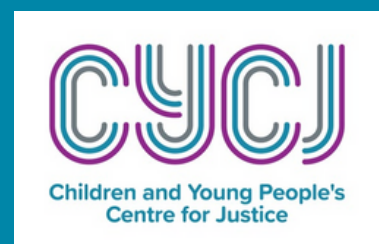


CHILDREN AND YOUNG PEOPLE IN CONFLICT WITH THE LAW: POLICY, PRACTICE AND LEGISLATION

Section 11: Diversion from Prosecution

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1. Introduction

Whilst a prosecutorial option for several decades, and a component of the Whole System Approach (WSA) since its inception, Diversion from Prosecution (DfP) has received limited attention in comparison to other strands of practice. This neglect is echoed amongst existing and current literature.

The use of DfP has increased in recent years following policy changes within the Crown Office and Procurators Fiscal Service (COPFS) and the revision of the Lord Advocate's guidance. The ambition of ensuring efficient and effective justice as part of the Justice Vision and the [Renew, Recovery and Transition](#) agenda may also increase the use of DfP in the coming years. In light of this, a section dedicated to practice in this area is warranted.

Whilst the contents of this section are as current as possible, it should be noted that the recently published [joint review of diversion](#) may well lead to a range of changes to the process through which DfP is delivered. The 32 recommendations contained therein are likely to result in slightly different approaches to certain situations, as well as improve multi-agency communication between partners, accused individuals and those who have been victims of crime. A working group consisting of various stakeholders has subsequently been set up to take heed of, and propose responses to, the review.

1.1 What is Diversion?

Defining diversionary practice is a difficult task, with Benbow (2019) and Brown (2019) noting that the term is vague, and often varies depending upon the context within which it is used. The phrase has been used in various contexts across the youth justice arena, blurring the distinction between the various initiatives to which the label 'diversion' has been attached. Broadly however, the term diversion is used to describe processes, practices and policies which provide alternative means of responding to episodes of offending behaviour other than through the penal mechanisms of being charged, prosecuted and sentenced. The practical means by which this is achieved across Europe vary considerably, with lesser or greater contact with formal judicial systems (Dünkel, 2022).

In the United Kingdom the uptake and popularity of such approaches has waxed and waned, with the era of responsibilisation and neo-liberal assaults upon childhood ending the pragmatic, diversionary approach seen through the 1980s (Bateman, 2020; Brown, 2019). The introduction and advancement of the WSA across Scotland has subsequently seen a greater willingness to utilise diversionary practice (Benbow, 2019; Gillon, 2018), further demonstrating the intermittent and cyclical nature of Scotland's relationship with diversion.

When applied within generic practice with children in conflict with the law, or exposed to risk, it can mean the provision of support in lieu of referral to the Principal Reporter. Similarly, literature referring to diversionary activities or approaches may allude to Early and Effective Intervention (McAra & McVie, 2018); see [Section 10](#) of this guide for more information. Moreover, within policing and legal circles the broader term 'diversion' has been used to refer to a variety of procedures including fixed penalty notices, referral to counselling and other similar measures (Richards, 2014). Internationally, the phrase 'diversion' has multiple meanings and interpretations (see: Cowan, Strang, Sherman, & Munoz, 2019; Reddy, 2022; Stevens, Hughes, Hulme, & Cassidy, 2022), resulting in cross-border comparisons being difficult to undertake.

In light of this confusing and amorphous landscape it is important to specify exactly what this section relates to: namely, the mechanism by which prosecutors are able to refer an individual to social work or other identified agency in lieu of the individual being prosecuted, or facing other prosecutorial proceedings. It is a decision that can be taken when it is deemed an appropriate means of addressing the underlying causes of alleged offending. In Scotland, this is referred to as Diversion from Prosecution (DfP). As a prosecutorial option it has the twin aims of providing an appropriate person-centred response (based on the circumstances of the individual and the alleged offence) without the need to enter formal judicial proceedings, whilst also delivering a swift response to said behaviour and thus attempting to prevent further conflict with the law.

DfP is one of multiple approaches that Scotland has adopted in order to divert children and young people away from the judicial arena. These steps have coincided with a reduction both in the number of children being referred to the Principal Reporter on offence grounds and of the number of children aged 16 or 17 appearing in court (McAra & McVie, 2018, 2022). It is an example of a policy shift having a material impact upon children's lives.

This section primarily focusses on the policy, practice and research relating to children and young people who are diverted from prosecution; however, much of the content is also relevant to adults. It will also be of interest to those who wish to know more about diversionary practices more generally. The content is somewhat skewed towards local authority social work practitioners, and their colleagues in the third and voluntary sectors. That being said, professionals within the field of prosecutorial services, police and beyond will find content within this section that will enhance their understanding of DfP.

1.2 Why use DfP?

The benefits of DfP are many and provide varied opportunities for some within the DfP arena to improve their situation. These benefits provide strong encouragement to justice organisations, statutory bodies and political decision makers to support the increased use of such an approach.

They include, but are not limited to, the following:

- **For the accused person:** access to support and assistance at an earlier stage, rather than having to await the conclusion of criminal proceedings; the opportunity to avoid a criminal conviction which may hinder employment opportunities and lead to other adverse outcomes
- **For the person who has been harmed:** avoidance of a lengthy wait for criminal proceedings to take place; not having to give evidence in court; the opportunity to take part in restorative approaches (this is only available in some parts of the country)
- **For the police and court:** a reduction in court business; fewer police officers spending time in court providing evidence; fewer witnesses being called to court; reduction in reoffending rates; greater time to spend on more complex cases

- **For social work and support services:** the opportunity to deliver support at an earlier stage; a reduction in screen-based tasks thus providing greater opportunity to spend time with individuals
- **For the state:** financial savings; reduced offending; improved wellbeing

1.3 Who is DfP for?

DfP has traditionally been thought of as a prosecutorial option reserved for young people and women. Similarly local provision has led to the belief that only particular types of crimes can be dealt with through this mechanism, and in limited areas of the country. These views are inaccurate, and COPFS will utilise DfP where it is the most appropriate course of action, based on the circumstances of the parties involved. The ultimate decision over the use of DfP rests with COPFS.

1.3.1 All ages

As Smith (2021) notes, diversionary approaches have often been adopted in response to youth crime given the reduced responsibility that children and young people are felt to possess. Evans, Raynor, and Heath (2022) make a similar argument, pointing to the lack of maturity amongst young individuals, and their limited agency to affect circumstances in their lives. In Scotland the updated [sentencing guidelines](#) reflect a growing recognition of these factors amongst the judiciary. Whilst earlier studies of DfP in Scotland suggest that some stakeholders have viewed that option as one solely suitably for younger people (Bradford & MacQueen, 2011; Robertson, 2017) this ought not to be the case, with Gibson (2019) highlighting [policy changes at the Crown Office and Procurator Fiscal Service](#) which have altered the way in which decisions are reached.

These policy changes now mean 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 best outcome for the individual.

This has the effect of making DfP a prosecutorial option for all individuals, of all ages. The impact of this development can be found in the [2020-21 Criminal Justice Social Work Statistics](#) (Scottish Government, 2022) which demonstrates the increase in use of DfP, particularly amongst the adult population.

1.3.2 All offences

Diversification approaches for children and young people have traditionally been adopted due to a belief that the behaviours which bring them into conflict with the law are commonly of a less harmful nature. This latter point - whilst perhaps historically accurate to some extent - does not reflect contemporary practice in this field, with the [Diversion from Prosecution guidance](#) explicitly noting that the nature of the offence is not the primary factor when considering who receives DfP. Rather, DfP is a response that may be considered for all accused persons and can be utilised when it is the most appropriate option given the circumstances surrounding the offence, and the individual concerned.

1.3.3 All areas

The creation of national guidance was in some way a response to the 'postcode lottery' of DfP provision that had existed across Scotland for many years. Due to local practices and urban myths relating to inclusions and exclusion criteria, uptake of DfP had traditionally been patchy across the country (Benbow, 2019; Bradford & MacQueen, 2011). This may also relate to the nature and quality of existing relationships between the various agents in the diversionary process, including police officers, COPFS and social work practitioners (Murray, McGuinness, Burman, & McVie, 2015). These connections have been lost somewhat following COPFS's decision to adopt centralised marking in most cases (Maglione, Buchan, & Robertson, 2020) although this ought not be the case for those under the age of 18, with a smaller national team dealing with the large majority of police referrals. The situation is compounded by inconsistent rates of referrals for children and young people, with some local authorities reporting a steady rate of DfP cases, whilst for others this occurs more sporadically (Benbow, 2019)

The 2020 DfP guidance responded to this by calling for the availability of DfP support in all areas of the country, with a bespoke level of care provided irrespective of location.

1.4 Responsibility

As Robertson (2017) illustrates, those involved in delivering DfP have often held competing and contradictory positions with regards to the need for individuals to accept full responsibility for their alleged actions, or to admit guilt. [Existing guidance](#) offers clarity on the situation, stating:

"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."

It is therefore left to the practitioner supporting the individual to gauge whether the willingness of the accused person is sufficient to provide confidence that they are adequately committed to the suite of supports that may be made available to them. It is not necessary for the practitioner to adjudicate on the remorse, culpability or guilt demonstrated by the individual. This position – mirrored in many European nations (Dünkel, 2022) - avoids the challenges and barriers to DfP that have been highlighted by those examining diversionary practices in England, where admission of guilt is mandatory prior to the provision of support (Cushing, 2014; Robertson, 2017). This led to the [Centre for Justice Innovation](#) recommending the removal of this stipulation, as outlined in their [Diversion Toolkit](#).

2. Effective Practice

2.1 Theories relating to DfP

Diverting those who have been accused of criminal behaviour away from formal justice responses has long been identified as a means by which desistance can be supported (McAra & McVie, 2014, 2022). This has been found to be true across a range of diversionary approaches (Hartell & Novak, 2022). Scholars have argued that minimising contact with so-called ‘antisocial peers’ can assist the process of avoiding conflict with the law, by weakening bonds to those who may support negative acts, and by reducing opportunity to engage in them (McAra & McVie, 2007). Furthermore, avoiding contact with the stigmatising effects of involvement with court and other legal proceedings can reduce the risk of being labelled as ‘deviant’, making the accused less likely to internalise the label and its negative associations (Hartell & Novak, 2022; Wilson & Hoge, 2013).

Whilst perhaps not the ambition of their policy shift, England’s drive towards reducing the number of ‘first time entrants’ into the justice system has seen greater use of diversionary measures, albeit with subtle differences in the model of practice utilised. This has led Bateman (2020) to comment on the long term impact upon desistance amongst this cohort, whose limited contact with the system has contributed to them subsequently coming into conflict with the law less often. Similar findings have been found elsewhere, including Ireland (Reddy, 2022), the United States of America (Schlesinger, 2018) and Australia (Cowan et al., 2019).

Practitioners note other features of DfP which can be of benefit, including access to resources and supports which address the underlying causes and drivers of the alleged offence (Benbow, 2019). Responding to areas of an individual’s life which may precipitate exposure to risk or have an impact on wellbeing, DfP support can improve the social milieu experienced by the child or young person, and in turn assist them to achieve their desired ambitions and goals, including reduced conflict with the law. As Benbow (2019) goes on to articulate, these contrasting theories (minimising contact with formal systems vs. providing support to achieve a positive outcome) compete against one another, playing out in the daily practice of those delivering support.

This tension is present in [existing national guidance](#), which highlights that “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."

Practitioners – at all stage of the process – must be cautious however of inadvertently replicating the impact of criminal proceedings within the support that is offered to the individual. As Richards (2014) warns, if the ambition of DfP is to avoid stigmatisation and labelling, caused by contact with court, whilst addressing the needs of the individual, then support must be delivered in such a way that achieves that without causing these problems

under a different guise or branding. Similarly, Case and Browning (2021) point to the need for supports to be delivered at an intensity that matches the needs of the individual, and which avoids the stigmatisation, alienation, marginalisation and social exclusion that can be caused by an overly intrusive response.

Other theoretical considerations relate to the age-crime curve: the almost universal tendency for episodes of offending behaviour to occur most often at certain points in an individual's life. Multiple studies have found that adolescence is the period of life during which an individual is likely to come into conflict with the law (or, at least, is more likely to be caught), before reducing sharply and tailing off to a low level as an individual enters middle age. As this trend has been found by multiple scholars in studies across the globe, it has been described as "one of the brute facts of criminology" (Hirschi & Gottfredson, 1983:555). Whilst recent studies have seen a slight shift in the peak of this age-crime curve (Matthews & Minton, 2018) it remains an important factor to consider when responding to children and young people who have come into conflict with the law. Explanations for this phenomenon are varied, including links to desistance theory, identity, neurological maturity and socio-economic status. DfP responds to this by providing additional opportunities for those younger individuals to continue the development of their lives without the need for a formal judicial response, during which time they can mature, attain new status and enjoy circumstances in life which lead to less conflict with the law.

Regrettably there is very little research specifically into DfP in Scotland, and indeed into DfP-like approaches in other nations (Evans et al., 2022). This point was noted by HMIPS (2023) in the recent review of DfP, and it may be that justice partners seek to address this significant gap amongst criminological literature over the coming years.

2.2 Practice Considerations

Whilst the paucity of research in this area limits the extent to which guidance can be offered, there are features of DfP - and similar approaches - which have been found to be effective. At the outset, practitioners ought to remain mindful of the work of McAra and McVie who have highlighted the deleterious impact that excessive, unnecessary contact with formal systems can have; a quasi-formal judicial system must therefore be avoided (Hartsell & Novak, 2022). Likewise Mears et al. (2016) caution against the inappropriate application of DfP interventions, fearful of net-widening, inconsistent delivery, and increased conflict with the law, amongst other concerns. Hartsell and Novak (2022) add to this, suggesting that being inappropriately involved in DfP may adversely affect participants, whilst Case and Browning (2021) point to evidence of the efficacy of both radical non-intervention and of minimal intervention.

DfP ought not to equate to diverting people away from support that they need. As Bateman (2020) notes, the minimalist intervention stance should be adopted in order to respect the potential of children to develop, and to respect their rights. It is not merely an opportunity to provide respite from the toxicity of contact with police, courts, probationary services and other well-intentioned, albeit corrosive, actors. Balancing these two subtle positions requires thoughtful assessment, and the availability of resources with which to provide the bespoke and tailored response that is called for under current DfP guidance.

Practitioners, policy makers and system leaders should therefore remain cautious regarding inappropriate use of DfP and other extra-judicial responses to alleged criminality.

That being said, Gibson (2022) has identified features of practice that are known to be beneficial in this area; thus, the following recommendations are made for those involved in the process of delivering DfP to children and young people:

- **Divert people away from formal systems** The [Edinburgh Study of Youth Transitions and Crime](#) has consistently demonstrated that access to community activities, education, youth work and other diversionary opportunities have greater potential to prevent further episodes of offending compared to the stigmatising and labelling environment of court or a Children's Hearing. Such resources must be adequately funded and resourced however, a point explicitly made by McAra and McVie (2018, 2022) and Bateman (2020).
- **Address underlying needs** Reflecting the adversities that children in conflict with the law have faced (Schlesinger, 2018) ([see Section 5](#)), DfP should address those needs which contribute to them coming into conflict with the law. It should also provide opportunities for the participant to access supports which can attend to other needs such as housing, health and employment.
- **Avoid net-widening** Gillon (2018) has highlighted the risk of net-widening within diversionary practice (namely EEI). Similar concerns in relation to DfP have been voiced by Robertson (2017), who found that DfP was utilised inappropriately on occasion. Adherence to guidance, adoption of universal supports, and pushing back against the clamour to '*do something*' may all be steps to avoid the net-widening effect that leads an otherwise benevolent system to have unintended consequences (Gillon, 2018). Support via universal services should be sought, rather than sustained contact with formal justice services.
- **Relationships with partner agencies** Identifying suitable cases for DfP often relies on positive relationships between the various actors in the diversionary chain (Maglione et al., 2020). As such, developing contact and rapport between practitioners from Police Scotland, COPFS, third sector and social work services will enable fluid and open communication that highlights challenges and opportunities for effective and appropriate diversionary interventions. Designated 'diversion champions' within each of these services - as suggested by Benbow (2019) - may be one way of achieving this, and of raising the profile of the approach.
- **Respect and uphold human rights** Mindful that those under the gaze of the criminal justice system have often faced multiple difficulties which prevent them from having their human rights realised (Lightowler, 2020), effective and ethical practice in DfP ought to address this inequity (Smith, 2021). Respecting and upholding rights in this context will bring Scotland closer to aligning with a range of international agreements we are already party to, including UNCRC compliance.

Underpinning effective practice is the need for a culture that views DfP - and other diversionary approaches - in a favourable light, recognising its benefits to desistance and the manner in which those in conflict with the law are supported (Evans et al., 2022). To this end practitioners, managers, policy makers and organisations should endeavour to stress

the extensive benefits of this approach, and in doing so breed confidence and familiarity across the justice systems.

2.3 Time Limited

Guidance pertaining to DfP highlights the flexibility that is available, with acknowledgement that for some people a very brief period of support will be required. For others, a more prolonged period may be necessary. In each instance a decision needs to be made in respect of the needs of the individual in question; communication with the relevant Procurator Fiscal is required in order to keep them up to date with the developments.

While this period can be extended, it should be the ambition of actors supporting the completion of diversion to transition people into universal, community services that continue to address their support needs, in order to ensure a continuity of care outside of the justice system; in so doing the broader aims of rehabilitation, recovery and citizenship are supported.

2.4 Rights

In addition to the empirical benefits of diversionary measures that are evidenced elsewhere in this section, adoption of diversionary approaches is mandated within international treaties to which the United Kingdom nations are signatories. For example, the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (commonly known as [the Beijing Rules](#)) calls on those supporting children and young people to “use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system”, and for the state agencies to use their discretion in diverting matters away from the judicial process.

Likewise, the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (commonly known as [the Riyadh Guidelines](#)) further underline the importance of diversionary measures for children and young people who are in conflict with the law. Section 58 of said resolution stipulates that those responding to such individuals “should be familiar with and use, to the maximum extent possible, programmes and referral possibilities for the diversion of young persons from the justice system.”

The United Nations Convention on the Rights of the Child (commonly known as [the UNCRC](#)) adds to this; Articles 40(3) and 40(4) make specific reference to the range of supports that ought to be utilised when a child has come into conflict with the law, and calls for a non-judicial response to be adopted wherever possible. Moreover, Article 3 of UNCRC calls on the state to act in the best interests of the child – including those who come into conflict with the law – and thus those making decisions about diverting a child away from the prosecutorial arena should be framed within that context. Similar sentiments - and clarification of operational mechanisms - are expressed within [United Nations General Comment 10](#) and [United Nations General Comment 24](#). Whilst this does not mandate DfP in its Scottish form *per se*, it does call on the state to develop mechanisms which achieve that end.

Whilst DfP can assist in realising these rights, Evans et al. (2022) caution against the assumption that the non-judicial route to support is necessarily a more rights-respecting one.

Supports offered through DfP must meet the needs of those requiring it. This requires investment and capacity in order to avoid the unintended consequences of neglectful responses to conflict with the law.

2.5 Practitioner Forums

Mindful that practitioners working in DfP often operate within small teams or have limited contact with others performing a similar role, practitioner forums have been established by CYCJ which provide opportunities for practitioners to meet, share learning and network. These have been found to improve the knowledge and capacity of those who attend (HMIPS, 2023). [Find out more](#) about the Forums that are hosted by CYCJ.

3. Decision Making

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

3.1 COPFS decision making

Where it is in the public interest (having taken into account all the circumstances of the case) COPFS has the option to utilise DfP as an option of prosecutorial action in order that a meaningful intervention can be delivered to address the identified needs and risks for that individual in a timely manner. 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 those under 16 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, 2015:8). 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 Hearings 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 Hearings 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 developmental issues that may indicate the child's needs and behaviour would be best met within the Children's Hearings 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, 2015:9).

3.2 Assisting decision making

Police and social work can highlight instances of individuals who they feel may be suitable for diversion to COPFS. 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 issue, their response to the current matter, parental involvement, education, employment or training, and substance misuse issues. 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 will also have a number of opportunities to highlight an individual who may be suitable for DfP such as:

- When they have been held in custody to appear at court, with direct phone contact to COPFS being 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 COPFS youth diversion e-mail inbox 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.

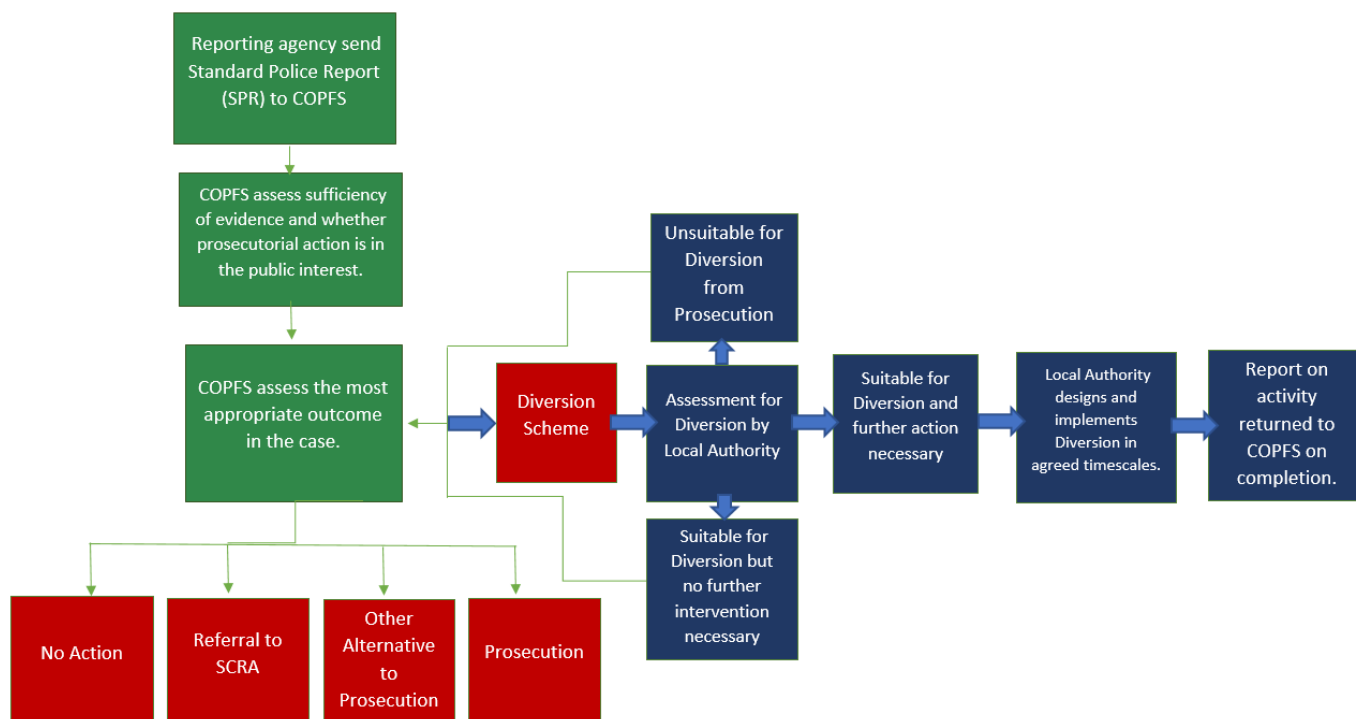
Communication with COPFS is encouraged at all stages, both in highlighting an individual who is suitable for DfP and upon completion. Alternative COPFS email addresses can be used, depending on jurisdiction; Ctrl + Click and of the links below to access the relevant email account:

[Eastdiversion](#); [GlasgowDiversion](#); [NorthDiversion](#); [ROWDiversion](#)s;
[TaysideCentral&FifeCommunityJustice](#); [NorthStrathclydeCommunityJustice](#);
[FiscalWorkOrders](#).

4. DfP Process

The process of delivering DfP follows a prescribed formula, as outlined within existing guidance.

4.1 DfP Flowchart



Once a decision has been made to utilise DfP the COPFS will write to them to explain and offer the opportunity to voluntarily take part in the process. Following that the local authority (or third sector partner) will undertake an assessment of the individual and their wider situation, as well as their agreement to participate. It must be noted that any information provided by the individual 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).

Should COPFS become aware of further information either following the referral or during the period of support being provided, such that they deem diversion to no longer be suitable, they 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 the following:

- It should be clearly explained that they can seek legal advice before deciding whether to participate in any diversion opportunity
- The decision to engage with diversion is voluntary and they can choose not to participate
- Ensuring the individual understands no information they give within the diversion process relating to the alleged offence can be used by the COPFS 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 COPFS however.
- Whilst concepts of guilt or innocence are not required, the individual should acknowledge some degree of responsibility for the circumstances which precipitated the alleged offence, and a willingness to take advantage of the support offered to them.
- The expectations of them should they decide to engage, the timeframe for intervention and the potential outcomes whether this is deemed successful or unsuccessful.
- That it is the decision of COPFS as to whether a diversion is successful or not, though the diversion worker will submit a recommendation within their report to aid the decision-making process.
- 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 potential impact on disclosure, for the duration of the diversion once completed.

All assessments for diversion 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:

- Their understanding of the referral from COPFS and their views of this

- Their 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.
- Their understanding of impact upon others such as victims, family and 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.
- Any support the individual identifies which would be helpful for them to be included in any diversion
- Their expectation of the process and outcome of DfP

4.2 DfP Assessment Report

Once the assessment has been undertaken there are three options available, as outlined in the existing guidance:

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 mind. • Agency information indicates unsuitability. 	A report is compiled by the LA and returned to COPFS.
Individual IS suitable for diversion from prosecution, BUT NO FURTHER INTERVENTION IS REQUIRED	<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>	
The individual IS suitable for diversion from prosecution.	<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. 	

Once the assessment has been completed then an assessment report must be submitted to COPFS within 20 days of receiving the referral. The assessment report should include a view as to whether the individual is suitable to participate in DfP; it should detail the reasons for this and when intervention is appropriate, what this will involve (including anticipated timescale) and the intended outcomes of any support. An outline of existing supports and their level of engagement with that support will also assist COPFS to make an informed decision. Where the assessment indicates a level of complexity that would suggest a more

sustained period of support this should be discussed with COPFS at the earliest opportunity.

Should the person being referred to DfP be a child with an existing Child's Plan in place, communication and liaison with existing services and supports is crucial. It may be that a practitioner outwith the DfP service is best placed to undertake an assessment or provide the necessary support. Similarly, whilst being subject to a Community Payback Order or other statutory order should not prohibit a referral to DfP, practitioners should liaise with COPFS and the existing lead professional in order to determine who is best placed to provide the necessary support, and to avoid duplication of efforts. Such information should be included within the completed assessment report.

4.3 DfP supports

In much the same way as children and young people under the supervision of social work and third sector through a CSO, Community Payback Order or other form of relationship can receive a broad and varied range of supports, those who are subject to DfP ought to receive tailored and bespoke care, reflective of their needs and circumstances. Support should respond to the needs of the individual and may be delivered on an individual or group basis. Support should be flexible and delivered in a manner that is effective and meaningful for that individual, building on their capacity, as well as seeking to reduce the likelihood of them coming into conflict with the law.

Whilst this may involve a combination of methods including cognitive behavioural therapy, mentoring, practical supports or family mediation, 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 individual's needs and risks, and mindful of any issues that may become evident during the intervention period.

Whilst not yet universal, Restorative Justice also features within DfP practice in some parts of the country (Maglione et al., 2020); as Scotland moves towards the implementation of the [Restorative Justice action plan](#) - which calls for that approach to be available at all stages of the justice system by 2023 - this is likely to increase in the coming years. Not all areas of the country are able to access or utilise Restorative Justice interventions at present. Where this is not possible Restorative Practice should be considered within the range of support provided. Further information on Restorative Justice and Restorative Practices can be found in [Section 12](#) of this guide.

Following completion of the DfP support, a report evidencing the level of engagement and participation relevant to the individual's developmental capacity should be submitted to COPFS.

4.4 Completion Report

There are three outcomes to any diversion intervention as outlined in the following table:

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 should focus on the depth of engagement displayed by the individual, whilst being mindful of their capacity and ability to participate in the support provided. Reflecting on how the intervention was undertaken, and how the support 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 individual 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 outwith 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 period have been made is important. Completion reports - or a progress report where a longer period of extension has been agreed with the COPFS - should be submitted no later than three months after the diversion intervention started.

Not all those referred to DfP will successfully complete the process easily and some may not engage at all. It is particularly important that every effort is made to support people to participate, whether that involves home visits or repeated attempts to engage them, requiring persistence and tenacity on the part of the workers. A flexible approach is necessary, one which is transparent, clear about the expectations of the child's participation, what an acceptable/unacceptable level of cooperation looks like and which alerts participants to the consequences of failing to fully engage with the offer of support. How this information is explained and the opportunity to remind the individual are both important to their ability to process and remember; [speech, language and communication needs](#) must be considered.

The following should be fully outlined within the report: where the decision was taken to return a referral to the COPFS (and the reasons why); reflections on any work undertaken by the individual; steps taken to avoid a lack of engagement and any possible solution.

Once they are in receipt of the completion report COPFS will make a decision as to whether any further prosecutorial action will be taken, or whether the case is closed. National guidelines indicate that it is then COPFS' responsibility to notify both the individual and the diversion coordinator of the final outcome of the case. Following the completion of any period of support the individual 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 COPFS independently.

5. Conclusion

This section has articulated a model of diversionary practice delivered in Scotland through DfP, and highlighted some of the benefits that such an approach can achieve. It has then touched on the limited research in existence, whilst highlighting trends and developments within the policy and practice of DfP in Scotland. Drawing on these sources and the learning CYCJ has gained through practitioner forums, suggestions have been made through which those working in this area can deliver effective supports.

As a growing element of Scotland's response to children, young people and adults who come into conflict with the law, statutory and voluntary bodies will have increased presence in this field in coming years. It is an approach which carries with it many benefits for the person accused of causing harm, any victims of the behaviour and for wider society. Confidence and competency in delivering effective DfP is therefore essential.

6. References

- Bateman, T. (2020). *The state of youth justice 2020: An overview of trends and developments*. London: National Association for Youth Justice
Retrieved from <https://thenayj.org.uk/cmsAdmin/uploads/state-of-youth-justice-2020-final-sep20.pdf>.
- Benbow, N. (2019). *Preventing Youth Crime in Scotland: The Practices of Early Intervention and Diversion under 'Whole System Approach' Implementation*. (PhD), University of Stirling, Stirling. Retrieved from <https://dspace.stir.ac.uk/bitstream/1893/29670/1/Final%20Draft%20Revised%20May%202019.pdf>
- Bradford, B., & MacQueen, S. (2011). *Diversion from prosecution to social work in Scotland: a snapshot of current patterns and an examination of practice in three CJAs*. Glasgow: SCCJR Retrieved from http://www.sccjr.ac.uk/wp-content/uploads/2012/11/Diversion_from_prosecution.pdf.
- Brown, A. (2019). *Dynamic Diversion? Examining the Multiple Impacts of 'Welsh Town' Bureaux*. (PhD), University of Swansea, Swansea. Retrieved from <https://cronfa.swan.ac.uk/Record/cronfa53253>
- Case, S., & Browning, A. (2021). *Child First Justice: the research evidence-base*. Loughborough, UK: Loughborough University Retrieved from https://yresourcehub.uk/images/Evaluation%20Library/YOT_Talk_Full_Report_European_Journal_of_Criminology_March_2021.pdf.
- Community Justice Scotland. (2020). *National Guidelines on Diversion from Prosecution in Scotland*. Retrieved from <https://communityjustice.scot/wp-content/uploads/2020/06/Diversion-from-Prosecution-Guidance-Version-4.0-FINAL-VERSION-April-2020.pdf>
- COPFS. (2015). *Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter*. Retrieved from <https://www.copfs.gov.uk/images/2019%2006%2013%20Joint%20Agreement%20COPFS%20and%20SCRA%20Decision%20Making%20in%20Jointly%20Reported%20Cases.pdf>.
- Cowan, D., Strang, H., Sherman, L., & Munoz, S. V. (2019). Reducing Repeat Offending Through Less Prosecution in Victoria, Australia: Opportunities for Increased Diversion of Offenders. *Cambridge Journal of Evidence-Based Policing*, 3(3), 109-117. doi:10.1007/s41887-019-00040-0
- Cushing, K. (2014). Diversion from prosecution for young people in England and Wales—reconsidering the mandatory admission criteria. *Youth Justice*, 14(2), 140-153.
- Dünel, F. (2022). Youth justice: European and international developments and (good) practices. In D. Nelken & C. Hamilton (Eds.), *Research Handbook of Comparative Criminal Justice* (pp. 30). Cheltenham: Edward Elgar Publishing.
- Evans, J., Raynor, P., & Heath, B. (2022). Locality, legitimacy and the limits of diversion: Reviewing youth justice in Jersey. *The Howard Journal of Crime and Justice*, 61(3), 367-380. doi:<https://doi.org/10.1111/hojo.12480>
- Gibson, R. (2019). *Policy Refocus at COPFS*. Centre for Youth and Criminal Justice Retrieved from <https://www.cycj.org.uk/wp-content/uploads/2019/12/Info-Sheet-86-1.pdf>.

- Gibson, R. (2022). *Effective practice in Diversion from Prosecution*. Glasgow: Children and Young People's Centre for Justice Retrieved from <https://www.cycj.org.uk/wp-content/uploads/2022/10/Info-Sheet-105.pdf>.
- Gillon, F. (2018). *Early and effective intervention (EEI) in Scottish youth justice: benevolent principles and unintended consequences*. University of Strathclyde,
- Hartsell, E. N., & Novak, A. (2022). A Comparison of Re-arrest Outcomes Between Youth in Juvenile Drug Court, Teen Court, Probation, and Dismissed Cases. *Crime & Delinquency*, 68(10).
doi:<https://journals.sagepub.com/doi/10.1177/00111287211073704>
- Hirschi, T., & Gottfredson, M. (1983). Age and the Explanation of Crime. *American Journal of Sociology*, 89(3), 552-584. doi:10.1086/227905
- HMIPS. (2023). *Joint review of diversion from prosecution* Edinburgh: HM Inspectorate of Prosecution in Scotland Retrieved from
<https://www.gov.scot/binaries/content/documents/govscot/publications/progress-report/2023/02/joint-review-diversion-prosecution/documents/joint-review-diversion-prosecution/joint-review-diversion-prosecution/govscot%3Adocument/joint-review-diversion-prosecution.pdf>.
- Lightowler, C. (2020). *Rights Respecting? Scotland's approach to children in conflict with the law*. Glasgow: Centre for Youth and Criminal Justice Retrieved from
<https://cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf>.
- Maglione, G., Buchan, J., & Robertson, L. (2020). The Local Provision of Restorative Justice in Scotland: an Exploratory Empirical Study. *European Journal on Criminal Policy and Research*. doi:10.1007/s10610-020-09470-3
- Matthews, B., & Minton, J. (2018). Rethinking one of criminology's 'brute facts': The age-crime curve and the crime drop in Scotland. *European journal of criminology*, 15(3), 296-320.
- McAra, L., & McVie, S. (2007). Youth justice? The impact of system contact on patterns of desistance from offending. *European journal of criminology*, 4(3), 315-345.
- McAra, L., & McVie, S. (2014). Maximum Diversion: Minimum Intervention. *Scottish Justice Matters*, 2(3), 21-23.
- McAra, L., & McVie, S. (2018). Transformations in youth crime and justice across Europe: Evidencing the case for diversion. In B. Goldson (Ed.), *Juvenile Justice in Europe* (pp. 74-103). London: Routledge.
- McAra, L., & McVie, S. (2022). *Causes and Impact of Offending and Criminal Justice Pathways: Follow-up of the Edinburgh Study Cohort at Age 35*. Edinburgh: University of Edinburgh Retrieved from
<https://www.law.ed.ac.uk/sites/default/files/2022-03/ESYTC%20Report%20%28March%202022%29%20-%20Acc.pdf>.
- Mears, D. P., Kuch, J. J., Lindsey, A. M., Siennick, S. E., Pesta, G. B., Greenwald, M. A., & Blomberg, T. G. (2016). Juvenile court and contemporary diversion: Helpful, harmful, or both? *Criminology & Public Policy*, 15(3), 953-981.
- Murray, K., McGuinness, P., Burman, M., & McVie, S. (2015). *Evaluation of the Whole System Approach for Children Who Offend in Scotland* Glasgow: Scottish Centre for Crime and Justice Research Retrieved from
<https://www.gov.scot/binaries/content/documents/govscot/publications/research-and->

- [analysis/2015/06/evaluation-whole-system-approach-young-people-offend-scotland/documents/00479272-pdf/00479272-pdf/govscot%3Adocument/00479272.pdf](#).
- Reddy, J. (2022). *The Youth Justice System in Ireland: A Review (Revised)*. Limerick: University of Limerick Retrieved from <https://ulir.ul.ie/bitstream/handle/10344/11103/Review%20of%20Irish%20youth%20justice.pdf?sequence=3>.
- Richards, K. (2014). Blurred lines: Reconsidering the concept of 'diversion' in youth justice systems in Australia. *Youth Justice*, 14(2), 122-139.
doi:<https://doi.org/10.1177/147322541452679>
- Robertson, L. J. (2017). *A practice-based approach to youth justice: the whole system approach in Scotland*. University of Glasgow,
- Schlesinger, T. (2018). Decriminalizing racialized youth through juvenile diversion. *The Future of Children*, 28(1), 59-82.
- Scottish Government. (2022). *Criminal justice social work statistics: 2020 - 2021*. Edinburgh: Scottish Government Retrieved from <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2022/01/criminal-justice-social-work-statistics-scotland-2020-21/documents/criminal-justice-social-work-statistics-scotland-2020-21/criminal-justice-social-work-statistics-scotland-2020-21/govscot%3Adocument/criminal-justice-social-work-statistics-scotland-2020-21.pdf>.
- Smith, R. (2021). Diversion, Rights and Social Justice. *Youth Justice*, 21(1), 18-32.
doi:10.1177/1473225420902845
- Stevens, A., Hughes, C. E., Hulme, S., & Cassidy, R. (2022). Depenalization, diversion and decriminalization: A realist review and programme theory of alternatives to criminalization for simple drug possession. *European journal of criminology*, 19(1), 29-54.
- Wilson, H. A., & Hoge, R. D. (2013). The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review. *Criminal Justice and Behavior*, 40(5), 497-518.
doi:10.1177/0093854812451089