

## Prosecution Code

First published Last updated  
01 May 2001 14 Jul 2023

### Strategic aim

As a department of the Scottish Government, we aim to play a pivotal role in the achievement of the purpose of the criminal justice system of maintaining the security and confidence of the people of Scotland by providing just and effective means by which crimes may be investigated and offenders brought to justice.

### Introduction

The Lord Advocate is the Government Minister responsible for the prosecution of crime in Scotland. Although a member of the Scottish Government, as the head of the prosecution system in Scotland the role is independent of other Ministers and indeed of any other person. No one can require the Lord Advocate to institute criminal proceedings or to abandon a prosecution. It is fundamental to the prosecution of crime in Scotland that decisions in individual cases are immune from political influence or other pressure.

The International Association of Prosecutors – Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, which the Crown Office and Procurator Fiscal Service adopted in 1999, states “the use of prosecutorial discretion... should be exercised independently and be free from political interference” and requires prosecutors to “perform their duties without fear, favour or prejudice.”

Under the authority of the Lord Advocate the Crown Office and Procurator Fiscal Service provides the sole public prosecution service in Scotland. The Strategic Aim of the department involves providing just and effective means by which crimes may be investigated and offenders brought to justice.

A key objective of the department is to ensure, in the public interest, that all crimes made known to the Procurator Fiscal are investigated and that effective and consistent use is made of the range of prosecution options, alternatives to prosecution and provisions for the confiscation of proceeds of crime.

This Prosecution Code sets out the criteria for decision making and the range of options available to prosecutors dealing with reports of crime. By publishing this information, the Crown Office and Procurator Fiscal Service aims to provide a general explanation of the various factors which may influence decisions regarding prosecution or alternative action. It is hoped that the Prosecution Code will provide an improved understanding of the decision-making process as well as an indication of its complexity.

The police and other reporting agencies send the Procurator Fiscal reports of crimes. The Procurator Fiscal then decides whether to begin criminal proceedings, or whether to take alternative action. Such decisions must reflect the values of the department, namely:

- impartiality
- thoroughness
- integrity
- sensitivity
- co-operation
- professionalism

### Criteria for decisions

In considering the action to be taken in relation to reports of crime the prosecutor must take account of both legal and public interest considerations.

#### Legal considerations

##### Domestic Law

In considering cases the Procurator Fiscal must decide whether the conduct complained of constitutes a crime known to the law of Scotland and whether there is any legal impediment to prosecution. For example, it may be necessary to consider the effect of any delay which has arisen; the Procurator Fiscal must consider any relevant statutory time limits and case law.

##### International Law

The Human Rights Act 1998 and the Scotland Act 1998 in general require Scottish prosecutors to act in a way which is compatible with the European Convention on Human Rights. Prosecutors will also have regard to relevant international obligations, including the United Nations Convention on the Rights of a Child.

#### Evidential considerations

##### Sufficiency of evidence

The Procurator Fiscal must be satisfied that there is sufficient admissible evidence to justify commencing proceedings.

In general, for there to be sufficient evidence there must be corroboration, that is evidence from at least two separate sources to establish the essential facts of the case, i.e.

- that the crime was committed; and
- that the accused was the perpetrator

The prosecution must prove these matters beyond reasonable doubt.

The various sources of evidence which may be available include not only ‘eye witness’ evidence but medical, scientific and other forensic evidence as well as evidence of statements by an accused person.

If the evidence appears to be insufficient, the Procurator Fiscal can instruct the police, or request another reporting agency, to carry out further inquiries. If, after a full inquiry, the Procurator Fiscal is satisfied that the evidence is insufficient, the Procurator Fiscal cannot then proceed with a prosecution.

#### Admissibility

The laws of evidence determine whether a court can consider certain types of evidence. In considering the evidence, the prosecutor will assess whether, having regard to the laws of evidence, a court will allow the evidence to be considered in the case. For example, the court may refuse to take account of evidence that has been obtained improperly, irregularly or unlawfully. Similarly, certain categories of evidence are inadmissible.

#### Reliability

Although there may be sufficient, admissible, evidence to justify criminal proceedings, consideration must also be given to the reliability of that evidence. This involves an assessment of the quality of the evidence. Concerns about the reliability of evidence may result from the existence of contradictory evidence, or from the existence of information which suggests that a witness is unable to provide an accurate account of events.

Where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate.

#### Credibility

As with reliability, the assessment of the credibility of evidence is ultimately a matter for the court. However, there may be doubt about the credibility, or truthfulness, of a witness's evidence because of other contradictory and apparently credible evidence; because a witness is known to be dishonest or because of prior inconsistent statements made by the witness.

Where there are concerns regarding the credibility of the evidence the Procurator Fiscal may take account of this in assessing whether there is sufficient evidence.

#### Public interest considerations

Assuming that the report discloses sufficient admissible, reliable and credible evidence of a crime committed by the accused, the prosecutor must consider what action is in the public interest. Assessment of the public interest often includes consideration of competing interests, including the interests of the victim, the accused and the wider community.

The factors which require to be taken into account in assessing the public interest will vary according to the circumstances of each case.

Where the accused and/or the victim or witness is a child, the best interests of the child are required to be treated as a primary consideration and to be given appropriate weight, along with other relevant considerations, in assessing the public interest.

The following factors may be relevant. Not all of them will apply in every case and the weight to be attached to any applicable factor will depend on the circumstances of each case.

The assessment of the public interest involves a careful consideration of all the factors relevant to a particular case.

##### (i) The nature and gravity of the offence

The nature of the offence will be a major consideration in the assessment of the public interest. In general, the more serious the offence the more likely it is that the public interest will require a prosecution. On the other hand, in the case of less serious offences the prosecutor may consider that the public interest would be best served other than by prosecution. In some circumstances the prosecution of a relatively minor offence, at least without first offering an alternative to prosecution, may be regarded as a disproportionate response to the circumstances of the case.

The particular circumstances of the offence may affect the prosecutor's assessment of the public interest. For example, prosecution may be indicated where the accused was in a position of trust or authority or the victim was a child or otherwise vulnerable.

##### (ii) The impact of the offence on the victim and other witnesses

Consideration must always be given to the effects of the crime on the victim and any other witnesses. Where an offence results in significant injury or impairment, significant financial loss, distress or psychological consequences for the victim or any other witness it is likely that the public interest will be best served by prosecution. In the absence of such factors, the prosecutor may consider that the public interest would be best served by action other than prosecution.

##### (iii) The age, background and personal circumstances of the accused

The youth or advanced age of the accused may, depending on other circumstances, be a factor which influences the prosecutor in favour of action other than prosecution.

The public interest is more likely to require prosecution where the accused has a significant history of recent previous convictions, particularly where they include convictions for similar crimes. However, where an accused person is already serving a lengthy custodial sentence, depending on other factors, there may be little to be achieved by a further prosecution.

Finally, the prosecutor may consider that ill health or other adverse personal circumstances on the part of an accused person may justify the exercise of discretion in favour of action other than prosecution.

##### (iv) The age and personal circumstances of the victim and other witnesses

Similar considerations apply in relation to the victim; the youth, or advanced age or personal circumstances of the victim e.g. ill health, may be regarded as an aggravating factor tending to indicate that prosecution is appropriate.

Conversely, it may be relevant to consider the possible impact on a witness of attending court and giving evidence; the age or state of health of an essential Crown witness, or some other personal factor may persuade the prosecutor to exercise his discretion otherwise than by prosecution. Such a situation might arise where the prosecutor considers that attending court and giving evidence regarding a relatively minor offence is likely to traumatise or seriously inconvenience a very young, elderly, vulnerable or infirm witness. However, in such circumstances the prosecutor will consider whether the evidence of such a witness can be considered by the court without the witness having to appear in court in person.

##### (v) The attitude of the victim

In addition to considering the impact of the alleged offence on the victim and other witnesses the prosecutor must take into account any available information indicating the views of the alleged victim about whether prosecution or alternative action is appropriate.

However, any views expressed by a victim or witness will only be one factor in the assessment of the public interest.

##### (vi) The motive for the crime

The public interest is likely to require prosecution where criminal behaviour was sexually motivated or motivated by any form of discrimination against the victim's ethnic or national origin or religious beliefs.

It may also be relevant to consider whether the behaviour of the accused was spontaneous or planned in advance and whether it was part of a course of criminal conduct by the accused.

(vii) The age of the offence

A significant delay since the date of an offence may indicate that a prosecution will no longer be in the public interest. However, other factors will also be relevant, particularly the nature of the offence; the more serious an offence the more likely that a prosecution will remain appropriate.

In considering this factor, prosecutors must have in mind the relevant legal considerations which may affect the Crown's ability to prosecute viz. statutory time bars, the requirements of domestic law and the European Convention on Human Rights.

(viii) Mitigating circumstances

The prosecutor may have reliable information indicating that the accused's actions are mitigated by circumstances such as extreme provocation. Depending on the other circumstances of the case, strong mitigating circumstances may persuade the prosecutor that the public interest would not require a prosecution. Similarly, the fact that the accused has offered restitution which has been accepted by the victim may, depending on other circumstances, persuade the prosecutor that prosecution is not necessary and that the case can be dealt with appropriately by other means.

(ix) The effect of prosecution on the accused

In some cases prosecution may have the potential to affect the accused in a way or to an extent which is wholly disproportionate to the gravity of the alleged offence. In relation to less serious offences, this may influence the prosecutor's decision as to the appropriate action.

(x) The risk of further offending

Where there is information regarding the likelihood of further offending this will be relevant in deciding whether to prosecute. A legitimate purpose, both of prosecution and of the use of alternatives, is to prevent/deter further offending.

(xi) The availability of a more appropriate civil remedy

On consideration of the whole circumstances of a case, civil proceedings may offer a more appropriate method for settling the conflict or issue which forms the core of the case. The right of a party to seek civil redress may, depending on other circumstances, influence the prosecutor in favour of a disposal other than prosecution.

(xii) Powers of the court

The ability of the court to take certain action on conviction may be a factor which weighs in favour of prosecution. Examples include the power to award compensation, to disqualify from driving or to order a driver to re-sit the driving test.

(xiii) Public concern

In assessing the public interest the prosecutor will take account of general public concerns as well as local community interests. Arrangements can be made to enable local community representatives to discuss general matters of concern with the Procurator Fiscal although the final decision is the responsibility of the prosecutor.

## Options

### Prosecution

For many of the cases reported to the Procurator Fiscal prosecution will be the preferred option, assuming that there is sufficient evidence to justify proceedings. In determining the appropriate level of court and type of proceedings the prosecutor will have regard to factors such as the gravity of the offence, the offender's record and the likely penalty in the event of conviction. The practical test to be applied is to consider the sentencing powers of the various courts.

The general rule is that cases should be taken in the lowest competent court unless there is some good reason for prosecuting in a higher court. Certain crimes such as murder and rape can only be prosecuted in the High Court. Where the Procurator Fiscal considers that a case should be prosecuted before a sheriff and jury or before the High Court he is required to conduct his own investigation and to report the circumstances of the case to Crown Office. The Lord Advocate or one of his deputies (Crown Counsel) will instruct on further action to be taken.

### Alternatives to prosecution

#### No proceedings

In the absence of sufficient evidence the only appropriate action is to take no proceedings. However, where there is sufficient evidence the prosecutor retains a discretion not to proceed where, in his assessment, prosecution is not in the public interest.

#### No proceedings meantime

Where the prosecutor decides that there is insufficient available evidence to justify proceedings in respect of a serious allegation but there is a possibility that further evidence implicating the accused will be submitted within a reasonable time, the case should be marked "no proceedings meantime". Similarly, such action may be appropriate where despite there being insufficient evidence the nature of the criminal conduct suggests that the accused may re-offend in similar circumstances which might provide additional evidence so that proceedings could be brought.

#### Warnings by the Procurator Fiscal

Other than for cases reported by the Health and Safety Executive, the Procurator Fiscal may issue a written or personal warning to an accused. Such a warning will make it clear that a report of a crime has been submitted to the Procurator Fiscal and that repetition of the alleged behaviour will be likely to result in a prosecution.

#### Fiscal fines (statutory conditional offers of fixed penalty)

Section 302 of the Criminal Procedure (Scotland) Act 1995 empowers the Procurator Fiscal to make a conditional offer of a fixed penalty in relation to any offence in respect of which an alleged offender could competently be tried before a district court. A range of penalties is available and fixed instalment payments may be offered.

#### Conditional offers of road traffic offence fixed penalties

Section 75(2) of the Road Traffic Offenders Act 1988 (as amended) empowers the Procurator Fiscal to offer a conditional offer of fixed penalty as an alternative to prosecution for specified road traffic offences, including offences such as speeding, failure to comply with road traffic directions and signs and breaches of construction and use regulations.

#### Diversion from prosecution

Diversion is a process by which prosecutors are able to refer a case to social work or other identified agency as a means of addressing the underlying causes of offending when this is deemed the most appropriate course of action. Any diversion program should be tailored to the needs of each individual.<sup>1</sup>

#### Referral to Scottish Children's Reporter

The Lord Advocate has issued confidential guidelines to the police in relation to reporting offences alleged to have been committed by children. The prosecutor retains a discretion to refer to the Reporter cases involving children where such action is considered to meet the public interest.

<sup>1</sup>As at 14 July 2023 the circumstances in which diversion may be selected as an appropriate outcome in the public interest are under review by COPFS.

## Review of decisions to prosecute

### Discontinuing proceedings

Where the prosecutor has advised an accused person, or has stated publicly, that no proceedings will be taken he has no power to reverse that decision.

However, where the decision has been taken to commence criminal proceedings the prosecutor remains under a duty to ensure that the decision remains appropriate in the public interest. Where there is a change of circumstances or where the prosecutor receives new information it will be necessary to consider whether the prosecution should continue. Where it is no longer in the public interest to prosecute or where it is no longer considered that there is sufficient evidence the prosecutor should not proceed with the case.

### Plea adjustment

The prosecutor has a discretion to accept adjusted pleas where to do so is consistent with the available evidence or otherwise in the public interest.

The deciding factor in discontinuing proceedings or in accepting a reduced plea is the prosecutor's assessment of the public interest. Thus, it will not be appropriate to accept a reduced plea for reasons of convenience or where, despite there being sufficient evidence, to do so will distort the court's assessment of the offending behaviour and of the appropriate sentence.

### Provision of reasons for particular decisions

The prosecutor cannot disclose publicly the detailed reasons for a decision in a particular case. There are a number of reasons for this policy; the decision will have been based on confidential information, for example information relating to matters such as the credibility, reliability or state of health of an essential witness or details of police operations. Furthermore, public disclosure of the reasons for not proceeding or for accepting reduced pleas may expose the accused person to accusations of crime in circumstances where he no longer has the opportunity of defending himself against such allegations in a court of law.