Assisting Offenders – SOCPA [2005] Sections 71-75

Relationship between the statutory scheme and previous practice

The Serious Organised Crime and Police Act *2005* ('the 2005 Act') established a number of important new powers designed to assist law enforcement agencies to investigate, disrupt and prosecute serious organised crime more effectively. Among these are provisions in sections 71 to 75 which establish a statutory framework to replace earlier arrangements for regulating agreements made with offenders who have offered to assist the investigation or prosecution of offences committed by others.

This guidance sets out the procedures to be followed in all cases in which a specified prosecutor is considering making a formal agreement:

(a) not to prosecute a person (an immunity notice under s. 71); or

(b) not to use certain evidence (a 'restricted use' undertaking under s. 72);

(c) setting out in writing the terms under which a person who, with a view to obtaining a reduced sentence under s.73, is willing to assist an investigation or prosecution; or

(d) setting out in writing the terms under which a prosecutor agrees to refer a case back to court for a review of sentence (s.74).

The use of one or other of these written agreements will ensure that, where appropriate, the individual is brought within the statutory provisions regarding reduction in sentence and provide the defendant with the right to seek a reduction or further reduction under s.74(2)(b) or (c) and the prosecution with the ability to seek a review of any discounted sentence under s.74(2)(a) should the individual fail to comply with the conditions in the agreement.

The statutory arrangements under the 2005 Act do not preclude the continuing use of prosecutorial discretion to secure the co-operation of potential co-defendants in an informal and strategic manner in accordance with existing common rule rules. Examples of the exercise of this discretion might include:

- a review decision to prosecute only the main offenders and to call peripheral offenders as witnesses;
- informing the court, when an accomplice or other witness gives evidence, that the witness will not be prosecuted on the basis of anything he may say in the course of truthful evidence on that occasion. This situation may arise at short notice when the court of its own motion warns the witness against self incrimination during the course of their testimony. (Note: it is preferable for such *ad hoc* non-prosecution undertakings to be expressly limited to offending of which the prosecution is aware or which the offender has already admitted in the course of his evidence; blanket undertakings not to prosecute *any* offending which is revealed should be avoided).

The 2005 Act is also silent on the status of 'texts', the procedure by which the police, with the concurrence of the prosecution, make the sentencing judge aware, in confidence, of assistance given by an accused to the prosecution whether in relation to the present case or more generally. It was not intended that the Act should prohibit this practice and texts may continue to be supplied under existing procedures: *R v P, R v Blackburn [2007] EWCA Crim 2290; R v H, D, Yasser Chaudhury [2009] EWCA Crim 2485.*

However, given the intention of the 2005 Act to place sentencing discounts on a statutory basis and to provide for the possibility of sentence reviews, it is generally preferable for assistance given during the course of the present investigation or prosecution to be made subject to a formal written agreement between the co-operating defendant and the specified prosecutor. This is especially so where it is envisaged that the assisting offender will give evidence in court, but as a matter of law a written agreement for the purposes of section 73 may also cover assistance by way of intelligence information only.

Texts may continue to be of relevance in cases which fall outside the statutory scheme either because the defendant is unwilling to sign an agreement or because they have pleaded not guilty but are nonetheless convicted and want credit for any assistance they may have given during the investigation. (An example of this situation might be an assisting offender who gives substantial information about the involvement of co-accused or the whereabouts of a weapon or stolen property and who goes on unsuccessfully to plead not guilty on the basis of duress). Texts may also continue to be used in the case of a registered informant who wants credit for past assistance of a general nature but who is not suitable for an agreement to provide future assistance in relation to any specific offence.

Defendants who prefer to rely on texts must take the consequence that any discount of sentence may be correspondingly reduced, simply because the value of assistance provided in this form is likely to be less, and is in any event less readily susceptible to a safeguarding review under s. 74(2) than it would if provided under the formal arrangements now available under s. 73: *R v P, R v Blackburn*, at paragraph 34; *R v H, D, Chaudhury*, at paragraph 4.

General principles and practice relating to formal immunities and restricted use undertakings

Principles

A specified prosecutor may be asked by an investigator or by legal representatives of an offender to consider making a formal agreement with an offender in order to secure evidence in the prosecution of others, or to obtain other information vital for protecting the public interest.

Although it is not a pre-requisite to any of the agreements that the assisting offender should have legal representation it is clearly preferable that they should in the interests of justice. Further, it is likely that subsequent challenges to the terms of any agreement will be easier to rebut if the offender had the benefit of legal advice before entering into the agreement. Therefore, before an assisting offender is invited to sign any form of agreement he or she should be advised by the investigator of their right to seek independent legal advice on its terms and effect.

In order to benefit from immunity, restricted use undertaking or witness agreement a person must:

(a) Fully admit their own criminality;

(b) Provide the investigators with all information available to them regarding the matters under investigation and those involved;

(c) Agree to maintain continuous and complete co-operation throughout the investigation and until the conclusion of any criminal or other proceedings arising from the said investigation, including giving evidence in court where appropriate.

In every case where an accomplice or potential co-defendant indicates that he or she is willing to assist the prosecution the terms under which this assistance is to be given, the range of assistance that is to be provided and any benefit to the offender should be reduced to writing with as much precision as is possible. In any subsequent application by the prosecutor to have a reduction in sentence reviewed the sentencing court will need to have unequivocal evidence of what was agreed in advance so that the alleged default can be clearly demonstrated.

Although it is not a statutory requirement, as a general principle and a matter of good practice those offenders who wish to benefit from a written agreement should be required fully to admit their criminality. This is especially so where it is envisaged that the assisting offender will give evidence in court, rather than simply provide assistance by way of intelligence. The process of admitting other criminality, often called "cleansing", should be part of the de-briefing process carried out by the investigators in the process of obtaining the evidence of the potential assisting offender. Cleansing protects the integrity of the informer system, countering the suggestion that "shady deals" have been struck between the offender and the prosecution, just to obtain testimony against others.

From a tactical point of view, full cleansing minimises the risk that the value of assisting offender's evidence will be reduced to nothing by cross-examination on criminal activities he has not admitted but which are well known to his former accomplices.

Cases may arise where an assisting offender is not prepared to admit all his other criminality but his evidence is considered of such importance that it should not be refused on this ground alone. The offender may be offering to give evidence or just intelligence. Any decision to use as a witness an assisting offender who has refused to undergo cleansing must be recognised as a high risk strategy and very careful consideration will have to be given as to whether, despite the absence of full cleansing, his evidence will be sufficiently credible before a jury, and is of such importance that it should be called. Cases where it is appropriate to proceed with such a witness should be thought of as truly exceptional particularly in light of obiter dicta in *R v P and Blackburn* and in *R v H, D, Chaudhury* which described full cleansing as "an essential feature of the new statutory arrangements."

Assisting offenders offering to give intelligence only and refusing to undergo cleansing are likely to receive a sentence discount which is significant smaller than had they undergone full cleansing. This should be made clear to them prior to entering any form of agreement.

As a general rule, an accomplice should be prosecuted, whether or not he or she is to be called as a witness and this should be the first option considered by investigators and prosecutors.

Only where it is clearly necessary in the public interest to depart from this position should consideration be given to entering some form of agreement not to prosecute. Only in the most exceptional cases will it be appropriate to offer immunity, rather than a restricted use undertaking.

The criteria to be considered in determining whether it is appropriate to grant immunity to a witness were set out by the then Attorney General in a written answer to the House of Commons on 9 November 1981. They are as follows:

(a) Whether, in the interests of justice, it is of more value to have a suspected person as a witness for the Crown rather than as a possible defendant;

(b) Whether, in the interests of public safety and security, the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual;

(c) Whether it is very unlikely that any information could be obtained without an offer of immunity and whether it is also very unlikely that any prosecution could be launched against the person to whom the immunity is offered.

These criteria may be applied when considering whether to make any formal agreement with an offender who is willing to assist the prosecution.

A prosecutor should endeavour to assess, in cooperation with the investigating agency, the strength of the prosecution case with and without the information from the potential accomplice/witness and should be satisfied that the person is able and prepared to provide reliable evidence on significant aspects of the case and would be a credible witness. In making to this judgement, some or all of the following factors may be relevant:

(a) the seriousness of any offence(s) concerning which the evidence, information, co-operation, assistance or other benefit would be provided; as a rule non-prosecution agreements should only be considered in serious cases;

(b) the seriousness of any offence(s) which the potential witness might have committed, in comparison with (a) above, including the extent to which the potential witness had coerced or incited another person to take part in the offence(s) under investigation;

(c) the importance and value of the evidence, information, co-operation, assistance or other benefit to be provided;

(d) whether it is possible to obtain the evidence, information, co-operation, assistance or other benefit from another witness, or in another manner;

(e) the strength of the prosecution case without the evidence that it is expected that the witness can give; and, if some other charge could be established against the defendant without the witness' evidence, the extent to which that other charge would reflect the defendant's criminality;

(f) the impact of the evidence that it is expected that the witness can give on the prospects of conviction in the case taken as a whole (the prospects of the conviction may actually be reduced because of the bad character and lack of candour of the witness when giving evidence);

(g) the criminal history of the witness and full details of his or her contacts with the police in order to assess credibility;

(h) whether there are other indicators tending to confirm that the evidence or information that the witness might give is true;

(i) the number of occasions and the circumstances in which any agreement has been made with the witness in the past; the expectation of a discount in sentence should not be seen as a licence to continue to commit offences;

(j) whether the interests of justice (including the protection of the public and the interests of the victim) would be better served by obtaining the proposed evidence, information, co-operation, assistance or other benefit; or by the conviction of the person with whom it is proposed to make an agreement.

Full immunity from prosecution

Section 71 of the 2005 Act provides that if a 'specified prosecutor' thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person immunity from prosecution, he may give that person an immunity notice. Although it is contained within an Act directed towards serious organised crime the only statutory limitation on this provision is that it cannot be applied in relation to an offence under s. 188 of the Enterprise Act 2002 (cartel offences) [s.71(7)].

Subject to this specific exclusion, immunity notices may be issued in relation to any type of offence. It should be noted, however, that only a specified prosecutor can give such a notice, not the police or other investigators; (reflecting the practice at common law, see *R v Turner and Others 61 Cr. App. R. 67*).

In accordance with previous practice, the Attorney General should be consulted before any decision is made on the granting of full immunity.

Immunity notices must be in writing [s.71(1)]. Where a person is given an immunity notice, no proceedings for the offence specifically described in the notice may be brought against that person except in circumstances specified in the notice [s.71(2)]. The ability to make the giving of an immunity notice subject to specific conditions distinguishes the new statutory scheme from previous arrangements in which immunity, once granted, was absolute. Under s.71(3) an immunity notice ceases to have effect if the person to whom it relates fails to comply with any condition specified in the notice. Where this occurs, a formal notice of revocation should be issued to avoid any uncertainty.

Case law relating to pre-statutory immunities established that the Crown had no power to make a prospective grant of immunity to cover future offending (see *R v DPP ex parte Pretty and Another [2001] UKHL 61; [2002] 1 All ER 1*). Nothing in the 2005 Act alters that position. Accordingly, immunity notices can only be granted in respect of offences which have already been committed. No immunity notice can be granted which condones, requires, or purports to authorise, or permits the commission of an offence in the future, whether by a particular person or a group of people. This may be contrasted with the power contained in section 27 of the Regulation of Investigatory Powers Act 2000 to authorise surveillance officers and human intelligence sources to engage in specific limited conduct which would, in the absence of that authorisation, make them liable to civil or criminal proceedings.

Restricted use undertakings

Section 72 provides that if a 'specified prosecutor' thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person an undertaking that information of any description will not be used in any criminal or confiscation proceedings or civil recovery under Part 5 of the Proceeds of Crime Act 2002 (civil recovery of the proceeds of unlawful conduct - but see further the section on Immunity and the Proceeds of Crime, below) he may give that person a restricted use undertaking. Any such undertaking must be given in writing [s. 72(1) - (2)].

Where such an undertaking is given it allows, in effect, a person to waive the privilege against self-incrimination without risk of prosecution on the basis of that evidence alone. The information obtained following the grant of the undertaking must not be used against that person except in circumstances specified in the notice [s.72(3)] but a restricted use undertaking ceases to have effect if the person to whom it relates fails to comply with any conditions specified in the undertaking [s.72 (4)].

This form of undertaking does not prevent a witness from being prosecuted where other evidence which justifies a prosecution is, or becomes, available. 'Other evidence' may include evidence from another source obtained directly or indirectly as a result of information given in reliance on a restricted use undertaking. Any undertaking which is given should include an express reservation to this effect. However, a decision to initiate a prosecution in reliance on this reservation could only be justified in exceptional circumstances and where the interests of justice clearly called for it. Moreover, a prosecution based solely on evidence obtained as a result of what the suspect said in response to a restricted use undertaking is likely to amount to an abuse of process.

As with the immunity notice a restricted use undertaking may be made subject to conditions which are specified in the undertaking. Substantial breach of any of these conditions may lead to the revocation of the undertaking (marked by the issue of a formal revocation notice).

It is suggested that it will be very rare for either a full immunity notice or a restricted use undertaking to be granted without a requirement to give evidence, if court proceedings follow.

Immunity and the proceeds of crime

The granting of immunity or the issuing of a restricted use undertaking can result in the loss of opportunities to confiscate criminally obtained assets following conviction or recovery under Part 5 of the Proceeds of Crime Act 2002. Section 72(2) of the 2005 Act provides that the issuing of a restricted use undertaking can prevent the use of the information obtained as a result of the undertaking in both criminal proceedings and for the purposes of civil recovery action or cash seizure under Part 5 of the Proceeds of Crime Act 2002. The desire to avoid confiscation through co-operation may be a powerful incentive for some offenders, but this motive can substantially reduce their credibility as witnesses by providing a considerable benefit in return for their testimony. It would also damage public confidence in the criminal justice system if criminals were routinely being allowed to keep the profits of their criminal activities in return for co-operation with the prosecution.

Prosecutors must always take into account the potential impact on the ability to recover the proceeds of criminal conduct when deciding if it is in the interests of justice to issue an immunity, a Restricted Use Undertaking or to enter into an agreement with a potential assisting offender that results in the dropping of offences that would otherwise trigger the confiscation provisions or invoke the criminal lifestyle presumptions. Only in very exceptional circumstances will it be justifiable in the public interest to agree to apply the undertaking to Part 5 proceedings. Further, it should be made clear that if the undertaking is extended to Part 5 proceedings it is restricted to the benefits derived from the investigation and charges specified in the agreement.

No agreement should be made which could have the effect of protecting the defendant from civil recovery or cash seizure under Part 5 of the Act without first consulting the head of the CPS confiscation unit within OCD. Further, it will rarely, if ever, be appropriate as part of an assisting offender agreement under section 73 or 74 to agree that the prosecutor will not ask the court to proceed to consider confiscation under section 6 of POCA. Such an agreement could not in any event bind the court which, under section 6 (3)(b), must proceed if it considers it appropriate to do so.

Reduction in sentence for defendants assisting the prosecution

This part of the guidance deals with those co-operating defendants who have not benefited from an immunity from prosecution or a restricted use undertaking but who have, nonetheless, assisted or offered to assist in the investigation or prosecution of others. Recent guidance on this aspect of the statutory scheme has been provided by the Court of Appeal (Criminal Division) in *R v P and Blackburn [2007] EWCA Crim 2290*.

The courts have long recognised the public interest in discounting the sentences of those defendants who give evidence for the Crown, frequently at physical risk to themselves. See e.g. *R v A & B [1999] 1 Cr App R (S) 52* in which the Court of Appeal reviewed the existing law on sentencing discounts for accomplices who gave evidence against co-accused; and see also *R v A [2006] EWCA Crim 1803* and *R v H, D, Chaudhury [2009] EWCA 2485* which extended the application of sentencing discounts to assistance given even after a not guilty plea. The application of Sections 73 to 75 provide a statutory framework for this continuing practice and a mechanism for supervising and reinforcing the flow of evidence or other information through the possibility of sentence reviews. Levels of authority for entering into such agreements are dealt with below.

A defendant who pursuant to a written agreement with a specified prosecutor has provided or who has offered to provide assistance to an investigator or prosecutor is eligible to receive a reduction in sentence provided he has entered a guilty plea [s. 73(1)]. Sentencing reductions are only available in the Crown court but a defendant who pleads guilty at a plea before venue hearing in the Magistrates' court may still be eligible for a reduction if committed to the Crown court for sentence [s. 73(1)(a)]. Sentencing discounts for assistance may be applied to the 'tariff' element of a sentence fixed by law or to a mandatory minimum sentence [s.73(5)] and in addition to other forms of sentencing discount including the discount for an early guilty plea [s. 73(6) and see *R v P and Blackburn [2007] EWCA Crim 2290* at paragraph 39].

The 2005 Act does not make a reduction in sentence mandatory. Rather, s. 73(2) provides that in determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered. Although sentence discounts are well established in practice, prosecutors should be careful to avoid giving any impression that a reduction in sentence will follow automatically upon the giving or offering of assistance. The approach to be taken in cases involving SOCPA agreements was explained in *R v P, R v Blackburn*; and see also *R v Bevens [2009] EWCA Crim 2554* and *R v Kiely [2009] 2 Cr.App.R.(S.) 726(111)*, C.A for illustrations of how the Court of Appeal have applied those principles in cases involving serious offending by the assisting offender.

In order to assist the court in sentencing it will necessary for the Senior Investigating Officer to prepare a report setting out the quantity and quality of the assistance given, the results arising from it (e.g. arrests or prosecutions directly attributable to the assisting offender's information) and an assessment of the risks that the assisting offender and his family face as a result of his or her co-operation. This report should be prepared and handled in the same way as texts produced for sentencing purposes.

Where a judge passes a sentence which is less than it would have been but for the assistance given or offered this fact must normally be stated in open court and the judge must state what the greater sentence would have been in the absence of the assistance [s. 73(3)]. This is to allow for the possibility of future review of the sentence on the application of the specified prosecutor.

However, circumstances may arise where it would not be in the public interest for it to be generally known that an accomplice had or was providing assistance. For instance, the assisting offender may decline to give evidence against his accomplices (which would make his co-operation obvious) but may be prepared to provide intelligence material in confidence. Where such circumstances are established to the satisfaction of the court the trial judge does not have to announce in open court that the sentence has been reduced. Instead, notice in writing of the fact and of the greater sentence may be given to the prosecutor and the defendant. Prosecutors must be alert at an early stage to the need to apply this measure of protection to co-operating witnesses and be prepared to make appropriate applications to the judge in advance of any sentencing hearing [s.73(4)].

In this context it is important to remember that following the decision in *R v Goodyear [2005] EWCA Crim 888* defendants may ask the judge for an indication of sentence at a preliminary stage in the trial process. Prosecutors must be alert to this possibility and be in a position to assist the court with an indication as to whether the defendant would be eligible for a discounted sentence where appropriate. It is not necessary that an assisting offender should have pleaded guilty before an agreement under section 73 is signed. There is no fixed time by which an agreement must be signed but as the section requires that the assistance must be provided "pursuant to a written agreement" it is desirable that the agreement is concluded as early as possible. In practice this is likely to be between the initial contact and/or the scoping interview and the full debriefing procedure.

Subsequent review of sentences

One of the most important innovations in the 2005 Act is the power contained in section 74 which allows a specified prosecutor to refer a sentence back to the sentencing court (i.e. the Crown court) for review if certain conditions are met and the defendant is still serving the sentence (including any period served in the community) [s.74(3)(a)]. Before referring a case for review of a discounted sentence the specified prosecutor must be of the opinion that it is in the interests of justice so to do [s. 74(3)(b)].

The review process is directed towards a sentence which has already been imposed. It may take place "at any time" after the legislation came into force, **whether the original sentence was imposed before or after the implementation of the 2005 Act**. The Act provides a comprehensive framework of general application for reviews of sentences, whenever imposed, and whenever the crime or crimes in question were committed.

The review itself is not an appeal against sentence, whether imposed in the Crown Court or this Court. It is a fresh process which takes place in new circumstances. Accordingly the process of review is not inhibited by the fact that the Court of Appeal has already heard and decided an appeal against the original sentence, whether the sentence is varied on appeal or not. The sentence imposed after a review may also be subject to a separate appeal.

Reviews are permitted in the following circumstances [s.74(2)]:

(a) the defendant received a reduced sentence on the basis of a written agreement to assist, but then knowingly failed **to any extent** to give assistance in accordance with the agreement (note that even partial non-performance permits the sentence discount to be reviewed);

(b) the defendant received a reduced sentence on the basis of a written agreement to assist, and then in pursuance of a separate agreement gives or agrees to give further assistance;

(c) the defendant did not receive a discounted sentence but in pursuance of a written agreement subsequently gives or offers to give assistance in connection with investigating or prosecuting an offence.

Where condition (a) is met the reviewing court has the power to increase the sentence originally imposed up to a term not exceeding the level that the court indicated would have been the sentence but for the agreement to give assistance. If the assisting offender is found by the court to have failed to comply with an agreement, the sentence to be imposed will normally be that previously indicated by the judge at the original sentencing hearing. Only in exceptional circumstances should the sentence indicated at the earlier stage be subject to any reduction, but equally it should not be increased by way of punishment for a defendant who has backed away from the agreement. In other words a defendant who reneges on an agreement will in future run the risk of losing any discount they had obtained but will not receive any additional punishment fro breaching the original agreement.

Where a reference takes place under conditions (b) or (c) the likely outcome is that the defendant's sentence will be reduced in return for further or new assistance. It is hoped that this power for ex post facto reviews and discounts to sentences will encourage some defendants who have been imprisoned to reconsider their earlier reluctance to assist in the prosecution of others.

Under s. 75(2) the Crown court has discretion to exclude the public from any proceedings relating to or arising in consequence of an application to review a discounted sentence. The court may also impose such reporting restrictions as it deems appropriate. Instances may arise where the very fact that a sentencing review was being sought would draw attention to the fact that someone serving a custodial sentence had, or was about to provide assistance to the prosecution in a manner that would endanger their safety. An order under s.75(2) can be made in such circumstances provided the court is satisfied that it is necessary to do so to protect the safety of any person and, moreover, that the order sought is in the interests of justice.

The power to exclude the public and the press from sentence review hearings should be used with great caution, particularly where the review arises under s. 74(2) following failure to fulfil an agreement to provide assistance. Where practicable alternatives are available to closed hearings they should be adopted if possible.

In any event a full transcript of the entire hearing of the proceedings should be prepared immediately after its conclusion, and retained in appropriate conditions of secrecy **by the specified prosecutor**, and kept available for further directions by the court in relation to publicity if and when the public interest so requires, at least until further order by the court, and in any event until the end of the sentence.

Following a sentencing review both the defendant and the specified prosecutor may appeal with leave to the Court of Appeal Criminal Division against the decision of the Crown court [s. 74(8)]. Further details of the procedure for appeals are given in Policy Bulletin 74/2006 and S.I. 2135/2006

Decisions to refer a discounted sentence may only be taken by those prosecutors to whom this power has been delegated.

Prosecuting as a consequence of false evidence

An agreement is always made on the basis that the witness will provide truthful information or evidence. All notices of immunity, restricted use undertakings and written agreements with co-operating offenders should contain an express condition requiring that what the witness or intelligence source (as applicable) communicates to the prosecution is true to the best of their knowledge and belief. Where subsequently it can be demonstrated (on the criminal standard of proof) that the evidence or information is false the agreement can be rescinded for failure of this condition. The agreement should state the consequences of such failure.

In addition, the giving of false evidence in court following a formal agreement may give rise to a prosecution for perjury or for attempting to pervert the course of public justice. When reviewing such a case in accordance with the Code for Crown Prosecutors, prosecutors should bear in mind that neither an immunity notice nor a restricted use undertaking will include immunity from, nor preclude the use of any evidence in, such a prosecution. Subject to the evidential stage of the Code Test being satisfied, prosecution will normally be required in the public interest. Any discount in sentence that has been obtained pursuant to formal agreement should also be reviewed using the power provided by section 74 of the 2005 Act).

The fact that an immunity notice or a restricted use undertaking has been issued does not prevent the bringing of a private prosecution against the recipient of the notice. Nevertheless, the public interest in securing the cooperation of accomplices is such that it would seldom, if ever, be right to permit a private prosecution to continue in the face of an immunity notice or undertaking. While every case must be judged on its own merits, the Director of Public Prosecutions is likely to exercise his power under section 6 of the Prosecution of Offences Act 1985 to take over such a prosecution with a view to discontinuing it.

Disclosure issues

Full and accurate records should be kept of this entire process, including the circumstances surrounding the exercise of these powers, and the reasoning behind any decisions taken. The decision to refer a case back to the Crown Court for review of sentence also has the potential to create disclosure obligations, either under the Criminal Procedure and Investigations Act 1996 or under common law (see *R v DPP ex parte Lee [1999] 2 Cr. App. R. 304, DC*).

The normal legal and procedural rules governing the disclosure of unused material apply as much in the context of accomplice evidence as they do to any other class of case.

Disclosure or non-disclosure of witness agreements is most likely to be an issue when the party to an agreement with the Specified Prosecutor is to be called to give evidence in accordance with the terms of that agreement.

Where an offender gives evidence pursuant to an agreement, the fact that he has signed such an agreement will almost always be disclosable as a matter undermining the witness. This is because it represents an inducement or benefit to the witness, since implicit in the agreement is that it is entered into with the intention of either avoiding prosecution (ss. 71 & 72) or seeking a reduction in sentence for his/her own offending (ss. 73 & 74).

Agreements should be treated as sensitive and, where disclosable, be subject to public interest immunity applications. Where the substance of the agreement goes no further than the matters about which the offender is to give evidence in open court it could be argued

that the agreement is not sensitive since it does not contain any information which will not be aired in public when the person gives evidence.

However, it is likely that a majority of agreements will not be limited in this way and will also contain or promise to provide further information about other offending and/or other offenders beyond the immediate case in which evidence is to be given. The fact that the person has, or has promised to give, information on a wider scale, will invariably be sensitive on three bases:

- the intelligence or information regarding other offences or offenders will not be public knowledge and release of such information would prejudice further investigations;
- the disclosure of the extent of the person's assistance to the authorities will be prejudicial to their interests and could increase any risks to the personal safety of them and their family;
- in the same way that the disclosure of informants generally is avoided, because confidentiality is essential to the maintenance of the necessary flow of information to law enforcement, so the disclosure of the extent of information provided over and above that about which a person is prepared to give evidence should be protected.

If disclosure of such an agreement is made only when it contains information restricted to the evidence that the assisting offender is to give, any case in which disclosure is either refused or made in redacted form will immediately indicate that the person has given information on a wider basis, with no relevance to those proceedings.

Therefore, to avoid this difficulty, it is CPS policy that ALL agreements made for the purposes of sections 71-74 of the 2005 Act are sensitive material and will not be disclosed.

In cases where the fact that an agreement has been signed is relevant to an issue in the case and passes the disclosure test because it undermines the prosecution or assists the defence, disclosure should be dealt with by way of admission regarding existence of the agreement and such information contained therein as also passes the test. The agreement itself should be the subject of a public interest immunity application. In accordance with guidance given in *R v H&C ([2004] UKHL 3*, (see paragraph 36) the document setting out the proposed admission should be approved by the trial judge.

In other cases where disclosure is not required, inquiries should be met with a standard response, similar to that given in regard to informants. This is to the effect that the prosecutor neither confirms nor denies that any person has entered an agreement relevant to the case, but acknowledges that they are aware of their disclosure duties and are satisfied that they have been complied with.

The sensitive nature of witness agreements is not confined to cases where the co-operating offender intends to give evidence for the prosecution. Agreements may be used in cases in which the assisting offender gives intelligence only, without ever being called to give evidence. Despite the fact that the party to the agreement is not destined to be a witness, disclosure may well become a potential issue if the defence, in a related prosecution which

was led or based, in part at least, on that intelligence, argue that the existence of the informant and/or the information passes the disclosure test. Such agreements, entered into for intelligence purposes only, will also be sensitive for essentially the same reasons set out above.

More detailed guidance on this topic may be found in The Disclosure Manual.

Levels of decision making

Within CPS the powers described in this guidance may be exercised personally by the Director of Public Prosecutions as the specified prosecutor within the 2005 Act. The Director has also restricted the exercise of the powers of 'specified prosecutors' to certain other post holders and individuals for these purposes. The extent of this restriction is set out in the succeeding paragraphs. Only persons so designated may exercise the powers provided by sections 71 to 74 of the Act.

Immunity notices

The following persons are authorised to give immunity notices:

(a) The Heads of the Organised Crime, Counter Terrorism and Special Crime Divisions, in respect of cases handled by their own divisions. In the absence of a head of division, the head of another division can exercise the powers on their behalf.

(b) The Principal Legal Advisor in respect of cases referred from CPS Areas.

(c) A nominated prosecutor, who is a Senior Civil Servant, if specifically approved by the Director, for a specified period of time. (This is intended to cover the situation when the post holders authorised in accordance with sub-paragraphs (a) and (b) above are unavailable).

The Attorney General's Office should always be consulted before any decision is made on the granting of full immunity.

Restricted use undertakings

The following persons are authorised to give Restricted Use Undertakings:

(a) The Heads of the Organised Crime, Counter Terrorism and Special Crime Divisions, in respect of cases handled by their own divisions. In the absence of a head of division, the head of another division can exercise the powers on their behalf.

(b) The Principal Legal Advisor in respect of cases referred from CPS Areas.

(c) In addition the Director may specifically authorise named Senior Civil Servants, upon application by the heads of the Organised Crime, Counter Terrorism and Special Crime Divisions or the Principal Legal Advisor.

Written witness assistance agreements

The following persons are authorised to sign written agreements with assisting offenders in accordance with s73(1)(b):

(a) Chief Crown Prosecutors (for cases prosecuted within their CPS area).

(b) Lawyers of Level E or above. In areas this power is delegated to prosecutors of Level E or above who have been specifically nominated for this purpose by a Chief Crown Prosecutor. Crown Prosecutors of Level D or below who are deputising for a designated Level E lawyer **cannot** exercise this power. Where there is no other authorised Crown Prosecutor in the Area, requests to enter into written agreements should be referred to the Principal Legal Advisor.

As a matter of good practice Area lawyers to whom this power has been delegated should advise their Chief Crown Prosecutors whenever this power is used.

Revocation notices

Prosecutors should apply the criminal standard of proof to the determination of breach of an agreement or a restricted use undertaking since revocation may result in the referral of the offender back to the Crown court for review of and de facto increase in, the original sentence. In cases where it has been determined that an assisting offender has failed to fulfil their obligations under an existing agreement or undertaking a formal notice revoking that agreement or undertaking should be issued Cases where this is considered necessary should be referred through line management for determination and signature by a Head of Division or the Chief Crown Prosecutor as appropriate.

Referring a case back to court for review of sentence

The procedure for referring cases back to court for a review of sentence under s. 74 is discussed above. A distinction can be drawn between cases in which the purpose of the referral is to enable the court to reduce or further reduce the sentence in recognition of new or additional assistance given by the offender and those cases where the offender has already received a discount pursuant to an agreement to assist but is said to be in breach of one or more of the conditions of that agreement.

The first type of case is covered by s. 74(2)(b) and (c) of the 2005 Act. Where, following sentence at the Crown Court an offender in pursuance of a written agreement subsequently gives or offers to give assistance for the first time or gives or offers to give further assistance, a specified prosecutor may refer the original sentence back for review if it is in the interests of justice to do so. Decisions on this type of referral for review (which might be thought of as a "beneficial" referral) may be taken by:

(a) Lawyers of Level E or above. In areas this power is delegated to prosecutors of Level E or above who have been specifically nominated for this purpose by a Chief Crown Prosecutor.

(b) Crown Prosecutors of Level D or below who are deputising for a designated Level E lawyer **cannot** exercise this power. Where there is no other authorised Crown Prosecutor in the Area, requests to enter into written agreements should be referred to the Principal Legal Advisor.

Section 74(2) (a) deals with situations where an offender who received a discounted sentence pursuant to a written agreement to assist has reneged on it to a material degree. Here the purpose of referral is essentially "punitive". It is to enable the court to reconsider whether the discount should be withdrawn and the offender re-sentenced up to the putative sentence originally indicated by the sentencing judge. This option should be considered in every case where a revocation notice has been issued. Power to determine whether it is in the interests of justice to refer the case back to the court for a review of sentence to take place has been delegated to the following post holders only:

(a) The Heads of the Organised Crime, Counter Terrorism and Special Crime Divisions, in respect of cases handled by their own divisions. In the absence of a head of division, the head of another division can exercise the powers on their behalf.

(b) The Principal Legal Advisor on behalf of the CPS Areas.

(c) In addition the Director may specifically delegate this power to named lawyers who are Senior Civil Servants, upon application by the Heads of the Organised Crime, Counter Terrorism and Special Crime Divisions or the Principal Legal Advisor.

Procedure for referring a case to the principal legal advisor or a head of division

When referring a case in any of the preceding circumstances, the reviewing lawyer or Chief Crown Prosecutor, as the case may be, should include with the full file a short report setting out the basic facts of the case and the reasons underlying the recommended course of action. The papers should be accompanied by a copy of any report from the police and all other relevant information which the Head of Division or Principal Legal Advisor will need to take into account.

Where an Area case is being referred which is connected to a case being handled by the Organised Crime, Special Crime or Counter Terrorism Divisions, the Principal Legal Advisor will liaise with the relevant Head of Division to determine an agreed approach.

The relevance of prior agreements

Sections 71 - 75 of the 2005 Act came into force on 1st April 2006. Due to the protracted nature of investigations into serious organised crime there may be assisting witnesses who were already engaged in the de-briefing process at that date whose cases have subsequently come to the attention of a specified prosecutor. Existing common law agreements already in place on 1st April 2006 need not necessarily be renegotiated but a decision may have to be made as to whether it is appropriate to bring these cases within the statutory scheme.

It will not be possible to refer a person for a review of sentence under section 74, in relation to a failure to provide assistance, if the offer of assistance was made **before** 1st April 2006. This is because any reduction in sentence discount would result in an increase in the sentence to be served which could be seen to amount to retrospective punishment.