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Alyn Smith MSP,
Convenor of the Criminal Justice Committee

22nd June 2026

Dear Mr Smith,

Prosecution Code

I am writing to advise that I will introduce a revised and updated Prosecution Code on 22 June 2026. The full terms are set out at Annex A below and will be published on the Crown Office and Procurator Fiscal Service website.

This work has been done to ensure Scotland's independent prosecutors have a decision-making framework which reflects the current legal landscape and aligns with the approach taken in other jurisdictions. The revised code reinforces transparency and accountability for prosecutorial decisions and will assist with consistency in decision-making.

The former code provides for a two-stage prosecutorial test comprising evidential and public interest elements, which may be summarised as follows:

- Is there sufficient (corroborated) evidence of the commission of the crime and identity of the perpetrator?
- If so, is prosecutorial action in the public interest?

This essentially quantitative test will now be complemented by a qualitative element which will assess the prospect of conviction based on the available evidence.

The revised evidential test will consist of the following elements:

- legal sufficiency of evidence; and
- a realistic prospect of a conviction.

The public interest test will remain.



The 'realistic prospect' test is stated as follows:

"Where there is a legal sufficiency of evidence, the prosecutor must be satisfied that there is a realistic prospect that the accused will be convicted before taking prosecutorial action. This means that an objective, impartial and reasonable jury, or sheriff, or justice of the peace, as the case may be, properly directed and acting in accordance with the law, is more likely than not to convict the accused."

My officials have conducted extensive training for COPFS staff and engagement with other organisations to raise awareness and aid understanding of the new test.

Yours,

**THE RIGHT HONOURABLE RUTH CHARTERIS KC
LORD ADVOCATE**



Crown Office and
Procurator Fiscal
Service

Prosecution Code and Test 2026

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Introduction

- 1.1 This Code is issued by the Lord Advocate to Scottish prosecutors to give general guidance on the criteria to be applied in every case. Whilst a decision in an individual case will depend upon the specific circumstances of that case, the guidance in this Code sets out a framework for prosecutorial decisions. All prosecutorial decisions will be made with reference to this Code.
- 1.2 The Lord Advocate is responsible for the prosecution of crime in Scotland. Although a member of the Scottish Government, the independence of prosecutorial decision-making is specifically protected by law. As the head of the prosecution system in Scotland, the Lord Advocate is independent of other Ministers and indeed of any other person.
- 1.3 It is a fundamental principle of our law that all prosecutorial decisions are made independently of Government and are immune from political pressure or outside influence. No one can require the Lord Advocate to institute criminal proceedings or to abandon a prosecution.
- 1.4 Prosecutors are independent from the police and other investigatory and reporting agencies.
- 1.5 A decision to take prosecutorial action is one of great significance and impact on the accused, victims, witnesses and the public at large and must be undertaken with the utmost care.
- 1.6 Scottish prosecutors will perform their duties without fear, favour or prejudice. When making decisions, prosecutors must be fair and objective. They must not let any personal views about the ethnic or national origin, sex, disability, age, religion or belief, sexual orientation or gender identity of the accused, victim or any witness influence their decisions.
- 1.7 Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.
- 1.8 Prosecutors must be even-handed in their approach to every case, and have a duty to protect the rights of the accused and victims, while providing the best possible service to the public.
- 1.9 The Code does not lay down any rule of law and is not intended to be a detailed manual of instructions for prosecutors nor a comprehensive guide to the policies and procedures of Crown Office and Procurator Fiscal Service. Rather, it outlines the general approach to decision-making that the Lord Advocate has adopted; every case must be considered individually having regard to its own facts and circumstances.

The Prosecution Test

- 2.1 Prosecutors may only take action where there is sufficient admissible evidence that a crime has been committed, by the accused, and that it is in the public interest to take action.
- 2.2 When considering whether to take action both the evidential and public interest aspects of the test must be satisfied.
- 2.3 Prosecutorial action includes prosecution before a court and the use of prosecutorial direct measures.

Evidential factors

- 3.1 The evidential stage involves consideration of two elements:
 - the legal sufficiency of evidence
 - the prospect of a conviction being recorded
- 3.2 There must be sufficient evidence in law before a prosecutor can take action. For there to be sufficient evidence in law, there must be corroboration¹, that is evidence from at least two separate sources to establish:
 - that a crime was committed
 - that the accused was the perpetrator
- 3.3 When assessing whether there is sufficient evidence to take action prosecutors must consider whether the evidence is admissible.
- 3.4 Evidence is admissible where 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 such as hearsay are inadmissible.
- 3.5 If the evidence appears to be insufficient, the prosecutor can instruct the police, or request another reporting agency, to carry out reasonable further inquiries. If, after proper inquiry, the prosecutor is satisfied that the evidence is insufficient, action cannot be taken.

¹ There are a small number of statutory offences where corroboration is not required.

- 3.6 Where there is a legal sufficiency of evidence, the prosecutor must be satisfied that there is a realistic prospect that the accused will be convicted before taking prosecutorial action. This means that an objective, impartial and reasonable jury, sheriff or justice of the peace, as the case may be, properly directed and acting in accordance with the law, is more likely than not to convict the accused.
- 3.7 In considering whether there is a realistic prospect of conviction prosecutors must take into account any known or reasonably anticipated position that may be advanced by the accused.
- 3.8 When assessing whether there is a realistic prospect of conviction, consideration must be given to the reliability of that evidence. This involves an assessment of the quality of the evidence. For example, concerns about the reliability of evidence may result from questions over the evidence's accuracy or integrity, 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.
- 3.9 When assessing whether there is a realistic prospect of conviction, consideration must also be given to the credibility of that evidence. Credible evidence is evidence that is truthful and capable of being believed. Prosecutors must assess whether there is any reason to call into question the truthfulness of a witness's evidence for example 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.
- 3.10 Where there are substantial doubts about the reliability or credibility of evidence, prosecutors must assess whether that evidence is essential to proof of the case, if so, whether the remaining evidence is sufficient to take action and, if so, whether there is a realistic prospect that a court will convict the accused.

Petition proceedings

- 3.11 The full details of solemn cases are rarely available at the early stages of an investigation when a decision to commence petition proceedings may be under consideration. For this reason, the "realistic prospect of conviction" test is not appropriate and a different evidential test is applied at the initial stages of solemn proceedings which is as follows:
- First Appearance/Committal for Further Examination (CFE): there is no requirement for a legal sufficiency of evidence in order to place an accused person on petition. Petition proceedings can be initiated on the basis of a single reliable source of evidence which gives reasonable grounds for suspicion, provided there is a reasonable prospect of a second,



corroborative source becoming available, and where bail is to be opposed, for that evidence to be available by the date of full committal.

- Full Committal (FC): the prosecutor should only move to fully commit where there is a prima facie case against the accused, that is, a corroborated case to answer. The test, at this stage, is purely quantitative and the quality or weight of the evidence is not necessarily fully assessed at this time.

The Public Interest

- 4.1 Where there is sufficient admissible evidence of a crime committed by the accused, and there is a realistic prospect of a conviction, the prosecutor must consider whether it is in the public interest to take action.
- 4.2 It does not follow that because the evidential elements of the test can be met, prosecutorial action must be taken. Prosecutors have discretion as to whether action should be taken. This discretion is informed by assessing where the public interest lies in any case. The factors which require to be taken into account in assessing the public interest will vary according to the circumstances of each case.
- 4.3 The assessment of the public interest often includes consideration of competing interests, including the interests of the victim, the accused and the wider community.
- 4.4 The public interest may not coincide with what the public are interested in.
- 4.5 Where the accused, 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.
- 4.6 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.
 - (i). Nature and seriousness of the offence or comparative minor nature of the offence.

The nature of the offence will be a major consideration in the assessment of the public interest. 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.

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 culpability of the accused.

The degree of culpability of the accused and their motivation is a relevant factor. The public interest is likely to require prosecution where criminal behaviour was sexually motivated or motivated by any form of prejudice or hostility toward the victim's actual or presumed ethnic or national origin, sex, disability, age, religion or belief, sexual orientation or gender identity.

When assessing culpability, regard will be had to:

- the accused's level of involvement in the crime
- the extent to which the offending was premeditated and/or planned
- the extent to which the accused has benefitted from criminal conduct
- whether the accused has previous criminal convictions or was on bail or licence
- whether the offending was or is likely to be continued, repeated or escalated

An accused is likely to have a much lower level of culpability if the accused has been compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending.

(iii). The Impact on the victim and the views of the victim

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.

In addition to considering the impact of the alleged offence on the victim and other witnesses, whilst not determinative, the prosecutor must take into account any available information indicating the views of the alleged victim about whether prosecution or other action is appropriate.

Prosecutors must be aware of the impact that a prosecution may have on a victim or witness, and must take appropriate steps to avoid or minimise that impact wherever possible.

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

(iv). The age maturity and personal circumstances of the accused

The prosecutor must consider the rights of the accused, and ensure that these are protected, throughout the life of a case.

The youth or advanced age of the accused may be a factor which influences the prosecutor in favour of action other than prosecution. Similarly the maturity of the accused is a factor to be taken into account.

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.

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.

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.

Prosecutors should also have regard to whether the accused is, or was at the time of the offence, affected by any significant mental or physical ill health or disability, as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether the accused is likely to re-offend and the need to safeguard the public or those providing care to such persons.

(v). Age and Personal Circumstances of the Witnesses

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 their 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.

(vi). The Impact on the community and public concern

The impact of an offence on the wider community, and considerations of public safety, are factors to be considered when assessing the public interest. Where there is a concern that the accused is a danger, prosecutorial action will usually be appropriate.

In assessing the public interest the prosecutor will take account of general public concerns as well as local community interests.

(vii). The proportionality of prosecutorial action

It is important that any action taken by prosecutors is proportionate. In particular, prosecutors should consider:

- The powers of the court: when considering action prosecutors should consider the powers of the court. In some comparatively less serious cases, prosecutorial action may be warranted as a court has a power to disqualify as a director or driver, or to endorse a licence.
- Whether there are any mitigating circumstances: where there is reliable information indicating that the accused's actions are mitigated by circumstances, the prosecutor may be persuaded that the public interest would not require a prosecution.
- 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.
- 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.

- 4.7 This is not intended to be a comprehensive list of public interest factors but is merely illustrative of common factors which arise. Prosecutors must consider each case on its own merits.

Prosecutorial Action

- 5.1 Where a prosecutor decides to take action, they may decide to raise proceedings in court, refer a child to the Children's Reporter or offer a direct measure. The nature of the action taken will depend upon the nature and relative seriousness of the offence, powers of the court or procurator fiscal and the outcome sought.
- 5.2 For many of the cases reported to prosecutors, criminal proceedings in court will be the preferred option. In determining the appropriate level of court and type of proceedings the prosecutor will have regard to the gravity of the offence, the offender's record and the likely penalty in the event of conviction.
- 5.3 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 on indictment, they are required to conduct their own investigation and to report the circumstances of the case to Crown Counsel. Crown Counsel will instruct on further action to be taken.
- 5.4 Where the prosecutor decides to take action, but prosecution in court is not required the prosecutor may decide, in line with the relevant COPFS guidance and instruction, to take action in the following ways:

(i) 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 further reports of similar behaviour will be likely to result in a prosecution.

(ii) Fiscal Fines, Fiscal Compensation Orders, Fiscal Work Orders

The procurator fiscal may make a conditional offer of a fixed penalty (fiscal fine), compensation order or work order.



(iii) Conditional Offers of Road Traffic Offence Fixed Penalties

For specified road traffic offences, the procurator fiscal may offer a conditional offer of fixed penalty as a direct measure and may impose penalty points.

(iv) 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.

(v) Referral to Scottish Children's Reporter

The Lord Advocate has issued 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.

No Action

- 6.1 In the absence of sufficient evidence or where there is sufficient evidence but there is not a realistic prospect of conviction, the only appropriate action is to take no proceedings. However, where there is sufficient evidence and a realistic prospect of conviction the prosecutor retains a discretion not to proceed where, in their assessment, prosecution is not in the public interest.
- 6.2 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.

Requirement for reasons

- 7.1 Where a prosecutor takes a decision to take action, or as the case may be no action, the nature of the decision made will be recorded along with the reasons for the decision by reference to this Code.

- 7.2 The reasons given for the decision shall be sufficient to demonstrate that the decision is made in accordance with law and allow any review of the decision to objectively determine the basis for the decision.

Cases involving Politicians

- 8.1 There is a long standing convention that Law Officers will not be involved in decision-making where an accused is a politician. In such cases decisions as to whether to take action will be taken by an Advocate Depute.

Ongoing duty of Review

- 9.1 The prosecutor has an ongoing duty to review decisions to prosecute throughout the life of a case to ensure that there remains sufficient evidence and a realistic prospect of conviction and that it continues to be in the public interest to take action.
- 9.2 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. This should be done by re-application of the prosecutorial test to assess whether the criteria continue to be met. Where it is no longer in the public interest to prosecute or where it is no longer considered that there is sufficient evidence or a realistic prospect of conviction, the prosecutor should not proceed with the case.

Plea adjustment

- 10.1 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.
- 10.2 The deciding factors in discontinuing proceedings or in accepting a reduced plea are (i) any change to the evidential position which means that there is no longer a sufficiency of evidence or realistic prospect of conviction in respect of any charge; (ii) 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 the consequent sentence.