJ's practice guide, communication and collaboration with colleagues from Police Scotland, COPFS and third sector agencies is necessary in order to instil confidence in the delivery of DfP, and to achieve positive outcomes. This is particularly important when supporting individuals who may pose a high risk of harm, or whose circumstances are particularly complex.
- Finally, practitioners may want to seek informal support and peer learning through the Diversion from Prosecution Practitioner's Forum.