

POLICE, PUBLIC ORDER AND CRIMINAL JUSTICE (SCOTLAND) ACT 2006 (ASP 10)

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Three: Criminal Justice

Offenders assisting investigations and prosecutions

Section 91 – Assistance by offender: reduction in sentence

194. This section provides that the court, when sentencing accused persons who plead guilty in proceedings on indictment before that court and who have entered into a written agreement with a prosecutor (an “assistance agreement”) to provide assistance in relation to any investigation or prosecution, must take account of the nature and extent of that assistance.
195. Subsection (3) requires the court, if it passes a lower sentence on account of the assistance, to state that it has done so and what the sentence would otherwise have been. Subsection (5) provides that the court does not have to make such a statement if it would not be in the public interest (in which case the court must provide a written notice to the prosecutor and the accused that it has passed a lower sentence on account of the assistance and stating what the sentence would otherwise have been).
196. Subsection (4) provides that if the court, taking into account assistance given or offered under an assistance agreement, does not pass a lower sentence it must state its reasons for doing so. Subsection (6) makes similar provision to subsection (5): the court does not have to state why it did not reduce the sentence if it would not be in the public interest (in which case the court must provide a written notice to the prosecutor and the accused stating its reasons for not passing a discounted sentence).
197. Subsection (7) clarifies that this section applies also to offences for which there is a minimum sentence and also where the sentence is fixed by law, in determining the minimum period of imprisonment that a person must serve. Subsection (8) provides that the court's decision to take into account the assistance provided or offered by a person does not affect any other power it may have to take any other matters into account when determining that person's sentence, punishment part or other minimum term of imprisonment. Subsection (9) clarifies the meaning of certain references and includes provision allowing the assistance agreement to be made using electronic communications.

Section 92 – Assistance by offender: review of sentence

198. This section provides that where an offender has been sentenced, following conviction of an offence on indictment, and one of the conditions in subsection (2) applies, a prosecutor may refer the case back to the court for review, if the offender is still serving

the sentence and the prosecutor considers it is in the interests of justice to do so. The conditions in subsection (2) are:

- that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor but then fails to give assistance in accordance with the agreement;
- that the offender received a discounted sentence on account of having entered into an assistance agreement with the prosecutor and then gives or offers to give further assistance in pursuance of another assistance agreement;
- that the offender did not receive a discounted sentence but then subsequently enters into an assistance agreement with the prosecutor.

199. Subsection (3) ensures that where a person was convicted of an offence for which the sentence was fixed by law, they must have pleaded guilty if their sentence is to be referred back to court for a review under this section. Subsection (4) provides that the prosecutor may refer a case falling under this section back to the court which passed the sentence or, if the sentence was passed on appeal, that it is referred back to the court of first instance, if the offender is still serving the sentence and the prosecutor thinks that it is in the interests of justice to do so.
200. Subsection (5) provides that a person is still serving a sentence for the purposes of subsection (4)(a) if they have been released from prison early (whether on licence or unconditionally) under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Accordingly, a person could, for example, be recalled to court to face the consequences of reneging on an assistance agreement in circumstances where they have been released on licence into the community. Subsection (15) makes clear that where an offender has entered into an assistance agreement and has been fined, that fine, where it has not been paid in full, may be referred to a court for review if any of the conditions set out in section 92(2) subsequently apply.
201. Subsection (6) provides that, where possible, any case which has been referred back under this section is to be considered by the judge who passed the sentence or, if the sentence was passed on appeal, by the judge who heard the case at first instance.
202. Subsection (7) gives the court a power to substitute a greater sentence where it considers the person has failed to provide the agreed assistance (not exceeding the sentence it could have passed but for the assistance agreement). Where a person has entered into an assistance agreement for the first time or a further assistance agreement, subsection (9) gives the court a power to take that into account and to reduce the individual's sentence accordingly. Subsection (11) gives a right of appeal to the offender (with leave of the High Court) and to the prosecutor in respect of any decision of the court in reviewing the sentence.
203. Subsection (12) requires the court, in passing a lesser sentence under subsection (9) or on appeal under subsection (11), to state that it has done so in consequence of further assistance or assistance given or offered for the first time. Subsection (13) provides that the court need not make such a statement where it does not consider it to be in the public interest, but in those circumstances it must give written notice of the fact that it has passed a lesser sentence on account of the assistance, to the offender and the prosecutor.

Section 93 – Proceedings under section 92: exclusion of public

204. This section provides that a court, in dealing with proceedings in respect of a sentence review under section 92, can make an order to exclude people from the court who, in its opinion, do not have a sufficiently direct interest in the proceedings to justify their presence, and to prohibit publication of any matter relating to the proceedings. The court may only make such an order if it considers that it is necessary to protect the safety of any person and that it is in the interests of justice. The court cannot, however, exclude

the judge, an officer of the court, the prosecutor and the other party to the proceedings as well as counsel or solicitor for that other party.

Section 94 – Section 92: further provision

205. Subsections (1) and (2) provide an order-making power for the Scottish Ministers to make provision in relation to the procedure to be followed in proceedings for sentence review under section 92. An order may apply with modifications the provisions governing appeals from solemn proceedings set out in Part VIII of the Criminal Procedure (Scotland) Act 1995 or modify that Part of the Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.
206. Subsections (3) and (4) provide an order-making power for the Scottish Ministers to make provision as to how a period served in custody, a period during which a person is released on license under Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, or a period during which a person is on unconditional release under Part 1 of the 1993 Act, are to affect the calculation of periods of time under the 1993 Act as they apply to a revised sentence imposed under either section 92(7), (9) or (12) of the Act. In making any such order the Scottish Ministers may modify the 1993 Act. Any such order is to be made by negative resolution procedure in the Scottish Parliament.

Section 95 – Sentencing: consideration of undisclosed information

207. This section provides that when a person has been convicted of any offence, the court in sentencing that person can take into account information contained in a report, including a report provided electronically, from a constable or other officer of an organisation which has the function of investigating offences, about assistance given by that person in relation to another criminal investigation or prosecution. This section applies to assistance provided otherwise than under an assistance agreement with the prosecutor.
208. With the agreement of the offender, the information will be made available by the prosecutor to the offender, his or her counsel or solicitor and the court. However, if the offender does not wish to disclose the information to his or her solicitor or counsel then it may be provided by the prosecutor only to the offender and the court. Where the court takes the information about assistance into account, it must not disclose the existence of the report or whether it has passed a lesser sentence on account of the assistance given.

Section 96 – Appeals etc.: undisclosed information

209. This section provides that confidentiality of undisclosed information should apply in all forms of appeal/reference back to the High Court. Subsection (1) sets out the review proceedings to which this section applies and covers all forms of review available in the High Court.
210. Subsection (2) makes clear that the section applies to the preliminary consideration by a judge of the High Court as to whether leave to appeal should be granted.
211. Subsection (3) concerns the case of any offender who has been sentenced in a court of first instance with the benefit of undisclosed information (sometimes known as “text” information), and who then appeals against the conviction, conviction and sentence or sentence alone. It confirms that the High Court and the Clerk of Justiciary must not disclose to any person other than the prosecutor, the offender and (with his or her consent) the offender’s counsel or solicitor the existence or content of that information. It also provides that the High Court and Clerk of Justiciary must not disclose to any person whether the information given resulted in a lower sentence in the first instance court.
212. Subsection (4) provides for cases which do not fall within subsection (3). It is designed to cover the case of an aggrieved co-accused who has not given “text” information when his or her fellow accused has done so. As a result the co-accused may receive

a heavier sentence than the offender sentenced with the benefit of “text” information. When such a person appeals, it is possible that the “text” information given by his or her fellow accused or knowledge of its existence may become available to the High Court. Subsection (4) therefore provides that where, in any situation not covered by subsection (3), the High Court or the Clerk of Justiciary becomes aware of “text” information, it should not disclose to any person the existence or content of that information or its impact on sentence.

213. Subsection (5) makes clear that provisions in the 1995 Act which require disclosure of information in various circumstances (for example, in relation to disclosure of the first instance judge’s written report in respect of a case to an appellant or his solicitor) do not apply in such a way as to enforce disclosure of “text” information which would be in breach of the restrictions on disclosure placed on the High Court and Clerk of Justiciary as set out in subsections (3) and (4). In relation to “text” information, therefore, the specific prohibitions in subsections (3) and (4) take precedence over the specified provisions requiring disclosure in the 1995 Act. Subsection (6) clarifies that these limitations on disclosure do not apply to prevent any disclosure to the Crown Agent or the Scottish Criminal Cases Review Commission. It does, however, impose on the Crown Agent and SCCRC a prohibition on further disclosure of the existence or content of the “text” information and its impact on sentence, albeit placing beyond doubt that this does not block disclosure by either body to the High Court.
214. Subsection (7) provides that the High Court in considering an appeal has the same powers to clear the court of all but the parties, their representatives and an officer of the court and to prohibit the publication of information about the proceedings as the judges reconsidering a sentence discount under section 92 as set out in section 93. This is without prejudice to any other power which the court has to exclude any person from the court or to prohibit publication about the case.
215. Subsection (8) introduces a new order-making power under which Scottish Ministers may make further provision to ensure that this section is given full effect. This may include provision modifying the 1995 Act. The order-making power is subject to negative resolution procedure in the Scottish Parliament.