



HM Inspectorate  
of Prosecution in Scotland

# Joint review of diversion from prosecution

Terms of Reference

March 2022



## About us

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### **HM Inspectorate of Constabulary in Scotland**

HM Inspectorate of Constabulary in Scotland (HMICS) is established under the Police and Fire Reform (Scotland) Act 2012 and has wide ranging powers to look into the state, effectiveness and efficiency of both Police Scotland and the Scottish Police Authority (SPA).

HMICS has a statutory duty to ensure that the Chief Constable and the SPA meet their obligations in terms of best value and continuous improvement. HMICS also has an established role in providing professional advice and guidance on policing in Scotland.

### **HM Inspectorate of Prosecution in Scotland**

HM Inspectorate of Prosecution in Scotland (IPS) is led by HM Chief Inspector of Prosecution who is appointed by the Lord Advocate to inspect the operation of the Crown Office and Procurator Fiscal Service. The functions of HM Chief Inspector are set out in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The 2007 Act makes clear that in the exercise of any of the functions conferred by the Act, HM Chief Inspector is independent of any other person.

### **Care Inspectorate**

The Care Inspectorate is the independent scrutiny, assurance and improvement support body for social care and social work in Scotland. The powers and duties of the Care Inspectorate are set out in the Public Services Reform (Scotland) Act 2010. The Scottish Government tasked the Care Inspectorate to lead on scrutiny and assurance of justice social work and support the implementation of the community justice model.

### **HM Inspectorate of Prisons for Scotland**

HM Inspectorate of Prisons for Scotland (HMIPS) is responsible for the inspection and monitoring of Scotland's 15 prisons, and reporting publicly on its findings. Inspection and monitoring activity focuses on establishing the treatment of and the conditions for prisoners, as well as the conditions in which prisoners are transported or held in pursuance of prisoner escort arrangements.

## Our review

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### Aim

1. The aim of our review is to assess the operation and impact of diversion from prosecution in Scotland. We will provide an overview of diversion practice from a policing, prosecution and justice social work perspective, highlight what is working well and explore any barriers to the more effective use of diversion.
2. The review will be carried out by HM Inspectorate of Constabulary in Scotland (HMICS), HM Inspectorate of Prosecution in Scotland (IPS), the Care Inspectorate and HM Inspectorate of Prisons for Scotland (HMIPS) (the scrutiny partners).

### What is diversion from prosecution?

3. Diversion from prosecution is one of several alternatives to prosecution available to the Crown Office and Procurator Fiscal Service (COPFS) upon receipt from the police of a report of offending. Diversion is the process by which COPFS refers an accused person to local authority justice social work (or a partner agency) for support, treatment or other action as a means of addressing the underlying causes of the alleged offending. Diversion from prosecution will be considered in any case where the person reported to COPFS has an identifiable need and where it is assessed that diversion is the most appropriate outcome in the public interest.<sup>1</sup>
4. A flowchart illustrating the diversion from prosecution process is available at Appendix 1.
5. The Scottish Government publishes data on diversion from prosecution in its Criminal Justice Social Work Statistics series.<sup>2</sup> Table 1 shows the extent of diversion since 2016, including the number of cases referred by COPFS to justice social work, and the number of assessments carried out by justice social work regarding an individual's suitability for diversion.

Table 1 – Diversion from prosecution 2016-17 to 2020-21

Action	2016-17	2017-18	2018-19	2019-20	2020-21
Referrals	3,476	2,662	2,945	3,088	3,886
Assessments	2,958	2,526	2,757	2,752	3,552
Cases commenced	2,006	1,725	1,849	1,990	2,230
Cases successfully completed	1,578	1,367	1,416	1,578	1,649

### Background

6. Diversion from prosecution is one of a range of community justice interventions available to address the underlying causes of offending and to

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<sup>1</sup> Community Justice Scotland, [National Guidelines on Diversion from Prosecution in Scotland](#) (April 2020).

<sup>2</sup> Scottish Government, [Criminal Justice Social Work Statistics](#).

prevent reoffending. The Scottish Government has for some time sought to shift the balance between custodial sentences and community justice. Its vision is for people to be held to account for their offending, but also to be given the opportunity to tackle the causes of that offending via early intervention, diversion and community-based disposals. In 2016, the Scottish Government published a National Strategy for Community Justice which stated that community justice partners should:

‘Maximise opportunities for the use of diversion. This will require a balance of appropriate decision making by the Procurator Fiscal and provision of suitable services by criminal justice social work and the third sector.’<sup>3</sup>

7. The strategy described the aim of diversion from prosecution as being to prevent individuals entering the wider criminal justice system by addressing the underlying causes of offending, and to help ensure people get access to the drug, alcohol and mental health services they need.
8. More recently, the Scottish Government’s Programme for Government 2021-22 notes plans to invest in a ‘substantial expansion of community justice services supporting diversion from prosecution, alternatives to remand and community sentencing, which evidence shows is more effective at reducing reoffending.’<sup>4</sup>
9. To support diversion from prosecution, Community Justice Scotland<sup>5</sup> has published national guidelines on diversion.<sup>6</sup> Developed in partnership with Police Scotland, COPFS, the Scottish Government and others, the guidelines describe the aims and benefits of diversion, the diversion process and the role played by the police, prosecutors and local authorities.
10. Within COPFS, prosecutorial decision making, including decisions on whether to divert an accused from prosecution, is guided by the Scottish Prosecution Code as well as case marking instructions. When any case is reported to the Procurator Fiscal and there is sufficient evidence, prosecutors will apply the principles set out in the Scottish Prosecution Code. Prosecutors will exercise their professional judgement and identify what, if any, prosecutorial action is in the public interest.

## Our review

11. The National Strategy for Community Justice acknowledges that the effective operation of diversion cannot be achieved by any one agency. It is dependent on community justice partners, including the police, COPFS, justice social work and the third sector, working together at a strategic and operational

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<sup>3</sup> Scottish Government, [National Strategy for Community Justice](#) (2016), page 32. The strategy is currently under review and a revised strategy is expected later in 2022.

<sup>4</sup> Scottish Government, [A fairer, greener Scotland – Programme for Government 2021-22](#), page 101.

<sup>5</sup> Established by the Community Justice (Scotland) Act 2016, the role of Community Justice Scotland is to oversee and report on the performance of community justice services, and promote and support improvement and awareness of community justice.

<sup>6</sup> Community Justice Scotland, [National Guidelines on Diversion from Prosecution in Scotland](#) (April 2020).

level. Given the partnership working required to deliver diversion, a similarly collaborative approach is required for the effective scrutiny of diversion. For that reason, the scrutiny partners have agreed to work together to review how diversion from prosecution is operating in practice.<sup>7</sup> All four scrutiny partners have a duty to cooperate for the purpose of improving the exercise of our scrutiny functions under section 114 of the Public Services Reform (Scotland) Act 2010. Taking into account the ongoing review of the National Strategy for Community Justice and this year's Programme for Government commitments, we consider our review of diversion from prosecution to be timely and in the public interest.

12. While IPS has previously considered the diversion of young people in the context of a broader review of the prosecution of young people,<sup>8</sup> we believe this to be the first independent, comprehensive review of diversion from prosecution. Certainly, it is the first time the four scrutiny bodies have worked together to review diversion.
13. Over the last decade however, some research has been carried out regarding diversion from prosecution, although much of it has tended to focus on the diversion of children and young people.<sup>9</sup> It appears that little research has been carried out since the development of the National Strategy for Community Justice, despite some of the earlier research concluding that further analysis was required:
  - to better understand the way in which cases are marked for diversion and the way in which diversion services are delivered
  - to ensure more equal provision and take up of diversion across local authorities
  - to capture and understand the impact of diversion and the outcomes being achieved.

## Scope

14. Our review will assess the operation and impact of diversion from prosecution in Scotland. Each of the four scrutiny partners has an inspection framework which underpins their approach to scrutiny. All of the frameworks are informed by the European Framework for Quality Management (EFQM) Model, the latest iteration of which incorporates three overarching tenets: direction, execution and results. In the context of diversion from prosecution, we will consider:
  - direction – the extent to which the police, COPFS and justice social work, alongside their community justice partners, share a vision for diversion from prosecution and collaborate on a strategy for delivery, while

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<sup>7</sup> While HM Inspectorate of Prisons has no locus in respect of diversion from prosecution, it shares an interest in developing community-based interventions and shifting the balance from custodial sentences.

<sup>8</sup> IPS, [Thematic report on the prosecution of young people](#) (2018).

<sup>9</sup> See, for example, A Fraser & S MacQueen, [Evaluation of early and effective intervention and diversion from prosecution in Dumfries and Galloway](#) (2011); B Bradford & S MacQueen, [Diversion from prosecution to social work in Scotland: a snapshot of current patterns and an examination of practice in three CJAs](#) (2011); C Gormley, [Mapping of active criminal justice diversion schemes for those with mental health problems in Scotland](#) (2013); K Murray, P McGuinness, M Burman & S McVie, [Evaluation of the Whole System Approach to young people who offend in Scotland](#) (2015).

respecting the important principle of independent prosecutorial decision making

- execution – the effectiveness of systems and processes that support diversion from prosecution and the progress made in implementing the National Guidelines on Diversion from Prosecution in Scotland<sup>10</sup>
- results – the extent to which the impact of diversion is understood and intended outcomes are being achieved.

15. In relation to execution, we will consider the individual and collective roles that the justice partners play at the various stages in the diversion process. We will consider:

- how effectively the police identify whether an accused person has an identifiable need which has contributed to the offending and communicate this via the Standard Police Report to COPFS
- the extent to which diversion is being considered and the systems and processes within COPFS which support prosecutors to make the most appropriate prosecutorial decision in respect of those who have an identifiable need
- the process by which accused persons are assessed for their suitability for diversion by local authorities
- the extent to which relevant and appropriate diversion schemes are available across local authority areas to meet the needs of those who have been diverted
- how well the community justice partners work together to identify individuals suitable for diversion and to deliver effective diversion from prosecution.

16. We will seek to:

- provide an overview of the operation of diversion from prosecution in Scotland, with a particular focus on the role played by the police, COPFS, justice social work and third sector partners
- assess, using available data, the extent to which diversion is being used as an alternative to prosecution
- consider any barriers to diversion or challenges in the effective operation of diversion
- highlight what is working well, as well as areas in need of further development or improvement
- consider the impact of Covid-19 on diversion from prosecution.

17. Throughout our review, we will explore equality issues in the context of diversion from prosecution and the extent to which equality has been considered in the development of policies and the delivery of diversion. We will consider, for example, whether particular groups are more or less likely to be diverted and whether appropriate services are available to meet the needs of some groups more than others.

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<sup>10</sup> Community Justice Scotland, [National Guidelines on Diversion from Prosecution in Scotland](#) (April 2020).

18. Our review will focus solely on diversion from prosecution to justice social work (or another agency) by COPFS. It will not address any additional diversionary activity undertaken by the police nor community-based disposals used by the courts. While much of the previous scrutiny or research concerning diversion has focused on the diversion of children and young people from prosecution, our review will consider diversion for adults as well as those under 18.

## Methodology

19. Following an initial period of scoping and planning our review, which includes engagement with the inspected bodies and key organisations such as Community Justice Scotland, we will seek evidence from a range of sources. This will include:

- engaging with key contacts from Police Scotland, COPFS and justice social work to support the review process and to facilitate appropriate access to people and information
- examining relevant documentation including strategies, policies, guidance, procedures and performance and management information. Where possible, we will access this information from open sources to minimise our scrutiny footprint, but this phase may require Police Scotland, COPFS and/or local authorities to provide information directly to us
- mapping the diversion services available
- analysing data to understand when diversion is used, who is diverted and where they are diverted to. We will also explore geographical variation in diversion data and seek to understand the reasons for this variation
- reviewing a sample of cases which prosecutors seek to divert from prosecution and, where possible, tracking the individual's journey through the process from police report to completion of diversion
- interviewing key personnel within Police Scotland, COPFS and justice social work, as well as third sector organisations delivering diversion services
- interviewing relevant stakeholders such as members of Community Justice Partnerships and organisations such as the Children's and Young People's Centre for Justice
- seeking the views and experiences of those individuals diverted from prosecution, as well as the views and experiences of complainers in cases where the accused has been diverted from prosecution.

20. In carrying out our review, particularly in the planning and evidence gathering stages, we will consider our duty of user focus, as set out in the Public Services Reform (Scotland) Act 2010. This will help us ensure that the views and experiences of service users, and those who represent them, shape our work.

21. In light of our available resources and to minimise our scrutiny footprint at a time of high demand across the public sector, it is likely that some of our work will be focused in a sample of local authorities rather than across all 32. In doing so, we will select a small number of authorities taking into account the size of the available sample, service model, geographical spread and the impact of other recent, planned or concurrent scrutiny activity.



## Reporting

22. A report of our review will be published and made available on our respective websites. We anticipate publishing our report in late Summer 2022, although that timescale may vary depending on, for example, the ease with which we are able to access relevant case records as well as restrictions associated with the pandemic.

23. For further information about the review, or if you have information or experiences that you would like to share with us, please contact:

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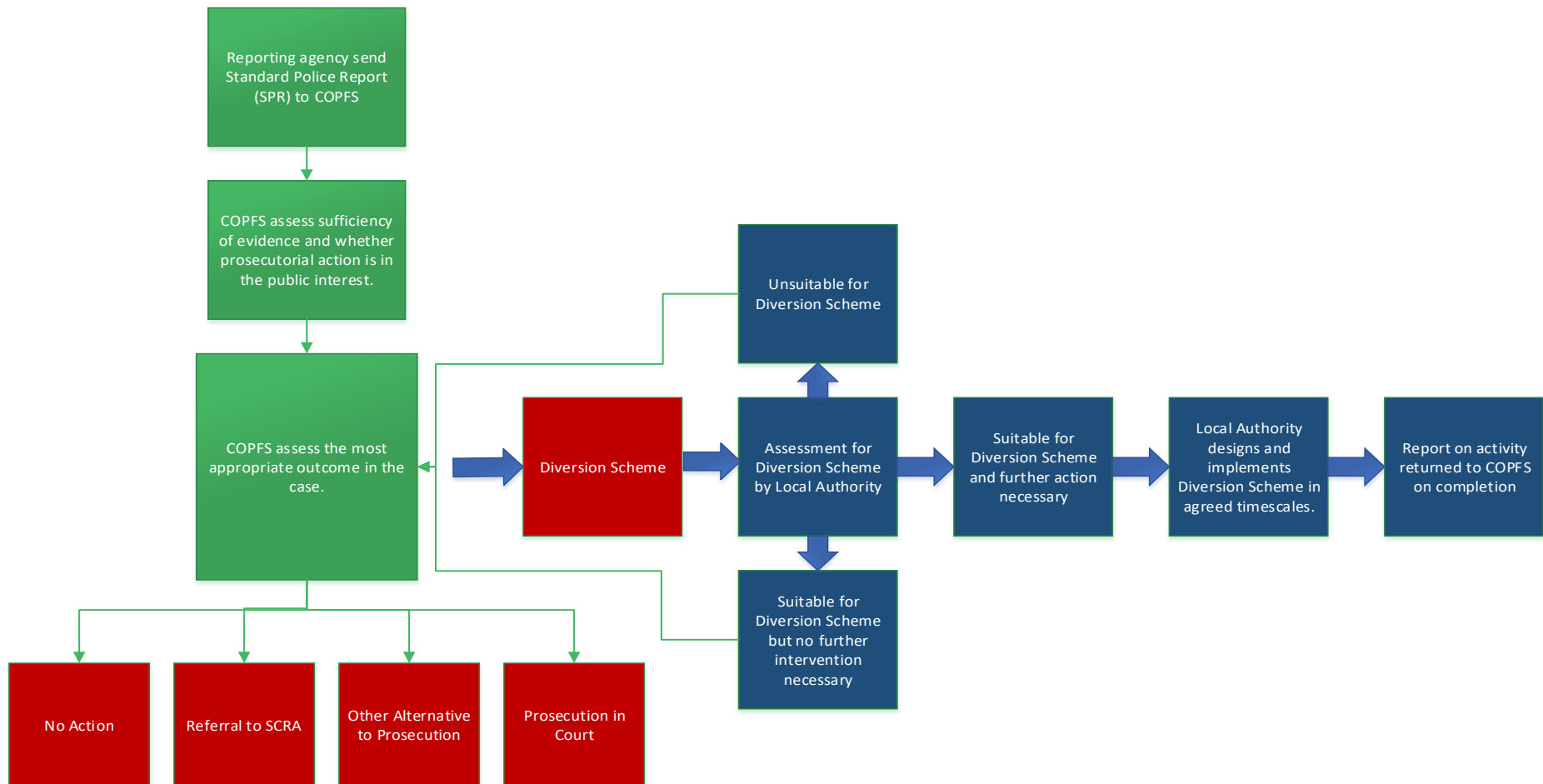
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## Appendix 1 – Diversion from prosecution process

This process chart appears in the National Guidelines on Diversion from Prosecution and is reproduced here with the kind permission of Community Justice Scotland.





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### **About HM Inspectorate of Prosecution in Scotland**

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