



CPS

SOCPA Agreements: Practical Note For Defence Advocates

Published: March 2010 version 2.0

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Introduction

Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 ('SOCPA') came into force on 7th April 2005 and 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 note 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);
- b) not to use certain evidence (a 'restricted use' undertaking under s.72);
- c) setting out in writing the terms under which a defendant 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).

Essential Reading

- Sections 71 to 75 of SOCPA, which can be found at www.legislation.gov.uk
- The SOCPA "Explanatory Notes", which can also be found at www.legislation.gov.uk;
- CPS guidance "Witness Immunities and Undertakings" can be found on the CPS website at www.cps.gov.uk/legal/index.html;
- [R v P, R v Blackburn \[2007\] EWCA Crim 2290](#);
- [R v Chaudhury \[2009\] EWCA Crim 2485](#); and
- [R v D \[2010\] EWCA Crim 1485](#).

The Decision to Offer an Agreement

The decision whether it is appropriate to offer a formal written agreement in any particular case is entirely that of the specified prosecutor.

Although it is not a pre-requisite to any of the agreements that the assisting offender (AO) should have legal representation it is clearly preferable that he/she should in the interests of justice. Therefore before an AO is invited to sign any form of agreement he/she will be advised by the investigator of his/her right to seek independent legal advice on its terms and effects. Additionally, where required under the PACE Codes an appropriate adult will be provided for the AO.

No notice or undertaking can be issued on the basis that the AO will only divulge information after an immunity or undertaking has been given.

De-Briefing Process

If a potential AO is believed to fall within the remit of the provisions of SOCPA, consultation should take place with the relevant AO debrief unit. This can be done by referring the request to the case officer dealing with the current investigation/prosecution or to a Crown Prosecutor who will refer the request to the relevant debrief unit.

The investigator will seek to obtain sufficient information to assist a specified prosecutor to decide if an agreement is suitable; this will either be through the AO's solicitor or through contact with the potential AO.

The initial scoping interview by the investigator will need to identify what areas the potential AO can assist with, and what, if any, un-prosecuted criminal activity needs to be addressed.

The investigator will gather the required information confidentially in order to reduce any perceived threat or risk to the potential AO.

The AO debrief unit will then refer the matter to a specified prosecutor who will consider if a full debrief should be undertaken in pursuance of a SOCPA contract.

Signing of the Agreement

The agreement is between the AO who has provided or offered to provide assistance to an investigator or prosecutor and a specified prosecutor.

The CPS specified prosecutor/prosecutor will discuss the terms of the agreement with the de-briefing officers and then draft the agreement which must be in writing.

The CPS specified prosecutor/prosecutor will arrange to meet the solicitor representing the AO in order to discuss the draft agreement with him/her.

Once the draft agreement has been agreed by both parties (after discussion with the specified prosecutor if he/she has not met to discuss it), it will be made available through the debrief unit for agreement and signature by the AO. The solicitor representing the AO must also agree and sign an undertaking in relation to his/her handling of the document whilst it is in his/her temporary possession.

Once the agreement has been signed by the AO, it should be returned immediately to the specified prosecutor for signature via the debrief unit.

Preparation for Court Hearing

When preparing for any hearing the CPS prosecutor and prosecution advocate will liaise with the counsel and/or solicitor representing the AO.

General Principles

The following are some of the general principles that can be established from the statute, the Explanatory Note, and the authorities:

- Sections 73 and 74 of SOCPA apply to hearings in the Crown Court only (including a committal for sentence);
- The assistance given or offered by a person is not confined to offences in which they participated, or were accessories, or with which they are linked;
- Section 73 of SOCPA only applies if the AO pleads guilty;

- Section 74 of SOCPA only applies if the AO is still serving a sentence. It does not matter if the original sentence was imposed before or after the 7th April 2005. A review can still take place after the sentence has been appealed successfully or unsuccessfully. A case referred under s.74 of SOCPA must, if possible, be heard by the judge who passed the sentence to which the referral relates;
- Section 74(2)(c) of SOCPA can apply to an AO who was sentenced for an offence to which he/she did not plead guilty, except when it was an offence where the sentence is fixed by law, i.e. murder (life), in which case it only applies if they pleaded guilty;
- Section 73 of SOCPA, and a referral relating to s.74(2)(b) or s.74(2)(c) of SOCPA can allow for a reduction of sentence even in cases where a minimum sentence is required, i.e. s.5 of the Firearms Act 1968 (minimum 5 years' imprisonment under s.51A of the Firearms Act 1968), or a reduction in the minimum period of imprisonment to be served ("tariff") where the sentence is fixed by law, i.e. murder (life);
- In determining what sentence to pass under s.73 of SOCPA, or a referral relating to s.74(2)(b) or s.74(2)(c) of SOCPA, the judge "may" take into account the extent and nature of the assistance given, but does not have to. Whether or not the judge takes into account the assistance offered or provided by the person, the judge can also take into account any other matter that he/she is entitled to in law i.e. guilty plea etc, for the purposes of determining the sentence or in the case of a sentence which is fixed by law any minimum period of imprisonment that must be served;
- The general principles about the amount of any reduction still apply, i.e. it is case specific and will reflect the extent and the nature of the assistance given or offered (the effect of any delay can be taken into account), but the normal level of reduction would continue to be a reduction between one-half and two-thirds. Only in the most exceptional circumstances would the discount exceed three-quarters. The discount for the assistance provided by the person should be assessed first, against all the other relevant considerations, and the notional sentence so achieved should then be further discounted for the guilty plea. The totality principle is fundamental;
- The existing "text" system can still be used, where appropriate, but any discount of sentence would, except in unusual circumstance, be less than under a SOCPA agreement as the value of assistance provided in this form is likely to be less, and

- Sentences passed for offences admitted during the cleansing process should normally be concurrent to a sentence reduced under s.73 of SOCPA. When there is a review of sentence relating to s.74(2)(b) or s.74(2)(c) of SOCPA, any sentences passed at the same time for offences admitted during the cleansing process will run from the date imposed, and the totality principle is critical;
- Any part of a sentence reviewed under s.74 of SOCPA that has already been served counts as time served if the sentence is reduced or increased;
- When substituting a sentence for a referral relating to s.74(2)(a) of SOCPA because the person failed to give assistance, the judge should not substitute a greater sentence that exceeds the sentence that would have been passed but for the agreement to give assistance. Only in exceptional circumstances would it be right for the sentence that would have been passed to be reduced;
- Both the prosecution and the defence can appeal by the normal avenues to the Court of Appeal in relation to sentences passed under both s.73 and s.74 of SOCPA.

Section 73 Hearing

CPS will provide the judge with the usual case papers and sentencing bundle and additionally:

- A Plea and Sentence Document or other Prosecution Note to assist the judge in understanding the SOCPA law as it relates to the particular case, and any further points that should be drawn to his/her attention regarding the law and/or facts;
- relevant sections of SOCPA (s.71 to s.75);
- [R v P, R v Blackburn \[2007\] EWCA Crim 2290](#);
- [R v Chaudhury \[2009\] EWCA Crim 2485](#); and [R v D \[2010\] EWCA Crim 1485](#) (if appropriate);
- signed SOCPA agreement; and
- investigator's report containing details of the value of assistance given.

The defence will be provided with all the above documentation apart from the signed SOCPA agreement. For reasons of security the investigator's report will only be served at court on the day of the hearing.

Section 74 Hearing

Whether before the original sentencing judge or not, CPS will ensure that the judge's bundle includes, in addition to the documents listed above:

- a transcript of the original sentencing hearing (to include opening, mitigation and sentencing remarks);
- original Indictment;
- original Case Summary;
- basis of plea (if any); and
- any other documents that were provided to the judge prior to the original sentence (previous SOCPA agreements, police/investigator's reports, texts etc).

The defence will be provided with all the above documentation apart from any previous SOCPA agreements. For reasons of security, the SOCPA agreement will only be disclosed on the date of hearing and the police/investigator's reports will only be served at court on the day of the hearing.

When preparing for the hearing it is advisable to establish the earliest date of release for the AO, and the expiry date of their sentence. It is important to be familiar with the sentencing provisions that applied at the date of sentence.

Court Hearings

Hearings Relating to Section 73 of SOCPA

There are no new powers in relation to publicity arising from sentences imposed in the context of a written agreement under s.73 of SOCPA.

Subsection (3) requires the court in passing a lower sentence to set out what the sentence would otherwise have been, unless (subsection (4)) it is in the public interest not to do so (in which case the court must provide a written notice of what the sentence would have been to the prosecutor and the AO).

Subsection (7) disapplies the specified provisions, which would otherwise require the court to explain the reasons for passing its sentence on a person, where the court has decided (under subsection (4)) that it is not in the public interest to make such an explanation).

Hearings Relating to Section 74 of SOCPA

Section 75A of SOCPA allows a s.74 SOCPA sentencing to take place via live link under s.57E of the Crime and Disorder Act 1998.

Unless absolutely necessary, the normal principle that sentences must not be imposed or reduced or altered after private hearings, privately ordered, should so as far as possible apply to reviews under s.74 of SOCPA. However, an application can be made under s.75 of SOCPA to exclude people from the court or impose reporting restrictions, but only to the extent that it is necessary to protect the safety of any person and it is in the interests of justice (where practicable alternatives are available, such as anonymising proceedings then these should be adopted). The following persons cannot be excluded from court:

- A member or officer of the court;
- A party to the proceedings, or their counsel or solicitor; and
- A person otherwise directly concerned with the proceedings.

If there is to be an application to exclude the public, the judge and court should be notified of this in advance of the hearing. A written application will be included in the bundle of papers provided to the judge and defence. This will ask the judge to exclude the public (other than those identified on a list which will also be provided to the judge) and ask for directions prohibiting the publication of any matter relating to the proceedings, including the fact that the SOCPA referral has been made.

The case will then be listed anonymously so that an oral application can then be made at the start of the hearing in the absence of the public. The judge should be asked to make the order until further order as, if the assisting offender does not comply with the agreement, there is the ability to refer the matter back to court. The Court of Appeal in *R v Blackburn* indicated that if there is a reference back to the court it is unlikely that such a hearing would be in private. Additionally, if the AO subsequently gives evidence in a public court then the SOCPA agreement would enter the public domain at that point and for transparency reasons it would be better if the order was lifted prior to the SOCPA agreement being made public during another court hearing.

When substituting a sentence under subsection (5), the specified provisions which would otherwise require the court to explain the reasons for passing its sentence on a person do not apply if the court thinks that it is not in the public interest to disclose that the person falls within subsection (2)(a). Subsections (3) to (9) of s.73 of SOCPA also apply to s.74.

Hearings in Absence

Although s.75A of SOCPA allows a s.74 SOCPA sentencing to take place via live link under s.57E of the Crime and Disorder Act 1998, SOCPA is silent as to whether a hearing can take place in the AO's absence.

Variation of sentence should be in the presence of the defendant unless either expressly or by implication (e.g. by absconding) he has waived his right to be present. Where the court varied an unlawful sentence in the absence of the defendant but in the presence of his counsel, the Court of Appeal refused to reduce the sentence on the ground that the variation was unlawful. The Judges observed that the action of the Crown Court did not give rise to any breach of natural justice, as the offender was represented by counsel who was present when the variation was made (*R v Shacklady* 9 Cr App R 258 CA).

In accordance with s.22(3) of the Criminal Appeal Act 1968 an appellant in the Court of Appeal can waive his/her right to attend an appeal against sentence.

It is therefore believed by analogy that an AO can "waive" his/her right to attend a SOCPA hearing provided that he/she is represented by counsel. The sentencing judge will then have discretion as to whether to hold the hearing in the AO's absence or require his/her attendance.

Funding

The Ministry of Justice is currently re-drafting guidance to cover section 74 proceedings. This will appear in the updated edition of the Criminal Legal Aid Manual (CLAM) which is expected to be released at the beginning of April 2011. This can usually be accessed via the LSC and HMCS websites.

This guidance will provide as follows:

If the AO was granted a legal aid representation order for the main trial proceedings, the representation order will extend to cover the section 74 hearing under SOCPA on the basis that it is 'incidental' to the substantive proceedings. This applies even if there has been a gap of several years between the original trial and the section 74 hearing. In some cases the AO may have instructed new solicitors since the case for which he was sentenced. This can be overcome by using the provision governing the transfer of the representation order - the relevant statutory reference is the *CDS (Gen)(No 2) Regs 2001/No. 1437*:

Change of litigator

Reg 16 (1) Where a representation order has been granted an application may be made to the court before which the proceedings are heard to select a litigator in place of a litigator previously selected, and any such application shall state the grounds on which it is made.

16(2) The court may:

(a) grant the application where:

(i) the litigator considers himself to be under a duty to withdraw from the case in accordance with his professional rules of conduct and, in such a case, the litigator shall provide details of the nature of such a duty;

(ii) there is a breakdown in the relationship between the assisted person and the litigator such that effective representation can no longer be provided and, in such a case, the litigator shall provide details of the nature of such breakdown;

(iii) through circumstances beyond his control, the litigator is no longer able to assist the assisted person; or

(iv) some other compelling reason exists; or

(b) refuse the application.

In cases involving sensitivity, the wording at 16(2)(iv) - 'some other compelling reason' - can usually assist.

If the AO was not granted a legal aid representation order for the main trial proceedings at the Crown Court but now wishes to be publicly funded at the section 74 hearing, the AO must submit a legal aid application to the relevant magistrates' court (the Crown Court no longer has the power to grant representation for such proceedings). The section 74 hearing comes within scope of the criminal legal aid scheme courtesy of section 12(2)(b) of the Access to Justice Act 1999 - 'proceedings before any court for dealing with an individual convicted of an offence (including proceedings in respect of a sentence or order)'. The legal aid application will not be subject to Crown Court means testing, but will have to pass the 'Interests of Justice' (merits) test.

Where the original case for which the AO was sentenced was a VHCC case, those representing the AO can also seek further information from the contract manager who handled the AO's original case contract.

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