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Lord Advocate's Guidelines Offences alleged to have been committed by children

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Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children:

Revised categories of offence which require to be Jointly Reported

This document contains guidance to police officers in Scotland on the categories of offence which require to be jointly reported to the Procurator Fiscal and the Children's Reporter, as set out below.

In terms of section 41A of the Criminal Procedure (Scotland) Act 1995, children under the age of twelve years may not be prosecuted, in respect of any alleged criminal conduct and will therefore not be jointly reported to the Procurator Fiscal.

Category 1

Offences which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest.

Category 2

Offences alleged to have been committed by children aged 15 years or over which in the event of conviction oblige or permit a court to order disqualification from driving.

Category 3

Offences alleged to have been committed by people who are aged 16 or 17, and who are classified as children by section 199 of the Children's Hearings (Scotland) Act 2011.

In terms of section 199 of the Children's Hearings (Scotland) Act 2011, the **definition of a child includes:**

- A person aged 16 and 17 years who is subject to a compulsory supervision order; or
- A person over the age of 16 years who was referred to the Principal Reporter before they turned 16, but a 'relevant event' has not yet occurred.

A 'relevant event' is defined as being:

- The making of a compulsory supervision order;
- The notification to the person that the question of whether a compulsory supervision order should be made will not be referred to a children's hearing or
- The discharge of the referral to the Principal Reporter.

However, there is no requirement to jointly report the child to the Procurator Fiscal and the Children's Reporter if the offence falls within the Framework on the use of

Police Direct Measures and Early and Effective Intervention for 16 and 17 year olds. Such offences should be submitted to the Children's Reporter alone.

Explanatory notes

Category 1

Offences which require by law to be prosecuted on indictment

These offences fall under two headings -

(1) Common law offences which are within the exclusive jurisdiction of the High Court of Justiciary namely treason, murder and rape;

and

(2) Statutory offences for which the statute only makes provision for prosecution on indictment or for a penalty on conviction on indictment - for example, contraventions of the:

- Firearms Act 1968, Section 16, 17(1) and (2), and 18(1),
- Road Traffic Act 1988, Section 1,
- Criminal Law (Consolidation) (Scotland) Act 1995 Section 5(1), and
- Sexual Offences (Scotland) Act 2009, Section 1, 2, 18 and 19.

Offences Which Normally Give Rise to Solemn Proceedings

Offences which may be prosecuted on indictment on the instructions of the Lord Advocate in the public interest is a wider category of offences, which often depends on the facts and circumstances of a particular case.

Early discussion with the Procurator Fiscal is advised where there is any doubt. Some common areas of offending which may fall to be considered under this heading are:

(1) Offences which are normally indicted in the High Court of Justiciary - these are offences of culpable homicide, attempted murder, assault to the danger of life, assault and robbery involving the use of firearms, attempted rape, incest and related offences (contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 Sections 1-2).

(2) Other offences which may fall into this category as being those normally prosecuted on indictment are assault to severe injury or permanent disfigurement, assault with intent to rape, serious assault and robbery (in particular involving the use of weapons other than firearms), assault with intent to rob involving the use of firearms, fire-raising and malicious mischief causing or likely to cause great damage to property or danger to life, Misuse of Drugs Act 1971 offences involving being concerned in the supply of any controlled drugs.

(3) The following Sections of the Sexual Offences (Scotland) Act 2009 contains offences that can be prosecuted on indictment:

- Sections 3, 4, 5, 6, 7, 8, 9 and 11 - offences capable of being committed against adults (aged over 16) and younger (aged under 13) and older (Aged 13, 14 and 15) children who do not consent to the conduct.
- Sections 20, 21, 22, 23, 24, 25 and 26, - offences capable of being committed against a younger child (aged under 13) who consents to the conduct.
- Sections 28, 29, 30, 31, 32, 33, 34, 35 and 36 - offences only capable of being committed by a person who has attained the age of 16 against an older child (aged 13, 14 or 15) who consents to the conduct.

These offences should only be considered for joint reporting where the offence has been committed by a "child" aged 16 or 17 who is subject to a supervision order or where a relevant event has not yet occurred.

"Section 37 " offences involving older children engaging in sexual conduct with each other. See paragraph (4) below.

Offending behaviour which is covered by any of the aforementioned offences may fall to be jointly reported for consideration. The facts and circumstances of the offence are therefore vitally important when considering whether the offence is so serious in its nature as to merit being prosecuted on indictment.

Where there is any doubt at all that the offence may fall into this category, contact is to be made with the relevant Sexual Offences Team to discuss the facts of the particular case, either by telephone or by submission of an occurrence report for advice & direction prior to submitting a full report.

(4) Section 37 of the Sexual Offences (Scotland) Act 2009 creates the offence of older children engaging in sexual conduct with one another.

This is not an offence which requires by law to be prosecuted on indictment but it may, depending on the facts and circumstances, be so prosecuted. When considering whether to report jointly allegations which are covered by this Section, Police Officers should pay regard to the following indicators:

- Age of the parties involved;
- Any power imbalance between the parties, for whatever reason;
- Overt aggression, manipulation, coercion or bribery;
- Misuse of substances as a disinhibitor, especially where this is at the instigation of the more dominant party;
- Whether the child's own behaviour, because of the misuse of substances, places him/her at risk so that he/she is unable to make an informed choice about any activity;

- Whether any attempts to secure secrecy have been made by the dominant party beyond what would be considered usual in a teenage relationship;
- Whether the either party is known to one of the agencies;
- Whether the parties deny, minimise or accept concerns;
- Whether the evidence is suggestive of grooming.

This is not an exhaustive list. Where, however, elements in this list or other circumstances are present which indicate that a young person may not have given free agreement to the activity concerned the matter should be jointly reported.

It should be re-emphasised that only offences which are normally prosecuted on indictment are to be reported jointly and that any cases of doubt should be discussed with the Procurator Fiscal in advance of any report being submitted.

Category 2

This category applies exclusively to children aged 15 years or over.

Children will be prosecuted for this type of offence only if the Procurator Fiscal considers that it would be in the public interest to obtain a disqualification which would still be in force when the child became 16 and that in the event of conviction it was likely that the court would impose such a disqualification. Minor Road Traffic Act offences carrying a liability to discretionary disqualification should not normally be reported.

Category 3

There is no legislative restriction on the forum for the prosecution of children of or over 16 years of age who can be proceeded against in the Justice of the Peace Court. However, where the child is 16 or 17 years old and subject to a supervision order (or a relevant event has not yet occurred) and the offence alleged to have been committed falls within the Framework on the use of Police Direct Measures and Early and Effective Intervention for 16 and 17 year olds then there is no requirement for the case to be jointly reported. Such cases may be reported directly to the Children's Reporter.

United Nations Convention on the Rights of Child

Police Officers must have regard to the United Nations Convention on the Rights of a Child (UNCRC).

In particular, the best interests of the child should be a primary consideration, in terms of Article 3 of the UNCRC and the views of the child should be taken into account in terms of Article 12.

Any discussion with COPFS around whether a case requires to be jointly reported should include consideration of the best interests of the child accused and any child

victims or witnesses, including any views expressed by the child or children, where known.

Where it is identified that a case requires to be jointly reported, Police Officers should ensure that the report submitted makes reference to any views expressed by the child or children, where known, and any other relevant information that is material to the best interests of the child or children. This should include details of any discussions with other agencies or the child's representatives.

In terms of Article 37(b) of the UNCRC, arrest, detention or imprisonment of a child should only be used as a measure of last resort and for the shortest period of time.

Dorothy Bain, QC
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