

Chapter 30: Assistance by Offenders – Disclosure Obligations

30.1 Introduction

30.1.1 The Police Public Order and Criminal Justice (Scotland) Act 2006 establishes a number of important new powers designed to assist law enforcement agencies to investigate, disrupt and prosecute serious organised crime more effectively.

30.1.2 The general intention of the 2006 Act is to place sentencing discounts on a statutory basis and to provide for the possibility of sentence reviews.

30.1.3 Sections 91 – 97 of the 2006 Act establish a statutory framework in relation to assistance by offenders.

30.1.4 All applications under the terms of this legislation will be dealt with by a “Specified Prosecutor.” The Specified Prosecutors are:

- Director of Serious Casework
- Deputy Director of Serious Casework
- Head of High Court Division
- Head of Serious and Organised Crime Division
- Federation Heads
- Functional Lead High Court/ Sheriff and Jury

30.1.5 Full details of these new powers and their application are contained in the Assistance by Offenders Manual.

30.2 Disclosure Policy

30.2.1 Where a Specified Prosecutor has made a formal agreement with an offender in order that the offender will give assistance to the Crown, in the hope of receiving a lesser sentence or immunity from prosecution, the existence of such an agreement may require to be disclosed in terms of **McLeod v HMA**. This will usually apply in relation to the case in which the offender is providing assistance.

30.2.2 Although the general rule is that the Specified Prosecutor should only deal with assisting offenders who have been convicted rather than those who are seeking an initial reduction in sentence in advance of tendering a plea, in exceptional circumstances the Specified Prosecutor may enter into an agreement with someone who has not yet been prosecuted. The Crown may be obliged, in certain circumstances, to disclose this information in respect of that case, e.g. where there are co-accused.

30.2.3 Accordingly, in order to ensure that the Crown properly discharges its disclosure obligations, it is essential that the Specified Prosecutor keeps full and accurate records of the entire process including:

- the circumstances in relation to the exercise of these powers,
- the reasoning behind any decisions taken and
- all contact with the defence

30.2.4 It should also be noted that the decision to refer a case for review of sentence has the potential to create disclosure obligations.

30.3 Types of Assistance provided by Offenders.

30.3.1 The Assistance by Offenders Manual provides full details of the different procedures that a Specified Prosecutor might enter into with an assisting offender. These can include:

- A written assistance agreement
- A conditional immunity notice (which requires Law Officers' instructions)
- Text letter.

30.3.2 A written assistance agreement should be made to:

- ensure that the individual is brought within the statutory provisions regarding reduction in sentence,
- provide the offender with the right to seek a further reduction under s92 (2) (b) and
- give the prosecution the ability to seek a review of any discounted sentence under s92 (2) (a) should the individual fail to comply with the conditions of the agreement.

30.3.3 Further guidance on written assistance agreements are contained in Chapter 5 of the Assistance by Offenders Manual.

30.3.4 Conditional Immunity Notices are granted under authority of section 97 of the 2006 Act and will only be used in exceptional circumstances and only on a Law Officer's instruction. Further guidance on conditional immunity agreements are contained in Chapter 4 of the Assistance by Offenders Manual.

30.4 Disclosure of Assistance Agreements and Conditional Immunity Notices

30.4.1 It is the responsibility of the Specified Prosecutor who makes any assistance/immunity agreement to consider whether the existence of the agreement requires to be disclosed to the defence in either:

- i. the case in which the offender is providing assistance; and/or
- ii. (where applicable) the case in which the assisting offender is being prosecuted in which a lesser sentence is sought.

30.4.2 If the Specified Prosecutor decides that the agreement/notice meets the disclosure test, a decision must be made whether or not it is in the public interest to withhold the information and consideration given to seeking a non-disclosure order as outlined in chapter 25 of this manual.

30.4.3 If there is no public interest reason why the existence of the agreement should not be disclosed then the specified prosecutor should seek Crown Counsel's instructions prior to disclosure of the existence of any agreement or conditional immunity notice.

30.4.4 Where the Specified Prosecutor takes the view that, notwithstanding the fact that the information meets the disclosure test, there is a strong public interest reason for withholding the information, then a report should be prepared for the attention of Crown Counsel, specifying why the information should be withheld and detailing whether or not, in their view, the accused can still have a fair trial without the disclosure of the information., e.g. where disclosure raises Article 8 issues, such as

where there is a threat to the life or limb of a subject then the matter should be referred for Crown Counsel's instructions. This would particularly relate to the disclosure of the address of a relocated witness. This will form the basis of a decision to be taken by the Director of Serious Casework to apply for a non-disclosure order in terms of section 145 of the 2010 Act.

30.4.5 Any report to Crown Counsel must contain sufficient information to ensure that Crown Counsel can make an informed assessment of the Crown's disclosure obligations. Accordingly, the report should include:

- the existence and terms of the agreement
- the level of protection being given
- any incentive to give evidence
- the involvement and significance of the subject
- the details of any related/ unrelated case.

30.5 Timing of disclosure

30.5.1 In many cases, it may not be appropriate to disclose material related to Agreements/ Notices until a certain stage of proceedings, e.g. where the disclosure of the existence of the agreement/notice may cause additional risk to the assisting offender. In such cases, it may be appropriate to delay disclosure until the stage of the preliminary hearing. When in doubt regarding the timing of disclosure, the Specified Prosecutor should seek Crown Counsel's instructions on when to disclose. Where disclosure of the agreement is delayed in such a way, no section 76 plea should be agreed in the interim.

30.5.2 It is essential, therefore, that a clear record of when the s76 plea was intimated is kept in order that the courts can be properly advised of the correct date of the plea for discount purposes.

30.5.3 Except in exceptional circumstances, the existence of an assistance agreement should not be disclosed until the agreement has been signed. Conditional immunity notices should never be disclosed prior to the notice being formally agreed. Where therefore an accused seeks to tender a plea (by means of a section 76 notice) and discussions are ongoing regarding an assistance agreement/ conditional immunity notice and the final agreement would require to be disclosed to that accused, then again it may not be appropriate to accept any early plea from the accused.

30.6 What needs to be disclosed?

30.6.1 It will be sufficient to disclose the existence of the agreement and any other relevant issues connected with the agreement. The actual agreement/notice should not be disclosed.

30.6.2 Details of the officer involved in the agreement will be provided to the defence along with a statement from the officer which will provide further detail in relation to the agreement. That officer must not be part of the criminal investigation team. Details will need to include the level of protection being given and any other incentive to give evidence.

30.6.3 Such a practice is consistent with the position adopted in England and Wales where the agreement/notices are not themselves disclosed. Relevant admissions and associated statements are also provided to ensure fairness.

30.6.4 Where the existence of an agreement is disclosed to the defence, this information should also be provided to the prosecutor, e.g. by inclusion in the disclosure page of the precognition.

30.7 Related/Unrelated Offences

30.7.1 Most conditional immunity notices are likely to be used in investigations where immunity is being offered in respect of a related offence. In some cases, however, consideration may have to be given to disclosure of details of an entirely unrelated case. Each instance will require to be dealt with individually and Crown Counsel's view sought.

30.8 Requests at precognition to give assistance

30.8.1 Where a witness indicates a desire at precognition to enter into an assistance agreement, the Case Preparer must bring this to the immediate attention of the Solemn Legal Manager, who should refer the matter to the specified Prosecutor, copied to the Functional Lead for High Court/ Sheriff and Jury.

30.8.2 It is unlikely that this situation will arise often, but full guidance on procedure can be obtained within the Assistance by Offenders Guidance Manual.

30.9 Previously undisclosed information at Sentencing / Appeals Stage

30.9.1 Section 95 of the Act sets out a statutory framework for the use of "text" letters. These were formerly referred to as "O'Neill texts" (see **O'Neill v HMA** (1998 SCCR 644)). O'Neill sets out the procedure by which the sentencing judge is made aware, in confidence, of assistance given by an accused to the prosecution whether in relation to the present case or more generally. O'Neill texts are not expressly ruled out by the new provisions: however, it is preferable to use the statutory provisions set out in section 95. Further guidance on text letters are contained in Chapter 6 of the Assistance by Offenders Manual.

30.9.2 Section 96 of the Act provides that confidentiality of undisclosed information should apply in all forms of appeal or review in the High Court. Further guidance is contained in Chapter 9 of the Assistance by Offenders Manual.