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FINAL REPORT

TO THE CRIMINOLOGY RESEARCH COUNCIL

RESEARCH GRANT ON PRISON INFORMERS

ASSOCIATE PROFESSOR DAVID BROWN

LAW FACULTY UNIVERSITY OF NEW SOUTH WALES

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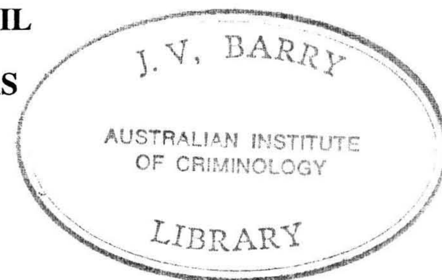
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1. Brown, D. and Duffy, B. `Privatising Police Verbal: The Growth Industry in Prison Informants', in Carrington, K., Dever, M., Hogg, R., Bargen, J and Lohrey, A. (eds) *Travesty!: Miscarriages of Justice*, Academics for Justice: Sydney 1991 pp 147-183. p5

SECTION TWO : THE CULTURE OF PRISON INFORMING

2. Brown, D. Notes on the Culture of Prison Informing, *Current Issues in Criminal Justice* 5:1 July 1993 54-71 p26

SECTION THREE : PUBLISHED COMMENTARIES ON THE REFORM PROCESS

3. Brown, D. `Danger in the Growth of Prison Informers', *Sun Herald* 13/4/1991 p44

4. Brown, D. `Prisoner Informants: the new growth industry', *Australian Society* June 1991 pp11-12. p47

5. Brown, D. "Prisoner Informants: The Privatisation of Police Verbal?", *UNSW Law School Bulletin* Vol 1 No 1 1991 6-8 p49

6. Brown, D. Prison Informers: Where the grasses are greener, *Alternative Law Journal* 1993 18(2) 80-85 p52

7. Brown, D. `Justice on the Word of Criminals: a Conundrum', *S. M. H.* 1/4/1993 p58

8. Duffy, B. `Prosecutors' secrets: the DPP's Informer Index *Alternative Law Journal* 19:3 June 1994 p59

9. Brown, D. `Many: Evidence test vital', *Sunday Telegraph*, 5/3/1995 p62

10. Brown, D. `Many's release raises legal - not political -questions', *S. M. H.* 7/3/1995 p63

ADDITIONAL USES OF RESEARCH

A) UNPUBLISHED CONFERENCE PRESENTATIONS

1. `Prison informants', Academics for Justice Conference, NSW State Library, 23/2/1991

2. `The Emergence of prisoner Informer Testimony', seminar delivered to the Law Faculty and Institute of Criminology, Victoria University, Wellington, New Zealand, 8/4/1992

3. `The Culture of Prison Informing', paper delivered to the Australian and New Zealand Society of Criminology Conference, Melbourne University, November 1992

4. `A Comment on the ICAC Report on the Investigation into the Use of Informers', The University of NSW, Faculty of Law 1993 Continuing Legal Education Program, 3/5/1993

5. `The Politics and Culture of Prison Informing', paper delivered at The Ultimo Series, School of Humanities, University of Technology, 19/5/1993

B MEDIA PRESENTATIONS

1. Television

i) ABC TV Lateline, *Prisoners for the Prosecution*, Kerry O'Brien, 1992
ii)ABC TV 7.30 Report,_Prison Informers: the Many and Domican cases, Kerry Douglas, 1992
iii)ABC TV 7.30 Report, The ICAC Prison Informers Report, Murray Hogarth, 1993
iv)ABC TV 7.30 Report The ICAC Police Inquiry Report, David Margin, 1994
v) ABC TV 7.30 Report, Many case, Phillipa McDonald, March 1995
vi) ABC TV 7.30 Report, Many case, Ray Moynihan, March 1995

2. Radio interviews: too numerous to record or mention

RESEARCH SUMMARY

The research grant of $24,000 was expended over 1991-1992 in employing a part time research assistant, for a three month period in late 1991 and a Senior Research Officer, Ms Beverly Duffy, for an 8 month period from February to September 1992. A full literature search was conducted and an archive of published literature on prison informants was compiled. This archive has been made available to other researchers in the area (see eg. acknowledgement in R. Settle, *Informers* (1995) Federation Press) and relevant organisations such as the NSW ICAC and DPP. Letters were written to overseas bodies such as the Los Angeles District Attorneys office and material and information was received from these sources. Again this material was made available to the ICAC and NSW DPP which assisted them in their inquiries and the formulation of policy responses. Eighteen interviews were also carried out with lawyers and prisoners in Australia. I personally interviewed the Head of the Appellate Division of the LA District Attorney's Office and prominant lawyers involved in prison informer cases in both New Zealand and the USA while on study leave in first session 1992. Repeated attempts were made to interview the NSW DPP but these requests were refused, although some questions were answered in correspondence.

The research material thus gathered was used as the basis for a number of articles on prison informers. These were published as a major chapter in a book, as specialist articles in legal and criminological journals and in popular newspapers. This published material forms the basis of the Final Report presented to the Criminology Research Council. In addition media and public commentaries were made on numerous occasions in the interests of increasing public awareness and knowledge of the issues. Also conference papers were presented on the issues. It was felt that rather than waiting to produce one large Report the research was better suited to being injected into the public debate and law reform processes in various ways as these debates unfolded.

The gist of the research findings were as follows. While examples of prison informers can be found in earlier periods it seems at least from press reports that there has been something of a growth industry in the last decade. Individual cases such as Many and Denning which came to public attention were used to illustrate the processes involved. An attempt was made to outline the major conditions encouraging the use of prison informers. A detailed article was prepared outlining the nature of the prison inmate code on informing. The key issues for public debate and political response were identified as being the reliability of evidence emerging from prison informers and the integrity of the legal processes. Accordingly a number of regulatory proposals and reforms were made in the course of the research. These included:

1. Greater scrutiny by the courts of informer sentence discounts;

2. The need for a warning in relation to evidence of informers;

3. Availability of witness immunities to the defence;

4. Tighter regulation of the grant of witness indemnities;

5. Improved administrative procedures in DPP Offices to monitor informers' `careers' and ensure adherence to policies and guidelines;

6. Strengthening of prosecution duties of fairness and independence;

7. Reconsideration of `targeting' tactics of prosecutorial agencies such as NCA, State Drug Crime Commission, Task Forces;

8. Full scale inquiry into the establishment, operation and practices of the NSW Department of Corrective Services Internal Intelligence Unit (IIU);

9. Recording and Monitoring of all Police Access to Prisons;

10. Prisoner Access to Legal Advice and Ability to Refuse Police Interview;

11. Clearer Institutional Separation of Police and Corrective Services Departments;

12. Reversal of Punitive and Counter-productive prison policies;

13 Re-introduction of appropriate positive incentives;

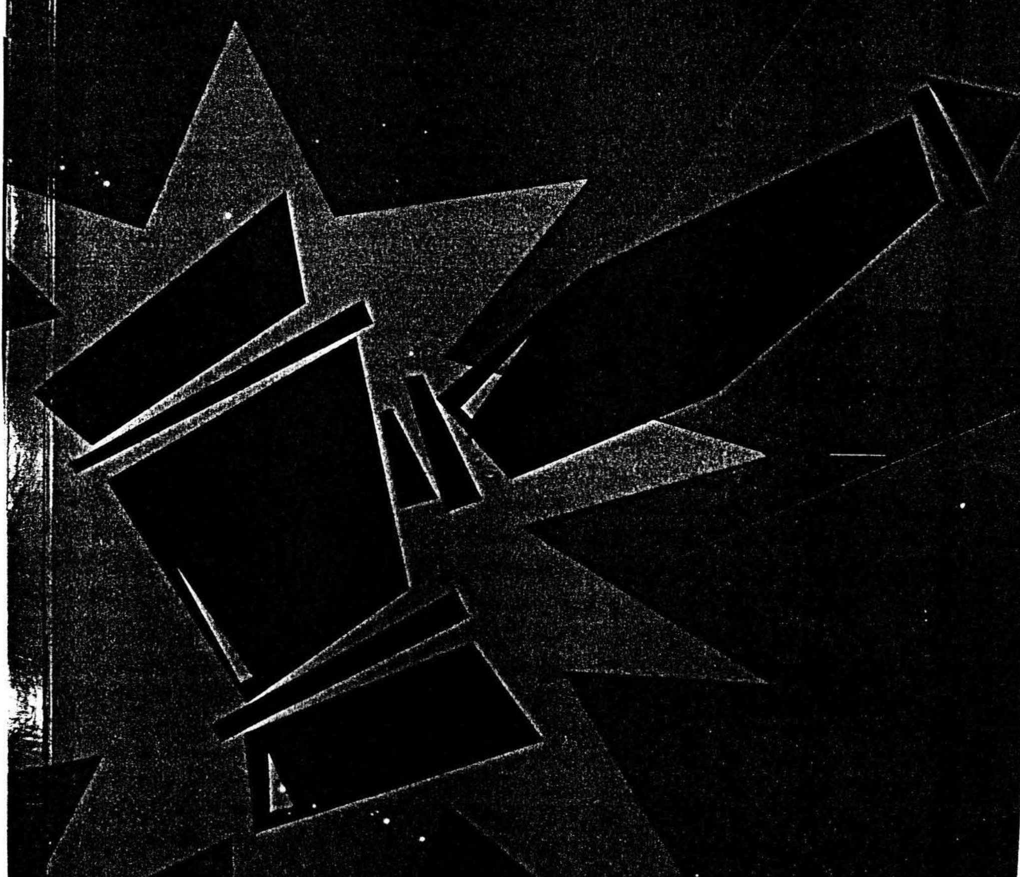
14. A formal commission of inquiry to examine cases of convictions obtained through the evidence of prison informers.

A number of these recommendations have been addressed or adopted by various agencies during the duration of the research, in varying degrees. For example the High Court has laid down a requirement for a prison informer warning. Publications from the research were cited in the High Court judgment of Pollit by McHugh J. An inquiry was held specifically into the use of informants conducted by the NSW ICAC. The ICAC has released two inquiry reports containing a range of recommendations, including an informer handling policy for police, which has been adopted by the NSW Police Service. The NSW DPP has responded to the concerns raised in 5 above to institute an Informer Index and elaborate policy guidelines in relation to informers. The NSW government has tightened various legislative criteria in relation to sentence discounts. It is hoped that the publications and commentaries emanating from the research helped create both the context and supplied some of the information and direction in which improvements in various aspects of the criminal process might be and have been made.

(5)

TRAVESTY!

Miscarriages of Justice



Edited by Kerry Carrington, Maryanne Dever,
Russell Hogg, Jenny Bargen and Andrew Lohrey

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Privatising Police Verbal:
The Growth Industry in Prison Informants

David Brown & Beverly Duffy

More mischief hath come to good men ...by false accusations of desperate villains than benefit to the public by the discovery of real offenders. [1] **Mathew Hale 1650**

The province of reward is the last asylum of arbitrary power. Jeremy Bentham 1825

This chapter examines what appears to be a growth industry in prisoner informants[2]. In general while the role of informants has a long history[3] the discussion will be confined to the more specific field of prisoner informants, that is informants who give information or evidence concerning the alleged activities or conversations of other prisoners while in jail. The typical formula is that a known prison informer will 'volunteer' information or testimony that another prisoner (often a high profile or 'targeted' figure) has made a confession or damaging admission concerning the crime with which he or she is charged, while on remand awaiting trial. A basic implausibility arises from the context of such claims. If particular prisoners are indeed seized of the desire to confess one wonders why they insist on doing so whilst on remand facing trial; and why the recipients of such 'confessions' seem so often to be the same small group of prison informers?

The chapter divides into four sections. The first section highlights a number of cases which illustrate many of the problems which arise from the use of prisoner informants. The second section identifies the three major conditions sustaining this growth industry. The third section outlines what is so objectionable about the current use of prisoner informants[4]. The fourth section suggests various regulatory responses or reform strategies.

Prisoner Informants: A Growth Industry

What evidence is there of a growth industry in prisoner informants? It should be initially noted that there are no clear cut statistics which prove an increase in prisoner informants for there are no such publicly available statistics. There are some statistics contained in the Annual Reports of the offices of the Commonwealth Director of Public Prosecution (DPP) and the National Crime Authority (NCA) on witness indemnities or undertakings[5] (see Appendices 1 and 2)[6]. In the Annual Reports of the New South Wales (NSW) DPP separate figures on witness indemnities are not given[7]. But figures for witness indemnities do not indicate the number of **prisoner** informants used in particular years. The formal grant of a witness indemnity is merely one of a number of inducements offered to prisoner informants which are examined in this chapter.

The absence of any statistical evidence of the use of prisoner informants in NSW may soon change. In December 1990 following the broadcast of an ABC Background Briefing Program, **Justice gone to the dogs: criminal informers in our justice system** (Davis, 1990) Dr Andrew Refshauge, Deputy Leader of the Labor opposition referred the following questions to the NSW Independent Commission Against Corruption (ICAC):

- How many criminals have given evidence in criminal court proceedings in the past two years?
- How many of these prisoners have benefited from reduced sentences?
- In how many court cases have individual witnesses been prisoners?
- What have been the results of cases which have depended on evidence from prison informers? (**Sydney Morning Herald [SMH]**, 17/12/90)

When the ICAC reports on these questions a clearer idea of the extent of use of prisoner informants will be possible. In the meantime we are left with the general impression of most informed commentators that there has been a significant increase in the use of prisoner informants. This impression is based largely on the number of celebrated cases over the last decade, and in particular in the late 1980s. What follows is a brief account of four particular examples; namely, those of Eric Heuston/Grant, Fred Many, the Cessnock prison officers case, and Darryl Cook, Stephen Robinson and Stephen Walsh. These accounts will illustrate some of the particular problems with the use of prisoner informants.

Eric Heuston/Grant

Eric Heuston (also known as Grant) figured prominently in many of the allegations of police malpractice examined in the Beach Inquiry in Victoria in 1978 (Keenan, 1988). In **the Hamilton Matter** (police investigation of an armed robbery) Beach found that "certain members of the armed robbery squad ...had conspired with Grant to ensure Hamilton's conviction...". Beach was satisfied that "Grant had taken part in the robbery, then, and with the active assistance of members of the squad, was eliminated as one of the offenders; further, regardless of whether or not Hamilton was involved, he was arrested and charged on information supplied by Grant... (Grant) implicated Hamilton in the robbery in question by "planting" the rifle used in the robbery in the house occupied by Hamilton..." (Beach, 1978:37). The Report stated that one of the police involved ultimately conceded that Grant had taken part in the robbery and had "set Hamilton up" (Keenan, 1988).

In **the Power Matter** Beach found that police had approached Grant who nominated two people as being involved in a murder. One of them, Power, was arrested. On investigation it was found the other could not possibly have been involved. Grant was approached again. He substituted another name, Hutchinson. Meanwhile there was no real evidence against Power. But police had sufficient evidence to charge Hutchinson with a number of break and enters and a serious assault. A deal was then done. "The deal was this:-In return for Hutchinson agreeing to give evidence against Power, he Hutchinson, would not be proceeded against in respect of the numerous offences with which he should have been charged" (Beach, 1978:42-43). Power was acquitted because Hutchinson's evidence was "demonstrably false" and Power had an

alibi. "At Power's trial it was demonstrated beyond doubt that the gun identified by Hutchinson as the murder weapon had in fact been in the possession of the Police for some six weeks prior to the shooting" (Beach, 1978:42-3). Beach added:

> The twin vices of the Power matter are these: first, that the police should engage in deals of this sort with criminals at all; second, that they should be content to rely on evidence induced from such a tainted source, in a matter of such gravity as a charge of murder. (Keenan, 1988)

In **the Lawless Matter** Beach noted that he was empowered only to examine the police conduct in the matter and not to consider whether Lawless was guilty or innocent of the charge. However he stated that "not only did those championing Lawless's interests allege that he had been wrongly convicted ...they also asserted that the real murderer was Eric Grant (alias Heuston) and there was produced a deal of evidence to that effect before the Board" (Keenan, 1988).

Here then in 1978 we have Beach describing Heuston variously as "tainted" and "devious", "a shadowy figure" whose dealings with police were highly suspicious, finding that Heuston had set up fellow criminals in some cases for crimes of which he himself was a suspect including murder. Yet incredibly, Heuston has continued to be used by both the NCA and the NSW police and DPP on at least 6 occasions, most recently in a series of conspiracy to murder prosecutions against Tom Domican and Peter Drummond.

Fred Many

Fred Many started his criminal career at the age of fifteen and spent most of his later life in prison. He was sentenced by courts in 1968, 1970, 1971, 1972, 1973, 1974, and 1976. The NSW Court of Criminal Appeal noted in 1990, "it seems that almost immediately he gets out of gaol he commits further serious offences and goes back to gaol". In 1978 he was sentenced to an aggregate 18 years imprisonment on six charges of armed robbery. He was released on parole in 1986, despite additional charges in the interim of escaping from lawful custody and conspiring to escape arising from separate incidents. His early release on parole was a reward for intervening in an attack on the Governor of Goulburn prison. Within two months of release Many seized a 15 year old girl from the street, locked her in the boot of his car, raped her three times, strangled her and left her for dead. Many was convicted in March 1988 of sexual assault and attempted murder arising out of these events. He received a total head sentence of 20 years which was later redetermined as a fixed term of 12 years and 10 months. Many appealed against his sentence and in December 1990 received a four year discount on the sentence from the NSW Court of Criminal Appeal (CCA), a decision which was upheld by the High Court in February 1991.

Many's discount was in part a reward for giving evidence in a trial in which Tom Domican and Peter Drummond were charged and initially convicted of conspiracy to murder Mr Franciscus Vandenburg, another prisoner. Many's claim for a sentence discount was supported before the CCA by evidence from police officers, Mr Cusack QC of the National Crime Authority and Mr MacCaskell, the Superintendent of the Internal Investigation Unit (IIU) of the NSW Department of Corrective Services. Many had at no time expressed contrition in relation to the attack. The NSW Court of Criminal Appeal in upholding Many's appeal and in setting a four year sentence discount said "it is not disputed that his assistance in this and the other matters here mentioned was significant, substantial and true" (R v Frederick Glen Many NSW CCA 11/12/90).

But some nine months earlier the NSW Court of Criminal Appeal (CCA) allowed an appeal by Domican and Drummond against their conviction on the very same charge, quashed the convictions and ordered a retrial (**Dummond and Domican [No 2]** [1990] 46 A Crim R 408). The major ground of appeal was that fresh evidence was available. The evidence was that of a solicitor, Ms Leigh Johnson, who deposed that Many had approached her while she was visiting another prisoner in the Special Protection Unit of the Long Bay Prison complex and they had a conversation in which Many told her that the evidence he had given in the Domican case "wasn't true, and I want to tell the truth; I really want to set the record straight but I'm afraid if I do so Ron Woodham would have me killed... I really do want to make a statement about it but I don't want to do it until I can be sure I won't be killed. I think that even if Woodham knew I was speaking to you, my life would be in danger." (1990:415).

When Many was called by the Crown he gave three wildly conflicting versions of these events to the court. He said that on the one occasion on which Ms Johnson spoke to him about giving or changing his evidence,

she gave him a quantity of heroin. He claimed he had flushed the heroin down the toilet although he agreed that within the prison system heroin was a valuable, tradeable commodity. Many had also made an earlier affidavit in which he did not make any mention of heroin. Nor did he mention in the affidavit that he wrote out a statement along the lines of the report by Ms Johnson of his conversation with her. In yet another earlier statement he denied having any conversation at all with Ms Johnson.

Acting Chief Justice Kirby summarised the position as follows:

> There are at least four versions of what happened that may be attributed to Mr Many:
>
> (a) His evidence in court at the trial;
>
> (b) The statement which he wrote out, described in his affidavit of 1 February 1990 and his evidence before this Court but not yet produced;
>
> (c) His statement in December 1989 denying any conversation about "these matters" with Ms Johnson; and
>
> (d) His evidence in January 1990 alleging that Ms Johnson had given him an ounce of heroin as a token to change his evidence but which he steadfastly refused to do. (1990:418-9)

Justice Kirby ACJ found that Ms Johnson's evidence was credible. "Stacked up against Mr Many's various versions of his conversation with Ms Johnson, I would accept hers" (1990:420). Kirby said the matters raised on the appeal:

> go to the very heart of the truth of what he said in the instant case. If the jury considered that that evidence ...was "not the truth" the foundations of the Crown case would be seriously undermined. In those circumstances an acquittal is a sufficiently realistic possibility as to warrant disturbance of the verdicts and an order for a retrial. (1990:422)

Interestingly two other key Crown witnesses in the original trial were (you guessed it) Mr Eric Heuston and a Mr Mark Yates. Mr Yates gave

certain evidence at the inquest into the death of Ms Sallie-Ann Huckstepp. In the course of giving evidence he admitted that testimony he had earlier given in the same inquest was a complete fabrication.

It is important to remember that the NSW Court of Criminal Appeal decision to allow Domican and Drummond's appeal was made on 9th March 1990, nine months **before** the same court (although differently constituted) allowed Many's appeal against sentence and awarded him a four year sentence discount specifically for his contribution in giving evidence against Domican and Drummond in the Vandenburg case. It is also important to remember that the CCA in the Many appeal stated that Many's assistance was "significant, substantial and true".

There is no indication in the case report of any mention of the previous finding. It might be assumed that if the Court was aware of its own previous decision it may have been a little more circumspect in describing Many's contribution thus, particularly as Domican and Drummond's appeal had been granted and a retrial ordered. From what we have been able to examine of the transcript of the Many sentence discount hearing it is not clear that the CCA was ever alerted to its own previous decision.

If this is so the question arises: why not? Presumably Many's counsel was not about to draw the court's attention to the previous hearing which cast doubt on his client's credibility in the very matter on which Many was claiming a discount. But did Crown counsel raise the matter, and if not why not? A general prosecution interest in promoting sentence discounts as an incentive to prisoners to come forward with information is hardly a sufficient answer. Whatever the answer, the result in the Many case brings the court into disrepute for it gives the appearance that the NSW Court of Criminal Appeal is not aware of its own previous decisions in a directly relevant matter involving the same events. Additionally but less directly, the High Court which upheld the sentence discount on appeal with no apparent reference being made to Domican and Drummond's successful appeal and Many's role in it, is left in the same position. It may well be that having promoted the evidence of particular informers on the issue of the accused's culpability the Crown is reluctant to then turn around and call that evidence into question on the informer's application for a sentence discount. If this is the case it illustrates the way the Crown becomes **compromised** in the exercise of its proper functions and highlights the absence of a party who does have an interest in putting such material before the court.

Many gave evidence in another prosecution against Tom Domican over a charge of attempting to murder hitman Christopher Dale Flannery. Domican's appeal against conviction on this charge was denied on the grounds that there was other corroborative evidence so that the conviction did not turn on Many's evidence alone. In yet another prosecution Domican and two others were cleared of conspiring to murder Mrs Kathleen Flannery, wife of Chris Flannery, after a magistrate found that most of the key prosecution witnesses could not be relied upon. Many also gave statements to authorities in relation to an alleged conspiracy by Domican to murder a man called Gudgeon and again in relation to an alleged murder by Drummond of a man named Kay.

Many also gave evidence against Domican and Drummond in a charge of conspiracy to murder Ron Woodham the Head of IIU of the Corrective Services Department. Both were acquitted of this charge. Also involved in giving evidence for the Crown in this case were notorious prison informers Ernest Samuel Wade and Cecil Gidley. Mr Wade admitted at the trial that he had stabbed more than 50 inmates and assaulted more men than he could count as a 'debt collector' for prisoners and prison officers selling drugs. Admitting he had also used violence on behalf of prison officers to enforce discipline in the jail, Wade said in court: "I either assault them or stab them or belt them over the head with something" (**SMH** 21/6/89). Wade agreed that he had written to the Superintendent of the Special Purposes Prison at Long Bay prior to the trial threatening that he would not give evidence if he was not moved to another prison. Another key prisoner informant in the failed prosecution against Domican and Drummond was Mr Cecil Walter Gidley who escaped from prison in 1982. While at large he beat an elderly couple to death with a shotgun butt, committed an armed robbery in which he seriously injured a man, and kidnapped a family of four at gunpoint and forced them to drive him around the city. He told arresting police he "was only doing what he was directed to by the voices" (**SMH** 29/10/89). After providing the evidence in the Domican case, allegedly helping to prevent 'attacks' on Premier Nick Greiner and Corrective Services Minister Michael Yabsley, and helping prison authorities to foil what was described as a "Charles Bronson-type" mass jailbreak involving a helicopter, Gidley escaped again in October 1989 from Grafton prison. A prison's spokesperson was quoted at the time as saying Gidley may have escaped when he found out he could not get an early release. "He expected that although he was a double lifer he could get an early release by providing information" (**SMH**, 29/10/89).

Cessnock Prison Officers Case

In 1989 three former prison officers from Cessnock jail were charged with serious offences. John Fitzpatrick and John Boyd were charged with conspiracy to murder a prisoner named Dawson and conspiracy to pervert the course of justice and conspiracy to supply drugs. Bryn Hill was charged with conspiracy to supply drugs. The charges were the result of a long investigation by the IIU of the NSW Department of Corrective Services in conjunction with the State Drug Crime Commission (SDCC) in an operation that went under the name of the "Jericho" Task Force. In late 1990 the charges were dismissed at a committal hearing (Davis, 1990; **SMH** 24/9/90).

In dismissing the charges Magistrate Warren Cook said that there were two chances of conviction by a jury: "Buckley's and none". Cook said of one of the key prisoner informants, Danny Edward Smith: "I, as a tribunal of fact, cannot and would not believe anything that man says". Nevertheless Smith was granted parole on the basis of his assistance in the case. The prosecution also relied on the evidence of Robert Young, a former prisoner and a man brain damaged in a motor vehicle accident. The Background Briefing Program (Davis, 1990) on the ABC reported that Young was unable to tell the court what day of the week it was. He was unable to tell the month of the year and when asked what year it was, was unable to tell the court it was 1990. Curiously for someone with such a poor memory Young had made a detailed statement to a senior official of the Corrective Services Department in relation to events going back eleven years. The disparity between the statement and Young's mental state and performance as a witness led Davis to raise the question: "how a brain-damaged person could apparently give such a detailed statement, let alone be produced in court as a credible witness. His inconsistencies and his incapacity raise the issue of whether his statement was prepared by someone else before he signed it" (Davis, 1990:7).

A third prisoner who gave evidence in this case was Noel Hinton, described by Magistrate Cook as intimidating and terrifying. Cook said of Hinton: "He has told on my count, I think at least four different versions of the same incident. If ever there was a proven liar in a court room presided over by me, it was Mr Hinton". The Magistrate recommended the DPP consider charging Hinton with perjury. Hinton was granted 42 days special remission for assisting in the investigation. The remission

recommendation was signed by the Head of the IIU, Ron Woodham.

Darryl Cook, Stephen Robinson, Stephen Walsh

Darryl Cook was another prison informer who appeared in the Cessnock case. The Magistrate described his evidence in the following terms: "The only thing I was really sure about with Mr Cook was his name and not much else. He is a witness completely and totally lacking in credibility." Cook has been a long term informer in the NSW prison system. Along with Stephen Robinson and Stephen Walsh, Cook offered to give evidence in the Tim Anderson Hilton bombing case but was not called by the Crown. He also appeared as a witness in the prison murder of Noel Holden who was killed at Long Bay Gaol in 1986. Eighteen months later Cook made a statement about the murder. However when he appeared as a witness at the coronial inquiry he recanted his statement and made direct accusations against members of the IIU, that they had been "recruiting witnesses to make some sort of case against innocent people" (Davis, 1990:8).

When the case came before the Supreme Court for trial Cook changed his story yet again, saying he had lied at the coronial inquiry. This aspect of Cook's evidence was pursued on the Background Briefing program in an interview between ABC journalist Sharon Davis and John Doris, barrister for one of the men accused of the Holden murder.

Darryl Cook and Stephen Robinson crop up again, along with two other prisoners, Peter Priest and David Stephens, in the Tim Anderson Hilton bombing case. In April 1990, after Tim Anderson's committal, the solicitor for public prosecutions wrote to Anderson's lawyers informing them of the Crown's intention to call four additional witnesses not called at the committal. The evidence they were to offer was to be evidence of alleged prison conversations involving Anderson in 1980-81, some ten years before. Several months later, the Crown evidently changed its mind and decided not to call these witnesses.

Robinson's statement was taken in the Sydney Central Police Cells on 5th March 1990 while he waited to give evidence in the Noel Holden prison murder trial discussed above. The statement of Cook was taken one month after Cook, Robinson and Walsh had escaped from custody at the Sydney Police Centre during the Holden trial. Walsh had begun his evidence when the three men escaped. The trial was aborted on 15

March after Justice Sully criticised the police for their "deplorable behaviour" in disobeying the court order that Walsh be kept in isolation from the others while he gave his evidence. Justice Sully said "There is simply no reason why the directions of the court were not obeyed strictly" (SMH 16/3/90).

Robinson was also involved in giving evidence in two Parramatta prison murder cases in the early 1980s. One of these cases resulted in the conviction for murder of Kevin Gallagher in 1983. Kevin Gallagher later appealed against his conviction on the ground that a subsequent confession to the murder by another prisoner, Arthur Gallagher (no relation) constituted fresh evidence. The NSW Court of Criminal Appeal, by majority, concluded that the evidence of Arthur Gallagher was suspect and rejected the appeal. Application for special leave to appeal to the High Court was dismissed (**Gallagher v The Queen** [1988] CLR 392). Arthur Gallagher died in a fire at Jika Jika prison in Melbourne in 1987. Another prisoner involved in giving evidence against Kevin Gallagher was Fred Many. Arthur Gallagher's sister confirms that Arthur confessed his role in the murder to her. The Gallagher case is ripe in our view for a s475 inquiry. Robinson appears again as an informant in the Vlahos murder case in 1988, along with Darryl Cook.

The four major cases/examples set out above have thrown up many of the problems arising from the tendency to use prisons as reservoirs of evidence on tap to shore up, or in some cases initiate, prosecutions. Other examples could be given, for example that of former folk hero and escapee Ray Denning who has received indemnities against major armed robbery charges in Queensland. Favourable character evidence has been given on his behalf by detectives in relation to serious charges where he has appeared before the courts. Denning has indicated his intention to apply for the $100,000 reward arising out of the Hilton bombing case. Denning's role as an informer is dealt with elsewhere in this book (see Chapter Seven).

Or the example of "Mr Smith" used repeatedly by the NCA before being finally discredited in the Grassby conspiracy committal proceeding in March 1988. Magistrate Mr Jon Williams found the evidence of "Mr Smith" so discredited that there was no chance a jury would accept it. "Smith", more popularly known as "the fat man" had according to Mr Grassby's legal adviser, John Foley, been granted at least 19 indemnities and given special witness protection status despite the fact that he was

continuing to engage in criminal activity and indeed there were "some 2,000 to 3,000 information reports about his activities contained on the Federal Police files" (Hansard, Joint Committee on NCA, 30/1/91:631,729).

Or that of Lee Henderson, who gave to police what he claimed to be recordings of police and criminals plotting the murder of Sallie-Anne Huckstepp. Henderson later admitted he had concocted the tapes. He was sentenced to a further six months in prison after pleading guilty to making false representations to police. Such informers rely heavily on media promotion and some journalists have proved rather gullible. Andrew Keenan points out that Henderson was adopted by ABC-TV and that a program based on material supplied by Henderson, who claimed to have been among other things a mafia hitman, won a high commendation from the judges in the 1987 Walkley awards. Unfortunately, Keenan notes, "much of the material was pure fantasy. As with Frank Duggan, whom the **Sun Herald** promoted as a major NCA supergrass, Henderson succumbed to the temptation of many informers to embellish their limited knowledge." (Keenan, 1988) Keenan points out that in August 1987 the **SMH** asked a senior NCA officer why the NCA had not even bothered trying to check out one of many of Henderson's amazing allegations. "The reply was to the effect that Henderson simply could not be trusted about anything. Yet at that time, the NCA was still hoping that Henderson would review his decision not to give evidence against a major NCA target."

In case it is thought that these issues and problems have only arisen in the last few years and are confined to NSW it is worth recalling the Geesing case (**The Queen v Geesing** [1984] 38 SASR 226). In South Australia in 1983 Raymond John Geesing was convicted of the abduction and murder of a young girl. After 17 months in prison the South Australian Court of Criminal Appeal quashed the conviction and ordered that no retrial take place. The evidence of four prison informants relied upon by the Crown at the trial was described by the appeal judges as unreliable and untrustworthy. One prisoner retracted his original statement. The evidence of another was declared inadmissible.

A particularly objectionable use of prisoner informants occurred in the Darren Brennan case. On the 17th June, 1990 Darren Brennan was shot in the face during a raid on his home by 14 members of the Tactical Response Group (TRG) looking for a stolen police badge and a small

quantity of marijuana. The Minister of Police, Mr Pickering, and the Commissioner of Police, Mr Avery, made public comments critical of the raid. On the morning of the day Brennan was to appear before the Police Tribunal investigating the incident he was charged with robbery. The robbery charge was later withdrawn after a prisoner informant, Leslie Wakefield, claimed he had been coerced by NSW police into making a statement falsely implicating Brennan.

Conditions Encouraging The Use of Prisoner Informants

A number of conditions are encouraging growth in the prison informant industry. Firstly, the police verbal, the fabrication of confessional evidence by police, is falling into disfavour. Juries are becoming increasingly reluctant to believe uncorroborated confessional evidence denied by the accused and unsupported by available sources of independent verification. The introduction of tape and video recording of police interrogation will make outright fabrication of confessional evidence more difficult. There has also been a strong push in the case law, initiated by the late Justice Murphy and forcefully continued by Justice Deane, to require a corroboration warning in relation to contested confessional evidence where police have failed to use available recording technology. The views of Murphy and Deane finally won over the majority of the High Court in the case of **McKinney v the Queen** handed down in February 1991.

In short the evidence of prisoner informants provides a convenient non-police replacement for police verbal, a privatisation of the verbal (see Hogg, 1988). As administrative and legal regulation of police interrogation increases so does the attractiveness of the prison yard or cell as a site for the production of prosecution testimony[8]. Other benefits ensue. Senior Public Defender Peter Hidden has noted with concern that evidence from prisoners can appear persuasive to juries:

> They (prisoners) are often down to earth appealing characters who appear to have no motive to lie ...some are very skilled liars ...who have learnt to work the system. (Duffy, 1990:134)

Secondly, the repressive and punitive regime in NSW prisons instituted by Minister Michael Yabsley fosters a trade in testimony. Deterioration in prison conditions; overcrowding; increasing levels of violence and assault; longer sentences; the abolition of remissions and the confiscation of property policy, all increase the pressure to find new forms of

personal advantage and new incentives within the system. The emerging incentive is a developing market in criminality; the volunteering of testimony in exchange for a range of privileges. These range from formal grants of immunity or informer sentence discounts to (prisoners allege) actual early release, favourable classification or transfer decisions, access to witness protection programs, recommendations for bail, favourable parole assessments, day release, contact visits, phone calls, property, drugs etc.

Thirdly, it is alleged within prison system that the increase in the power within the Department of Corrective Services of the IIU has led to a growth in the industry in prisoner informants. Set up in the late 1970s the IIU has recently gained considerable power in decisions over classification, prison transfers and the witness protection program. These are valuable bargaining chips and prisoners allege that the IIU has been at the forefront of recruiting prisoner informants. Particular claims of inducements are currently before the NSW Independent Commission against Corruption (ICAC). The activities of the IIU and the access to prisoners available to certain detectives, claimed by prison officers to be "running" particular prisoner informants, are examples of the increasing intermeshing of prisons and police under the Greiner government. The appointment of two retired police superintendents to head the NSW Department of Corrective Services symbolises this intermeshing.

Darryl Cook in the tape referred to in the Background Briefing program described how he was approached by a senior officer of the IIU to supply evidence:

> I refused to give evidence and now am paying because I would not let (a senior IIU officer) recruit me as a witness to put this innocent man in gaol for something I know he had nothing to do with...I have paid the consequences of being shanghaied for not co-operating with the IIU. (Duffy, 1990:134)

He claims such approaches are also made directly by police officers:

> There are also a number of these people that have been recruited by the police who have, in return for their evidence been taken out on day leave visits to see their families, been given drugs, been allowed extended visits, had property dropped at the gate, been taken out to restaurants. (Duffy, 1990:134)

It is not only prisoners who make such claims. Janet Fife-Yeomans in the **Sydney Morning Herald** noted that while publicly the Department of Corrective Services denies that any carrots are held out to tempt prison informers "privately police admit they are promised favours. A word to the prosecution and the judge if they are awaiting sentence - it is an established practice that informants get lesser sentences" (SMH 17/3/90). She went on to refer to other incentives: "better prison conditions such as extra visiting rights, one extra phone call a week, increased contact visits with loved ones". She quotes a police officer: "When they inform there is always some underlying reason, whether for movement to another jail or because their homosexual lover has been moved and they want to be near them". Revenge was another motive mentioned.

In order to verify such claims it would be useful to know what if any checks and records are made of visits by particular detectives to particular prisoner informers? What records are kept by the IIU itself of its meetings with and conversations with prisoners? Is there, for example, a register of informants? Is there a clearly articulated code of practice covering police or IIU relationships with informants? Barrister John Doris noted in relation to the Holden murder case that:

> during the course of evidence in this trial, it emerged that Mr Woodham is not the subject of any statutory regulation above and beyond the Prisons Act itself, and one really wonders who it is that Mr Woodham answers to. It did emerge in this case too that while he's the head of investigations or the head of security, he's a gentleman who seems to keep very little record - indeed, in this case no record - of his own personal involvement in these inquiries. (Davis, 1990:10)

The Director of NSW Corrective Services Custodial Division, John Horton, emphatically denied in an interview with Duffy that departmental officers are in any way involved in setting up deals with prisoner-informants:

> It doesn't happen, I've got no knowledge of it and I believe that the system of dealing with witnesses is such that it couldn't happen. (Duffy, 1990:135)

Horton went on to explain that all potential witnesses are vetted by an interdepartmental committee which determines "the veracity of their evi-

dence". The committee includes senior officers from the NCA, the ICAC, the Federal Police, state police and himself as chair person. Horton stated that it was made very clear to prisoners that no benefits were to be gained by giving evidence.

The existence of such a committee is interesting in itself. No explicit reference to it appears in the Annual Reports of Commonwealth or NSW DPP[9]. It is our contention that such bodies should not be established without parliamentary and public debate over their desirability, constitution, functions and procedures. Without some clear and publicly articulated foundation, difficult issues concerning, for example, the relationship between such a body and the courts, and whether such a body is bound by the policies and guidelines of the DPP, cannot be answered.

If such a committee has indeed been vetting potential prisoner witnesses on the "veracity of their evidence" why have so many of the witnesses proved unreliable, as shown in the cases mentioned above. Did the committee vet the witnesses in the Cessnock prison officers case, for example, or Fred Many or Ray Denning? Does it check whether informers who claim to have been the recipients of confessions were actually in the same prison with the alleged confessor at the time? Who is going to vet, or monitor the committee, to whom is it accountable?

Shortly after Duffy's interview with John Horton a prisoner, Stephen O'Hara, giving evidence in a prison murder trial, claimed in the Supreme Court that he did a deal with John Horton so that he could go home if he gave evidence for police. O'Hara said he made a statement to police and was on the train home from Goulburn Jail that afternoon. Two other prisoners also gave evidence that they were offered early release if they made statements about the murder. Scott Carson told the court that he was given a blank piece of paper by two police officers. "I was offered to get out of jail early" Carson said. "They were asking me who done it. I said I didn't know. They gave me a piece of paper and said 'we know Glazby did it, sign it and you can walk from the cop shop'. Carson said he refused to sign and was not given an early release. Another prisoner, Stephen Cardona agreed he had struck a deal to get early release for supplying information about Glazby. He was allowed home that same day (**SMH** 10/4/90).

Key Issues: Reliability of Evidence and Integrity of the Legal Processes

Well, you may ask: what is wrong with the use of prisoner informants? Is there not a public interest in destabilising any notion of honour among thieves? Indeed it is important to be clear about what exactly is objectionable about the use of prisoner informants. It is not the giving of evidence by prisoners per se that is objectionable. There is a place for prisoner evidence and witnesses should not be disbelieved or their evidence discounted merely because they are prisoners. The key issues relate to the **reliability** of the evidence and the **integrity** of the legal processes. On both these fronts there is much to worry about.

In assessing the reliability of the evidence we might reflect on the fact that some of these prisoner informants have been used repeatedly in different cases. One informant has figured in five different murder cases. It is stretching the bounds of credulity to believe that in the rumour-mill atmosphere of the prison, prisoners would continue to confess the commission of serious crimes to known prison informers. In some cases the informants have eventually been completely discredited. In others they have changed their testimony repeatedly. In yet other cases informants have claimed that their earlier testimony was induced by incentives held out by police or members of the IIU.

The point here then is that in the context of an increasingly brutalised and impoverished prison regime prisoners are rendered peculiarly vulnerable to pressure. Pressure from prison, police and prosecution authorities appearing to offer incentives to testify. Pressure from other prisoners hostile and violent towards informers ('dogs' in prison parlance). Prisoner testimony that another prisoner confessed to a crime may in fact be honest and reliable. It may not. But the conditions of its emergence and making must be subject to the most rigorous scrutiny lest evidence be manufactured merely for the purpose of exchange. In the testimony bazaar prisoners are hardly "free" contractual agents and have little to offer. Save claims to knowledge of conversations potentially exchangeable against the length and conditions of their own punishment.

Which is where the concern for the integrity of the legal process arises. There must be a wide range of much stricter mechanisms of regulation and accountability, to ensure that testimony is not being bought by the state. However sensitive the issues and dangerous the role of informant there is nevertheless a need for openness in the processes and a clear articulation of the criteria on which particular decisions are made. Whatever one may think about the merits of an informer sentence dis-

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count, as in Many's case, at least it is made in public and can be the subject of public debate and criticism. Some of the other incentives and inducements claimed by prisoners are far more subterranean and may never be revealed. Serious questions arise about the ethics of prosecution authorities in relying on the evidence of particular prisoner informants, over and over again in different cases.

When the public furore broke over the Many sentence discount in December 1990 NSW Attorney-General, John Dowd was quoted as saying that calls for an inquiry into deals with criminal informants was "stupid". He also dismissed suggestions that the government should be more selective about which prisoners were used as informers saying that "the Crown can't be too fussy who its witnesses are" (**SMH** 13/12/1990). It seems obvious from some of the specific cases detailed earlier that the Crown is indeed not being "too fussy". Whether such an approach is legally and ethically correct is an entirely different matter. The Attorney-General and the officers of the DPP need to be reminded that the prosecution is required to exercise an independent assessment of the credibility of the Crown's evidence, with an eye to the Bar Rules and to ethical duties.

If calls for an inquiry were "stupid" was the Premier being "stupid" when the next day he overruled his Attorney-General and ordered a review of informer sentence discounts (**SMH** 14/12/90)? Subsequent comments by the Attorney-General suggested that the result of the inquiry will be to abolish sentence discounts for people convicted of serious criminal offences. The actual bill in essence codifies existing common law discretions. This gives the appearance of government action but is merely calculated to assuage public passions understandably aroused over the enormity of Many's crime, its effect on his victim and his total lack of repentance. Both the Attorney-General's and the Premier's initially inconsistent and ultimately ineffective responses ignore the central issues we have stressed in this chapter: namely the reliability of informer's evidence and the integrity of the legal processes.

Regulatory Proposals and Reforms

Responses to the multitude of issues which arise from the increased use of prisoner informants need to be addressed on many fronts. Precisely because the problems are diverse and do not have their location in any single source of state power, the development of regulatory strategies

must be pitched at a range of sites, organisations and agents. You will note that we use the term "regulatory" rather than "abolishing" or "outlawing". The reason for this is that we are not suggesting that prison informants should be "outlawed", even if in fact this could be done. Rather our suggestion is that the wide range of practices that have developed through the relationship between the prison informer and various criminal justice agencies should be subject to greater regulatory control. One aspect of increased regulation is bringing the practices to the surface, stripping them of the secrecy that surrounds them and opening them up to public scrutiny and debate.

But this is of course easier said than done. Some of the practices are in their nature clandestine and ambiguous, resistant to regulation. Given the potentially dangerous nature of informing and the development of witness protection programs some aspects of secrecy may even be justified. It is important to acknowledge, as Hogg points out (Hogg, 1987:135) that what is at issue here "is not control, but the prospect of constraint and influence". We have suggested that such constraint and influence should exhibit three characteristics. It should be specific, directed at the development of specific regulatory regimes in relation to specific practices. There is no general strategy which will solve the many problems in this area. It should be organised around the key questions of the reliability of the evidence emerging from the prisoner informants and the integrity of the legal processes. Securing convictions is not the measure of all things. It should also be directed not only to the individual interactions between the parties but also to the wider conditions under which such interactions take place. Hence our insistence on including in the discussion the contribution that Michael Yabsley's intensification of penal discipline has made in creating a climate in NSW prisons wherein the role of prison informer is seen as one of the only incentives left open to prisoners. Hence our insistence on tying the development of prison informer testimony to the increased regulation of police interrogation practices at police stations. Hence our insistence on the need for individual journalists and sections of the media forever whipping up "scandals", campaigns against crime/evil/Mr Bigs, demanding "runs on the board" (convictions) to consider the extent to which such activities also form one of the key conditions sustaining the very sub-legal strategies they purport to deplore.

The following suggests some of the sorts of regulatory and reform strategies we would like to see examined.

1. Greater scrutiny by the courts of applications for informer sentence discounts

Informer sentence discounts are now a well established feature of the common law sentencing tradition[10]. Their rationale is clearly stated in a leading case:

> Courts are opposed to the precept that there should be honour among thieves and, all other considerations aside, sentences and published reasons for them should be adjusted to further that opposition... Where a prisoner is shown to have been an informer (whether in the matter in which he had been convicted or some associated matter or matters, or in some matter or matters that has no direct relation to the offence for which he has been convicted), the court, other considerations apart, will be disposed to show leniency to mark the good he has done and in furtherance of the policy ...above. (**R v Goldring** [1980] 24 SASR 161 per Wells J at 172-3)

The rationales for the discount are broadly three, to disrupt the notion of honour among thieves, to encourage the giving of information to the authorities and to reward the informant for harsher conditions suffered in prison. The rule of thumb developed through the cases is that the standard level of discount is one third of the proposed sentence on the basis that twelve months imprisonment under conditions of greater than normal severity is roughly equivalent to 18 months under normal discipline. This recognition is interesting in itself for it breaks with the usual legal, political and popular tendency to evaluate imprisonment only according to the length of **time to be served** rather than the conditions under which the prisoner is held (Zdenkowski, 1991).

The discount is not (unlike the guilty plea discount) dependent on an expression of remorse. Nor at least in the NSW cases is the discount linked to the "effectiveness" of the information or evidence (**R v Cartwright** [1989] 17 NSWLR 243 per Hunt J & Badgery-Parker J at 250-251 cf Mahoney J at 244-5). Nor need there be any nexus between the offences for which the offender comes to be sentenced and the information supplied in order to attract a discount (see **R v Frederick Glen Many** NSW CCA 11/2/90 [unreported] at 28). All these elements are contentious. But it is not our intention to go into the detail of the various factors considered relevant in determining the discount although we note that one of them, as formulated by the NSW Court of Criminal Appeal in Many's case is "whether the information was true" (see **R v Frederick Glen Many** NSW CCA 11/2/90 [unreported] at 30). As previously mentioned, it is far from clear that the court was in a position to apply properly this criterion given the apparent lack of reference to its own earlier finding.

Indeed as we made clear in our discussion of the Many case, this is our chief objection to informer discounts. We do not object to informer discounts per se, but nor do we regard the legislative response as relevant to the central concerns mentioned earlier. The key question is the **reliability** of the evidence which in turn is affected by the nature of any incentives offered. This entails a full examination by the sentencing court of the circumstances surrounding the original "volunteering" of the evidence (including any promise of a sentence discount),

full disclosure of all previous convictions and all previous occasions on which the informant gave evidence against others, full disclosure of any previous witness immunities or other incentives to testify, and a full and accurate account of the alleged assistance offered by the informer.

What the Many case shows par excellence is that there appears to be no party either in a position (defence)[11] or willing (prosecution) to place such material before the court. Perhaps the onus should be cast on the court to carry out such an inquiry. But sometimes it seems as though the court itself is happy to rely on the 'nod and a wink' system, granting the sought-for reward on the basis of a coded statement from the prosecution that the offender has 'assisted police with their inquiries into other matters'. As we have seen sometimes the evidence of police is effusive and totally at odds with the known facts and the recent criminal history of the accused. As noted in Chapter Seven when Ray Denning was being sentenced in July 1989 for escaping from custody the detective providing information to the sentencing judge managed not to mention that Denning committed armed robberies when he escaped from custody in 1980 and 1988, nor any of the other offences he had committed on the run. At the same time Ron Woodham felt able to agree "absolutely" that Denning had shown a "complete reversal of his attitude to society". Denning subsequently received a two and a half year sentence for the escape cumulative on his previous sentence.

2. The Need for a Corroboration Warning in relation to evidence of Informants.

In relation to the evidence of certain categories of witnesses the law requires a judge to give a warning to the jury of the dangers of convicting on the uncorroborated evidence of the witness. The three major categories of witnesses requiring corroboration warnings have in the past been accomplices, young children and sexual assault complainants. As a result of the recent decision of the High Court in **McKinney v the Queen** (22 March 1991 [unreported]) disputed confessional evidence allegedly made by an accused while involuntarily held in police custody without access to a lawyer or without recourse to some independent verification such as a tape or video-recording of the interview, has been added to the categories requiring formal corroboration warnings.

The rationale behind and effect of corroboration warnings give rise to considerable debate[12]. The rationale for a requirement in relation to accomplice evidence is that because accomplice witnesses may have a special interest of their own to serve by giving evidence their testimony requires special consideration and caution. The requirement of corroboration in relation to the evidence of sexual assault complainants and young children has been based on the rationale that the former are likely to fabricate allegations through hysteria or embarrassment and the latter through suggestibility or fantasy. The former is objectionable and the latter questionable. Correctly in our view, the mandatory corroboration requirement in relation to sexual assault complainants has been abolished in many jurisdictions, including NSW, and the requirement in relation to very young children is in the process of being watered down.

The closest analogies to informer evidence is that of accomplices and disputed confessional evidence. The first turns on the type of witness, someone with a perceived interest in minimising his/her own involvement in a criminal offence. The second turns on "the special position of vulnerability of an accused to fabrication when he is involuntarily so held, in that his detention will have deprived him of the possibility of any corroboration of a denial of the making of all or part of an alleged confessional statement" as the majority put it in **McKinney v The Queen** (1991:7).

Elements of both these rationales exist in the case of evidence given by a prisoner informant alleging another prisoner confessed to a crime. The informant, peculiarly vulnerable to the battery of incentives and inducements relating to the length and conditions of their own prison sentence, has a potential personal interest in making the allegation. And the prison context places the accused in a position of special vulnerability to the manufacture of alleged confessions in a setting depriving them of potential corroboration. It is a strange state of affairs post **McKinney v The Queen** that a corroboration warning is required in relation to even a signed record of interview emanating from a police interrogation whereas no warning is required in relation to an alleged oral confession to a known prison informer in a prison yard or cell.

3. Availability of witness immunities to the defence

Paul Byrne sets out clearly the arguments against relying on the practice of granting immunity (Byrne, 1984:165-168). First "it is essentially unfair" in that it is "realistically open only to the prosecution to engage in such a practice". This creates an imbalance in the trial. Byrne quotes an American author:

> The defendant in a criminal trial may not bribe or threaten a witness in order to obtain testimony favourable to his case. Save through ties of loyalty or clever examination he cannot legally influence the content of witness' testimony at all. This is as it should be; justice is best served when witnesses testify according to their perception of the truth and not according to the wishes of a party. It is therefore anomalous that, if a potential witness is himself legally vulnerable, the prosecutor is allowed to influence the content of his testimony through promises of favourable treatment, such as a grant of immunity, premised on the witness' 'co-operation'. (Byrne, 1984:166)

This objection that the practice is unfair because restricted to only one of the parties, the state, which on any realistic analysis already enjoys considerable advantage in terms of material resources and powers, is in our view a compelling one. Precisely such a complaint is currently before the NSW Court of Criminal Appeal in the Savaas appeal. Savaas's counsel has argued that requests for immunities for defence witnesses have been refused by the Attorney-General. American lawyers have been arguing for some time that applications for defence witness immunities should be granted by prosecutors. In the face of denials of their applications tactics have shifted to arguing that the courts themselves should exercise the power to grant immunity to defence witnesses. In **Virgin Islands v Smith** (615 F 2d 964 3d Cir 1980) the court accepted the argument in favour of an independent judicial authority to grant immunity to defence witnesses[13]. US lawyers have argued that the court in a habeas corpus proceeding should itself grant immunity to an informant who invokes his fifth amendment privilege (see Winograde, 1980:755). These arguments have gained greater force following the revelations that a prisoner informant used by the District Attorney's Office in Los Angeles for 10 years, Leslie White, admitted to fabricating evidence in a number of cases[14].

4. Tighter regulation of the grant of witness indemnities

The grant of witness indemnities requires tighter regulation than at present. We acknowledge both the potential usefulness of indemnities and the fact that there are already formal procedures required for their grant. Our argument is that within the application of the existing guidelines there have been times, most notably the NCA under Justice Stewart, where indemnities have been granted inappropriately. In this period indemnities/immunities were seized upon by the NCA and heavily promoted by individual journalists and sections of the media running particular campaigns[15]. Justice Stewart described them as "a **vital pre-requisite** to any meaningful strategy against organised crime" (emphasis added) (**The Age** 22/3/85). Quite apart from the question whether some of the NCA's targets could in fact be described as "organised crime" such a heavy investigative reliance on the granting of indemnities led to the dubious promotion of and reliance on informers such as the notorious "Mr Smith", who was eventually totally discredited. It also had the effect of slowing the development of other investigative strategies.

The Report of the Parliamentary Joint Committee of Inquiry on the NCA **Witness Protection** (1988) is disappointing in its failure to really come to grips with the many criticisms raised against the NCA use of the indemnity system. The Committee restricted its discussion to accomplice informers and while pointing to some of the dangers it concluded simply that the benefits of relying on this class of evidence where no other evidence was available outweighed the detriment (para 511). Whether the current Joint Committee Inquiry will come up with anything more substantial remains to be seen.

Byrne's second objection is that the evidence gained through the grant of immunities is unreliable. This is the major objection that we have discussed throughout this chapter. Byrne suggests the requirement of a corroboration warning in accomplice evidence is insufficient protection. His third and fourth objections relate to the secrecy of the process and the uncertainty of its operation. Byrne suggests that the prosecution should be required to disclose to the defence and to the judge at trial "prior to cross-examination by the defence, and in detail, any favouritism shown or promises of favourable treatment made to prosecution witnesses" (Byrne, 1984:168). He argues that "the compulsory disclosure of the nature of 'deals' struck between the prosecution and the witness is an essential measure in order to protect the integrity of the criminal justice system and to preserve the right of the accused to have a fair trial" (Byrne, 1984:169).

It should be noted that there has been some movement towards this position.

Guideline 9 of the NSW DPP Prosecution Guidelines now states:

> Where Crown witnesses are known to prosecuting counsel to have prior convictions and/or are indemnified in respect of the matter before the court and that fact could be of any material significance in the trial, it is appropriate to reveal the conviction or indemnity to the defence. (NSW DPP 1990:12)

The equivalent Commonwealth DPP guideline goes further, extending to the receipt of:

> **any concession** from the prosecution in order to secure his or her evidence, whether as to choice of charge, the grant of immunity from prosecution or by means of an undertaking...the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to **the court**. (emphasis added) (Commonwealth DPP, 1986:19)

The publicly announced policies of the Commonwealth and NSW DPPs regarding the grant of undertakings and indemnities are unexceptional. The Commonwealth policy, which is much fuller, specifies that an undertaking "will only be given as a last resort". (5.2) Our concern is less with the specific formulation of the existing policies, although arguably the NSW DPP's policy is excessively general, than with the question of whether the policies operate in practice so as to enable effective scrutiny of applications for indemnities by officers of the DPP. Some of the cases outlined above suggest not.

5. Improved administrative procedures in DPP Offices to monitor informers 'careers' and ensure adherence to policies and guidelines

In order to ensure that existing policies and guidelines are complied with a range of monitoring procedures and improved file management practices are required in DPP offices. It is essential for example, that when assessing an application for an indemnity received from the police the DPP officer charged with assessing the case and making a recommendation have access to some sort of centralised file or tracking system that would reveal the 'career' of designated informants. It should be apparent from such a file whether a particular Crown witness has a prior criminal record, has appeared in numerous prior cases, what those cases were, the nature of the evidence given, copies of witness statements, whether any indemnities or other considerations were granted by the police or DPP and if a sentence discount was forthcoming. If the witness's credibility was impugned either by the defence or by the court this should also be recorded as should the result of the case and any comment by the magistrate or judge concerning the witness. It is our understanding that there are no such files available in the DPP's office in relation to Crown witnesses, so that such information is not currently available. The lack of a recorded institutional memory of information concerning informants, other than that which is kept in individual DPP officers themselves, is a major limitation on the ability of DPP officers to apply properly the DPP policy guidelines. Presumably if such information was available the continued use of informants like Heuston, Many, Cook, Robinson et al after they had been repeatedly discredited in previous cases would be carefully considered.

In addition to such improvements a clarification of lines of complaint against alleged failures to comply with DPP policy guidelines is required. Presumably there is some mechanism in the DPP to deal with such complaints, to ensure compliance with official policy and to make individual officers accountable for their decisions. It would help if such avenues and mechanisms were clearly and publicly spelt out. One difficulty here is that legal professional privilege is (quite correctly) claimed in relation to recommendations for indemnities. This should not prevent the DPP from exercising a system of internal administrative accountability in response to complaints.

6. Strengthening of Prosecution duties of fairness and independence

In addition to improving information sources and internal accountability within the DPP as a means of ensuring the careful application of policy guidelines it is necessary to promote an ethos and culture of independence and fairness. The rationale for establishing the DPP was to secure a separation of investigative and prosecutorial functions, to ensure that legal professional standards of assessment and evaluation were brought to bear on evidence assembled by police. If the DPP is to operate merely as a conduit for operational and investigative decisions made by the police, then its reason for existence vanishes. If formal institutional separation is to be given some content it must flow from specific practices and decisions which give expression to the separate functions of investigation and prosecution. Such practices and decisions, for example not to recommend an indemnity, are more readily made in an institutional culture in which meticulous concern for procedural propriety and adherence to a set of professional standards outweigh the desire to 'win', to secure a conviction and to wage the 'war against crime'.

As with the guidelines in relation to indemnities the problem is less the existence of ethical rules of fairness and independence than the degree to which they operate in practice. Guideline No 1 of the NSW DPP Guidelines resolutely quotes Rule No 20 of the NSW Bar Association:

> A barrister appearing for the Crown in a criminal case is a representative of the State and his (sic) function is to assist the court in arriving at the truth. It is not his (sic) duty to obtain a conviction by all means but fairly and impartially to endeavour to ensure that the jury has before it the whole of the relevant facts in intelligible form and to see that the jury is adequately instructed as to the law so as to be able to apply the law to the facts. He (sic) shall not press for a conviction beyond putting the case for the Crown fully and firmly. He (sic) shall not by his (sic) language or conduct endeavour to inflame or prejudice the jury against the prisoner. He (sic) shall not urge any argument of law that he (sic) does not believe to be of substance or any argument of fact that does not carry weight in his (sic) mind.

Gender identification aside, this is admirable. As are many of the guidelines for "evaluating evidence" such as: "prosecutors will wish to satisfy themselves that confession evidence has been properly obtained"; "has a witness a motive for telling less than the whole truth?"; and the injunction that "particularly in border-

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line cases, the prosecution must be prepared to look beneath the surface of the statements" (NSW DPP, 1990:36-37). Our only question is how far do such injunctions square with the conduct of some of the prisoner informant cases discussed earlier; if some of these were not "borderline cases" requiring a peep "beneath the surface" we wonder if there be a border.

7. Reconsideration of 'targeting' tactics of prosecutorial agencies such as NCA, State Drug Crime Commission, Task Forces

It strikes us that many of the cases in which prisoner informants have been used are not run-of-the mill cases. Prisoners facing charges of break enter and steal are not alleged to have broadcast their guilt through the prison toilet-pipe phone or to have sought out a known prison informer in order to confess their crime. Rather the genre seems reserved largely for high profile crimes (Hilton bombing) difficult to solve crimes (prison murders) high profile 'identities' (Domican) or as examples of particular groups, gangs or occupations against whom there is some "crackdown" or against whom it is important to demonstrate that they are not immune from prosecution (allegedly corrupt police or prison officers). Often prison informers seem to be used in cases where the evidence is otherwise weak. Sometimes they seem to emerge in the period after the committal but before the trial.

A common factor in many of the cases is the existence of a 'targeted' suspect; that is targeted by a specific group of investigative officers belonging to some special Task Force set up after a high level decision taken in one of the 'new' investigative agencies such as the NCA, the State Drug Crime Commission, a Special Commission of Inquiry (particularly those around drugs) or in the traditional police forces, state or federal. Often these targets have been set after some 'scandal' has been discovered or after sections of the media have run a campaign against the crime, type of crime or specific individual involved. Often these media campaigns involve stirring calls for prompt action to 'clean up' the scourge. Often it is intimated that corruption in the law enforcement agencies is the most likely reason why such activity has continued, particular individuals are at large or why crimes remain unsolved.

Sometimes the decision to "target" may be based on reliable intelligence and may be justified. Similarly the media campaigns may be highlighting particular problems that need to be exposed in order to prompt official action. There is however a danger in this sort of scenario where significant financial and human resources are devoted and individual reputations and ambitions become entwined. The danger is that once the decision is made, the fact of targeting is translated into police or investigators' 'knowledge' that a particular individual 'did' this or that and the investigation becomes geared not to the compilation of evidence surrounding the event, which may or may not implicate the target, but to the assembling of only that evidence which will establish legal guilt on the part of the target. In the excitement of the chase, in the certainty that is generated out of the very processes of 'targeting', the conditions are created in which selectivity, recruitment and outright fabrication of evidence can be more easily justified as merely means to a (higher and 'just') end.

Nothing we can say by way of recommendation here is likely to alter the shift to target-based policing and investigation strategies. What we can say is that the evidentiary products of such exercises should be scrutinised more thoroughly and more sceptically for indications of departure from fair practice. It is (as the Birmingham 6, Tim Anderson and Harry Blackburn can attest) precisely in those cases where public and media passions are most aroused, the crime most abhorrent, the conviction most sought by the forces of law and order, that the integrity of the legal process needs to be most clearly demonstrated. Such demonstration is best achieved through the application of all the procedural and evidentiary safeguards against even the appearance of selectivity, negligence or malpractice by criminal justice agencies, in order to prevent miscarriages of justice.

8. Full scale inquiry into the establishment, operation and practices of the NSW Corrective Services Department Internal Intelligence Unit

The IIU has figured heavily in the allegations surrounding the growth of prisoner informants. It has been alleged that the IIU is in the forefront of recruiting prisoner informants. Some of the terms of that recruitment, in particular some of the alleged inducements offered in exchange for testimony are at best open to question and at worst corrupt. Specific allegations concerning the IIU are, as previously stated, before the ICAC. We await the findings with interest.

But in addition to any specific findings the ICAC might make there is the prior question of the proper democratic and public authorisation of a body such as the IIU. We suggested earlier that the establishment, constitution, functions and procedures of the IIU should be the subject of a separate inquiry. A clear foundation for its activities should be laid down in the **Prisons Act.** Rules should be laid down similar to those in the **Police Commissioners Instructions** governing the conduct of IIU officers. Such rules should specify a set of institutional conditions under which IIU officers are to conduct interviews with prisoners. If such rules already exist they should be made public. If the IIU is taping phones, intercepting mail, carrying out electronic and visual surveillance both inside and outside the prison, as prisoners and some prison officers allege, the legal authority for such activities should be clearly indicated and the conduct and results of such activities subject to an obligation to account to parliament.

9. Recording and monitoring of all police access to prisons

We have characterised the growth industry in prisoner informants in the metaphor of prisons becoming reservoirs of evidence on tap. Doubtless other metaphors could be used. The 'on tap' aspect is rather obvious but important; prisoners by virtue of their confinement are (unless they have escaped) 'always there'. Moreover precisely by virtue of 'being there' they also have access to or can be portrayed as having access (even when they are in fact in different prisons) to other prisoners, most importantly as we have seen to those most vulnerable, to prisoners awaiting trial. Prisoners are peculiarly vulnerable to all sorts of inducements, threats, and manipulations by police, prison authorities and other prisoners.

Recognition of this vulnerability should result in a range of protective measures, both in the general prison population and in officially designated 'protection' sections. One form this protection should take is the meticulous recording of police visits to particular prisoners and to police requests to remove prisoners to police custody for the purposes of interviewing. In the context of complaints that particular detectives are 'running' particular informants it should at the least be clear when contacts were made and for how long. Preferably any conversations should be recorded.

10. Prisoner access to legal advice and ability to refuse police interview

More generally prisoners should have either the right to refuse to see police for the purposes of interview or to only see police in the presence of a solicitor. Any interviews that do take place should be recorded on audio or video tape. In short the codes of practice recommended by the NSW Law Reform Commission in its recent Report, **Police Powers of Detention and Investigation After Arrest** (1990) in relation to police interrogation of suspects should apply (especially) to interviews with prisoners. A duty solicitor's office could be established permanently at all major prisons or appointments to see prisoners could be made through an expanded prisoners' legal service or private solicitors.

11. Establish institutional separation of police and Corrective Services Departments

The more general principle around which specific protection of prisoners should be organised is the separation of police and corrective services functions. The function of a Corrective Services Department is to carry out the specific sentence of the court, to supervise the daily operations and routines of imprisonment or other forms of custodial, semi-custodial and non-custodial sentences or portions of sentences. This function is a post conviction one, and is premised either on a conviction following the establishment of legal culpability or the remanding of an accused in custody prior to trial. It is not the function of Corrective Services Departments to operate as an arm of the Police Department, an extension of the police holding cell, continuing the evidence assembling process. Corrective Services Departments should not hinder police in the proper exercise of their investigative functions but neither should they confuse those functions with their own.

Arguably under the Greiner government and in particular under the Corrective Services Minister, Michael Yabsley, the institutional separation of police and corrective services has become increasingly blurred. Examples of this tendency have been given earlier in this chapter and elsewhere (see Brown, 1988; Brown, 1990; Brown, 1991).

12. Reversal of punitive and counter-productive prison policies of the Greiner government

As outlined earlier, the penal context within which the informant industry is developing is that of demoralisation and increasing savagery. The main characteristics of the Greiner government's policies have been:

- a 40% increase in the prison population, with consequent overcrowding problems
- removal of many of the mechanisms of scrutiny and accountability within the system;
- an intensification of penal discipline exemplified by the return of the "bash" and the prisoners' property confiscations policy;
- cuts to educational and rehabilitative programs and services to prisoners.

We will not rehearse the many examples nor the tragic effects of these policies here. They are spelt out in other publications (see Brown, 1988; Brown, 1990; Brown, 1991). Our point is that a reversal of these policy directions will mitigate the development of a culture in which informing is seen as one of the only approved incentives within the prison system.

13. Reintroduction of a formalised system of remissions and appropriate incentives within the NSW prison system

More specifically there should be the reintroduction of a formalised system of remissions and other incentives within the prison system. Such incentives should be oriented around the promotion of positive values associated with education, participation in programs, work, cultural activities, and so on. Such incentives have the potential to encourage and reward behaviour which accords with social values supposedly promoted and defended in the operation of the criminal justice system. The current promotion of informing as the major incentive only encourages manipulative behaviour, brings criminal justice into contempt, induces bitterness and cynicism against a system which is perceived to have a price for everything and is prepared to turn even criminality into a commodity. Far from exemplifying and promoting the defensible social and moral values upon which the criminal justice system is supposedly based it in fact feeds into and consolidates many of the anti-social values present in prison culture, values which contributed to the prisoners offences and imprisonment in the first place.

14. A formal Commission of Inquiry to examine all cases over the past 10 years where convictions have been obtained through reliance on the evidence of informants

It is time to institute an inquiry into a number of cases where convictions have been obtained based on the evidence of prisoner informants. Whilst it would involve a certain irony, consideration could be given to an offer of formal immunities against prosecution for perjury to particular prisoner informants to give evidence before an inquiry. They could be asked whether their evidence in particular cases was true and if not whether it was induced or recruited and if so by whom. If it appears that the informant's evidence was false or improperly induced the inquiry should also examine whether the convictions should stand.

An inquiry is currently under way in Los Angeles into 200 murder cases in Southern California where convictions were obtained through reliance on the testimony of prisoner informants. Sixteen people convicted in those cases are on death row. The inquiry was established after one prominent informant admitted manufacturing evidence in numerous cases. He obtained the information which gave seeming veracity to his evidence through phone calls to the District Attorney's office. Posing as a police officer he obtained information from the file. An article in the American Bar Association Journal quotes the President of the California Attorneys for Criminal Justice as saying that these cases represent:

> an unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement officials who are running a training ground for snitches over at the county jail, and prosecutors who are taking what appears to be the easy route, rather than putting their cases together with solid evidence. (Curriden, 1989:55)

In addition to initiating the review of 200 murder cases the Los Angeles County Attorney's office has also made two procedural changes. The Director of Criminal Law must give his/her approval before an informant can be used at trial and corroborating evidence is necessary. Similar recognition and forthright responses are urgently required from Australian state and federal government agencies to the various problems raised by the growth industry in prison informants.

End Notes

1. Hale, M. **Pleas of the Crown,** 1650:225, cited in Smith, A. "Immunity from Prosecution" (1983) **Cambridge Law Journal** 229 and in Byrne, P. (1987) "Granting Immunity from Prosecution", in Potas, I. (ed) **Prosecutorial Discretion** 155.

2. See: Keenan, A. "Do police use 'tainted' supergrasses?" **SMH** 13/4/1988; Duffy, B. "An unholy alliance", **Legal Service Bulletin** 15:3 (1990) 134-5; Fife-Yeomans, J. "Informants: Justice Goes to the Dogs" **SMH** 17/3/90; Brown, D. "Danger in growth of prison informers", **Sun Herald** 13/4/91; Brown, D. "Justice: Going to the Dogs?", **Australian Society** May 1991; Zdenkowski, G. (1991) "The Traps in Trade-offs" **The Bulletin,** January 8.

3. The early history of informants is closely tied to that of the pardon: Smith, A. (1983) "The Prerogative of Mercy, The Power of Pardon and Criminal Justice", **Public Law** 398. For a rich discussion of the significance of the pardon in eighteenth century Britain see: Hay, D. (1977) "Property, Authority and the Criminal Law", in D Hay et al (eds) **Albion's Fatal Tree,** Penguin: London. For a more contemporary (but less critical) account see: Oscapella, E. (1980) "A Study of Informers in England", **Criminal Law Review** 136

4. There is a tendency for discussion of subjects such as criminal or prisoner informants and their relationships with agencies such as prison, police and prosecution authorities to be conceived predominantly within a civil libertarian discourse which sees such criminal investigation practices as essentially unregulated and "corrupt" and as a manifestation of the deviousness of state power. While we are concerned in this chapter to engage in a popular and programmatic treatment of the subject, to highlight what we see as undesirable practices and to offer suggestions for reform, our discussion may be open to such a reading. We would however stress the ambiguous and "productive" nature of police - informant relationships and their irreducibility to some simple strategy of state power. Apart from anything else, the field of power relations and effects in question traverse any neat division between state and civil society, public and private, police and crime. For more developed formulations of this argument see especially: Hogg, R. "The Politics of Criminal Investigation", in Wickham, G. (ed) (1987) **Social Theory and Legal Politics** Local Consumption: Sydney; Freiberg, A. (1986) "Reward, Law and Power: Toward a Jurisprudence of the Carrot", **Australian and New Zealand Journal of Criminology** Vol. 19. Speaking of police informant relationships Hogg notes (1987:134):

> These practices also facilitate the access of criminals to the criminal justice system - to information, to selective protection by police officers, to the uses of the prosecution process against unwanted competitors or recalcitrant underlings, etc - whilst simultaneously extending immunity from prosecution. On the other hand, police are enabled to continue the exercise of public control by private means. Thus, illegal methods and tasks of investigation may be delegated to private agents to perform, freeing police from any direct responsibility.

5. The words immunity and indemnity tend to be used interchangeably. Immunity is a more general concept, closely tied to the pardon. Indemnity is a more specific concept involving an undertaking that evidence given by a witness will not be used against them or that they will not be prosecuted. Hence the word undertaking is sometimes used. Then there are different forms of indemnity, a "use indemnity", a "use-derivative-use indemnity, and a "transactional" indemnity. For the purposes of the discussion in this paper it is not necessary to distinguish the different technical types of immunity and the words immunity, indemnity and undertaking will tend to be used interchangeably. For more technical definitions and useful discussions of the differences see: Temby, I. (1985)"Immunity from Prosecution and the Provision of Witness Indemnities", **The Australian Law Journal,** Vol. 59 August p501; "Bar News Interviews Ian Temby QC" **Bar News,** Autumn 1989 13; Byrne, P. (1986) "Granting Immunity from Prosecution", in I Potas (ed) **Prosecutorial Discretion** AIC:Canberra, p155; Eagles, I. (1982) "Evidentiary Protection for Informers _ Policy or Privilege?", **Criminal Law Journal** Vol. 6, p175; Sadler, R.J. (1982) "Judicial and Quasi-Judicial Immunities: A Remedy Denied", **Melbourne University Law Journal,** Vol 13 October, p508. In England see : Smith, A.T. (1983) "Immunities From Prosecution", **Cambridge Law Journal** ,Vol. 42, No. 2, November p299; The US literature on indemnities is extensive. For a selection see: Phelan, A.C. (1989) "Legislative Investigations: The Scope of Use Immunity Under 18 USC s6002", **American Criminal Law Review** 27:209; Lawler, L.E. (1986) "Police Informer Privilege: A Study for the Law Reform Commission of Canada", **Criminal Law Quarterly** Vol. 28, No. 1, p91;

Carlson, R. L. (1976) "Witness Immunity in Modern Trials: Observations on the Uniform Rule of Criminal Procedure", **The Journal of Criminal Law and Criminology** Vol. 67, No. 2, p131; Comment, (1974) "Judicial Supervision of Non-Statutory Immunity", **The Journal of Criminal Law and Criminology** Vol. 65, No.3, p334; Bauer, W J. (1976) "Reflections on the Role of Statutory Immunity in the Criminal Justice System", **The Journal of Criminal Law and Criminology** Vol. 67, No. 2, p143;

6. The figures provided by the Commonwealth DPP and the NCA also vary in referring to numbers of **persons** granted witness undertakings or indemnities or to numbers of **indemnities** or undertakings, which are not the same thing. The figures we have compiled from the Annual Reports of the Commonwealth DPP and the National Crime Authority, in as much as they can be relied upon tend to show fluctuations over the period studied (1984-1990). There is no obvious increase in the formal granting of indemnities or undertakings reported by the Commonwealth DPP or the NCA over the period.

7. The statistics provided in the Annual Reports of the NSW DPP do not enable figures for grants of indemnities to be extracted, as they are collapsed in the far broader category of numbers of cases not proceeded with, predominantly "no-bills", in which they are included in a "miscellaneous" category with four other entirely different sorts of cases. This is unsatisfactory public accounting which should be remedied in future Annual Reports. The only specific reference to indemnities we could find was the following statement in the 1987-88 Annual Report: "50 references were made to the Directors Office to advise the Attorney-General whether an immunity from prosecution should be granted. (1987-88:30) Even this rather inscrutable reference (were all 50 granted?) seems not to have been repeated in subsequent Annual Reports.

8. Our argument here is supported by developments in other jurisdictions. The National Crime Authority Report, **Witness Protection** (1988) notes a similar sequence in Northern Ireland in relation to the development of "supergrasses":

> The adoption of the 'supergrass' system in Northern Ireland appears to date from the early 1980s. The methods used by the Royal Ulster Constabulary to extract confessions had been the subject of severe criticism and with the adoption of new procedures the flow of confessions dried up. It appears that the law enforcement authorities then set out upon a deliberate path of cultivating accomplice witnesses.(3.28)

See also: Grant, E. (1985)"The Use of 'Supergrass' Evidence in Northern Ireland 1982-1985", **New Law Journal** November 8; Bonner, D. (1988) "Combating Terrorism: Supergrass Trials in Northern Ireland", **The Modern Law Review** 51 p23. For other discussions of the shift in tactics and sites in reform struggles over confessional evidence and police investigation practices see: Zdenkowski, G. and Brown, D. (1982) **The Prison Struggle** Penguin: Melbourne p337-351; Brown, D. (1987) "The politics of reform", Zdenkowski, G. et al (eds) **The Criminal Injustice System** Vol 2, Pluto: Sydney (1987); Brown, D. et al, (1990) **Criminal Laws** Federation: Sydney

9. Unless statements like the following are meant to encompass such activities: "The major achievement of the (NSW DPP Special Crime) Unit has been the establishment of close professional working relationships with investigators and criminal law agencies and the ability to provide quick and accurate assistance to investigators on legal issues." (NSW DPP Annual Report 1987-88:19). Note that the ICAC Annual Report for 1990 does refer to a Witness Protection Coordination Committee and a Witness Protection Assessment Committee "which considers applications for entry and exit from the Special Purpose Prison, Long Bay" (1990:37). Perhaps the latter Committee is the one referred to by John Horton.

10. One of the earliest reported cases which openly discusses sentence discounts is **R v James and Sharman** (1913) 9 Cr App R 142. Other leading English cases are: **R v Lowe** (1977) 66 Cr App R 122; **R v Davies** (1978) 68 Cr App R 319; **R v King** (1985) 82 Cr App R 120; **R v Sinfield** (1981) 3 Cr App R (S) 258. The leading Australian cases are **R v Golding** (1980) 24 SASR 161; **R v Perez-Vargas** (1986) 8 NSWLR 559; **R v Cartwright** (1989) 17 NSWLR 243; **R v Frederick Glen Many** NSW Court of Criminal Appeal 11 December 1990 (unreported).

11. In the case of Donald Tait, for example, Judge Soloman who in sentencing Tait called him an "evil man" for his part in a conspiracy to import heroin nevertheless reduced his sentence by a third after "the Australian Federal Police had handed a sealed envelop to the judge containing help Tait had offered to give them. Tait had not even allowed his own lawyers to see the contents of the envelope." (SMH 13/12/90)

12. For example the Australian Law Reform Commission has recommended the abolition of the accomplice corroboration warning on the grounds that accomplice evidence is no more unreliable than other sorts of evidence such as eye-witness evidence; see: ALRC, **Evidence** Interim Report, No 26, AGPS: Canberra (1985) Vol 1 558-61; **Evidence** ARC No 38 AGPS: Canberra, (1987) 132

13. In the **Virgin Islands** case a juvenile defendant sought a grant of use immunity for a potential witness who was in the custody of juvenile authorities. The juvenile authorities consented to a grant of immunity but this was refused by the United States Attorney. The defendant was convicted without having access to material evidence for his defence. The appeal court held that a direct judicial grant of immunity to the witness might be necessary to protect the defendant's due process right to exculpatory evidence, which the court treated as inherent in the guarantee of a fair trial. For a discussion of the case and the whole question of defence witness immunities in the US see: Karolcyk, M. E. (1981) "Defence Witness Immunity", **Arizona State Law Journal**, p771.

14. Mark Curriden, "No Honour Among Thieves", **American Bar Association Journal** June 1989; Ted Rohrlich, "Review of Murder Cases is Ordered: Jail-House Informant Casts Doubt on Convictions Based on Confessions", **Los Angeles Times** 29/10/1988; Kevin Cody, "Jailhouse Informants: The D.A.'s Ethical Bind", **Los Angeles Times** 13/11/88; "Jail Informant says he lied in Role as Informant", "The Bar looks at informants", **Los Angeles Times** 1/12/88

15. For example **The Age's** pressure on the Commonwealth Attorney-General to grant indemnities to 31 NSW police involved in the 16 year illegal taping operation: **The Age**, 22/3/1985

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Appendix 1

Commonwealth Director of Public Prosecutions - Witness Indemnities and Undertakings not to Prosecute

The following figures have been compiled from Annual Reports of the Commonwealth DPP. The DPP is empowered to give undertakings not to prosecute under the **Director of Public Prosecutions Act** 1983 (Commonwealth) and the **National Crimes Authority Act** 1984 (Commonwealth). Under s9(6) of the **DPP Act** "use" indemnities may be granted by the DPP; under s30(5) of the **NCA Act** "use-derivative" indemnities may be granted by the DPP upon the recommendation of the NCA. Only the Commonwealth Attorney-General may grant "transactional indemnities" although usually on the recommendation of the DPP.

1984-1985	
Undertakings not to prosecute	61 persons
Indemnities conferred by the A-G	16
1985-1986	
Undertakings not to prosecute	80 undertakings (48 in 1 case)
Indemnities conferred by A-G	5
1986-1987	
Undertakings not to prosecute	25
1987-1988	
Undertakings not to prosecute	12
Undertakings under s30 **NCA Act**	10
Indemnities conferred by A-G	5
1988-1989	
Undertakings not to prosecute	23
Undertakings under s30 **NCA Act**	0
Indemnities conferred by A-G	1
1989-1990	
Undertakings not to prosecute	71 (23 matters)
Undertaking under s30 **NCA Act**	2

Appendix 2

National Crime Authority - Indemnities from Prosecution

The following table has been compiled from NCA Annual Reports. Under s30 of the **NCA Act** 1984 the Commonwealth DPP may grant indemnity from prosecution to witnesses appearing before the Authority in relation to Commonwealth offences.

1984-1985	
Indemnities	No figures
Witness Protection	"
1985-1986	
Indemnities	No figures
Witness Protection	2
1986-1987	
Indemnities	14 (11 witnesses)
Witness Protection	5
1987-1988	
Indemnities	9
Witness Protection	9
1988-1989	
Indemnities	1 (3 witnesses)
Witness Protection	No figures
1989-1990	
Indemnities	7 (3 witnesses)
Witness Protection	No figures

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NOTES ON THE CULTURE OF PRISON INFORMING*

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> A figure had haunted earlier times, that of a monstrous king, the source of all justice and yet besmirched with crime; another fear now appeared, that of some dark, secret understanding between those who enforced the law and those who violated it.[1]
>
> ...
>
> There was also a new culture and pecking order in the gaols. It had been developing through the seventies and had now arrived with a vengeance. The old school of prisoners convicted of standard offences like armed robbery, violence and petty crime had been replaced by the drug culture syndrome. Addicts and pushers were dictating events. Solidarity amongst prisoners was traded for a needle. Individuals would sell their mother for a fix. Nobody trusted anybody, as informants were everywhere. Solitary was no longer a punishment determined by the administration, but a protection demanded by the prisoners. Characters like Darcy, who hated drugs and all those associated with the trade, were relics of the past. Their values, discarded like a used syringe. The idea of 'copping it sweet', a forgotten principle.[2]
>
> ...
>
> The difference I noticed my second fall, there aren't no more real convicts since this crack shit come about. Convicts, they'd sit around talking about jobs, banks they'd held up, argue about how to blow a safe. Now you got inmates instead of cons and these guys are crazy. All they think about is getting dope and getting laid, looking to see who they can turn. See, once you get turned your pussy. Inmates, they'll snitch you for smoking a joint, anything, to get in good with the turnkeys.[3]
>
> ...
>
> SHIRKER: Gimme the old days
>
> TOSSER: Yeah. I can remember when you'd never even bother to spit at a uniform or a dog. Look at it now, but: nobody worries about chocolate frogs any more.
>
> SHIRKER: You can drop off the 'nobody'. I dont ever talk to dogs or screws, mate. Anyone that does oughter be pinched for consortin', I reckon. My old woman used ter say, yer judged by the company yer keep ... 'n she was right: only dogs talk to dogs.

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* Paper presented to the ANZ Society of Criminology Conference, Melbourne, September 30–2 October 1992. The author would like to acknowledge the assistance of Beverly Duffy in research for this paper.

1 Foucault, M, *Discipline and Punish* (1977) at 283.

2 Hay, R, *Catch Me if You Can: The life and times of Darcy Dugan* (1992) at 378.

3 Leonard, E, *Maximum Bob Penguin* (1992) at 98.

> TOSSER: Yeah. Trouble is, but, yer never know these days who is a bloody chocolate and who ain't![4]
>
> ...
>
> In recent years, there has been a determined campaign designed to deprive law enforcement of the time-tested and valued confidential informant. This campaign of vituperation is part and parcel of Communist strategy to convert the courtroom into a forum to discredit the judicial process.[5]

INTRODUCTION

This paper will seek to make some preliminary and speculative comments on the culture of prison informing. Interest in this topic stems from research into what appears to be an increase in the use of prison informants in criminal prosecutions in Australia and in particular New South Wales in recent years. While it is not possible to demonstrate such an increase statistically, it is difficult not to draw the impression from media reports of particular trials that the calling of prisoner witnesses to give evidence of alleged prison yard or cell "confessions", while not entirely novel, is nevertheless an increasing, prosecution tactic.

The drift of the research so far[6] is to locate such a development in the context of a set of conditions which encourage the use of prisoner informants. These conditions include:

- a shift to proactive policing practices
- restrictions on the ability of police to fabricate confessional evidence
- the nature of prison regimes and the availability of a range of incentives or rewards for informing
- the establishment and expansion of prison intelligence units such as the Internal Intelligence Unit in New South Wales and their control over witness protection schemes
- the increasing interpenetration of prison and police departments.

The concern has been to highlight the key issues arising out of these conditions in relation to the growth of prisoner informants, namely the reliability of evidence emerging from the informants, the integrity of the criminal justice system and the accountability of its agencies and practices.

One of the great difficulties in the research has been in trying to confine it to the specific issues thrown up through the use of *prison* informers, that is prisoners who give information or evidence in relation to what it is alleged other prisoners have told them in prison. The difficulty lies in the wide variety of types of informing and informants, which

4 McNeil, J, *The Chocolate Frog, The Old Familiar Juice* (1973) at 18.

5 J Edgar Hoover (1955) quoted in Harney and Cross, *The Informer in Law Enforcement* (1968) at 18–19.

6 Brown, D and Duffy, B, "Privatising Police Verbals: The Growth Indistry in Prison Informants" in Carrington, K et al (eds), *Travesty! Miscarriages of Justice* (1991) at 181.

moreover overlap at points. Rod Settle has produced a useful typology in his research on informers. He separates out "indemnified dogs", "chocolate frogs", "gigs", "anonymous grassing" and "respectable grassing".[7] These distinctions are important and it is easy to move back and forth between quite different types of relationships and impart a spurious unity to the various and diverse practices and cultures. It is a danger this paper, concerned as it is with the culture of prison informers, does not entirely avoid.

TAIL WAGGERS

G A Wilkes' *Dictionary of Australian Colloquialisms*[8] defines dog as "an informer; one who betrays his associates, often in the expression 'turn dog'. It gives the derivation as United States, appearing in the 1846 edition of the *Oxford English Dictionary*. Most of the US literature on prison informing seems to use the term "rat" or "snitch". "Dog" is the well established Australian term, directly or through rhyming slang derivatives such as "chocolate frog" (as in the title of a play by New South Wales prison playwright, Jim McNeil[9]). McNeil defines the term in the foreword to the play:

> a dog is one whose conduct violates, or has violated in times past the informal 'laws' of prison society. A dog in prison is a criminal in the sight of those termed criminal themselves by ordinary society. And a dog should be judged, has to be punished, deserves to be ostracised and deprived — as criminals are.[10]

The persistence of the notion can be seen in the incident during the Tim Anderson committal in Sydney in 1989 when former prison folk hero Ray Denning was giving evidence. A large bone was placed on a railing in the courtroom by an ex-prisoner who then shouted out "you forgot your lunch, Denning".

Wilkes goes on to give a number of examples of its use, the first being J F Mortlock's *Experiences of a Convict* in 1864. Mortlock used the term to describe men betraying their companions or accepting authority over them, noting that sometimes they have their nose bitten off — the morsel being termed "a mouthful of dog's nose". In 1895 Cornelius Crowe in *The Australian Slang Dictionary* defined "to turn dog" as to turn Queen's evidence. To dob or dob in, is also an Australian colloquial term, defined by Wilkes as "to inform against, implicate, betray." Dob has a wider and more popular meaning, not restricted to the criminal justice system; giving any sort of information to authority about others.

Several of Wilkes' examples stress the use of the term as a verb, to turn dog. This usage emphasises the active process by which one becomes a dog, stressing the element of moral choice involved. The two old-lag prisoners in McNeil's play "The Chocolate Frog" refer to "putting" the newly arrived young prisoner Kevin "on the dog", as in "Yer can't really put 'im on the dog, he's just ignorant, is all ...". [11] This usage emphasises the

7 Settle, R (1991) unpublished, private correspondence.
8 Wilkes, G A, *A Dictionary of Australian Colloquialisms* (1978).
9 Above n4.
10 At 10.
11 Id at 28.

ascribed status of dog, a process less of becoming through ones own actions than a status denoted by others. It is then the defining by the peer group that is important rather than something inherent in particular behaviour. Shirker, one of the old lags, explains the process to Kevin:

> Our forms is already *established*, if yer know what I mean? There no one in the nick here can point the finger of scorn at me or Toss. But you're *new* ter the scene, 'n *as* such yer'll be answerin' all kinds of questions in the next few days. All the crim'sll wanter know yer *form* ... 'n they'll be looking ter me'n Toss fer a rundown on yer. That's why we ask yer questions ... we're *entitled* to, see? It could be that yer a bit short of credentials. Might even be a chockie frog, or something': in which case, a'course, we'd have ter say so around the place."[12]

McNeil exposes the negotiated status behind the apparently uncompromising approach of Shirker and Toss. While Shirker invokes the once and forever status of the dog: "once a dog, never a good feller! Yer can't be a tail-wagger this week, 'n a good fella the next"[13] Kevin's presence provokes a dispute between Shirker and Tosser in which Shirker reveals that he has long suspected that Tosser informed the police of his whereabouts after an escape many years before, "but it was just easier to fergive yer, yer know?" Tosser rejects this vehemently: "I ain't never lagged nobody!!!"[14]

This exchange highlights the way in which a strong rhetorical adherence to the inmate code hatred of informers is mitigated in practice by a range of pressures forged in the interests of harmony, company and friendship, and by a recognition that in many cases it is not possible to know conclusively (except where someone has formally given evidence in court or made a statement to police) exactly what did or did not happen in a particular instance. Prisoners realise how easily the process of "putting someone on the dog" can be motivated by personal malice entirely unrelated to an alleged incident of informing, or instigated by rumours put into circulation by police or prison officers for their own ends. The exact truth of events becomes impossible to unravel from the stories and myths that circulate in the rumour mill atmosphere of a prison. There is also an awareness that the "dog" tag can remain with a person and their relatives for a long time, decades and even lifetimes, carrying significant consequences in terms of reputation, future prospects, friends, and the possibility of physical reprisal or death. Thus, while a hatred of clearly designated informers who have sought official protection and whose status is widely known can be an important component in prisoner solidarity, the widespread use of the "dog" label within the prison as part of personal and faction fights can serve to break down prisoner solidarity and create a climate of suspicion and mistrust which militates against collective action.

McNeil's usage highlighting "dog" as an interactionist concept or label opens up clearer connections with prison culture and the "inmate code". In traditional prison and criminal culture the stigma "dog" is a way to maintain solidarity, lessen the chance of

12 At 37.
13 At 34.
14 At 48.

being betrayed, construct a notion of unity, in the sense of a shared moral value that it is immoral to inform, rather than a necessary approval of specific criminal activities. The transmission between prison and criminal subcultures outside the prison is important for the maintenance of an ethic against informing, for outside the prison informing can be carried out more anonymously and therefore with less risk. Herein partly lies Settle's distinction between "chocolate frogs" and "gigs", an abbreviation from fizz gigs, regular police informants outside the prison context. The possibilities of constructing an adherence to a shared set of values against informing are restricted in a broader societal context where there is little to unify the participants in the commission of the vast bulk of criminal offending. The possibility of unity is stronger in a specific subcultural professional and semi-professional criminal milieu around certain offences such as armed robbery, large scale car theft or break and enter, contract killing, drug dealing. There is no obvious principle for unity in either the offences (diverse) or the types of offenders. Many of the activities, apart from being illegal and thus in their nature secret, are individualistic, selfishly motivated, anti-collective. So while there is a rhetorical ethos of "crims as staunch and anti-authority" there is not a strong tradition or ethos of collective solidarity or action, except in a minority group of prisoner activists and militants who maintain a self identified "prisoner" or "crim" status outside the prison which they use openly in media, political, lobbying and welfare activities on behalf of prisoners. Individualism and conservative political preferences on the part of the "old guard" criminal elite often go hand in hand, witness Hay's reference to Darcy Dugan as "a Liberal voter at heart".[15] Certain police practices (verbal) and antipathy towards informing provide one of the few vehicles for solidarity.

The position is rather different inside the prison. Informing is far more visible, particularly where it leads to some sort of segregation and protection. However even this is confused as a great many of the prisoners seeking to be placed on protection do so because of drug debts. The prison pecking order tends to be determined by a combination of reputation, physical strength and popularity. Reputation derives from the offence for which imprisoned, prior criminal record, stance towards prison officers and authorities, preparedness to act as prisoner representative, and physical prowess. Professional and semi-professional armed robbers, particularly those without drug habits, and career criminals, including stand-over men and contract killers tend to be high on the pecking order. These are also the sorts of prisoners more likely to ascribe to the code of not informing. Prison experience thus tends to refurbish the general, at least rhetorical, ideology of despising dogs.

DOGS AND THE INMATE CODE

The transmission between prison and criminal subcultures outside the prison is highlighted in some of the penological literature on the origins and functions of the inmate code. Sykes[16], Messinger[17] and others have portrayed the inmate culture as emanating

15 Hay, R, *Catch Me if You Can: the Life and Times of Darcy Dugan* (1992) at xii.

largely from within the prison as a response to the pains of imprisonment, its function to lessen those pains through solidarity. Outlining the chief tenets of the inmate code they identify "the most inflexible directive" as being concerned with "betrayal of a fellow captive to the institutional officials: *Never rat on a con*."[18] They summarise the inmate code as follows:

> 1 Inmates give strong verbal support to a system of values that has group cohesion or inmate solidarity as a basic theme. Directly or indirectly, prisoners uphold the ideal of a system of social interaction in which individuals are bound together by ties of mutual aid, loyalty, affection, and respect, and are united firmly in opposition to the enemy out-group. The man who exemplifies this ideal is accorded high prestige. The opposite of a cohesive inmate social system — a state in which each individual seeks his own advantage without reference to the claims of solidarity — is viciously condemned.
>
> 2 The actual behaviour of prisoners ranges from full adherence to the norms of the inmate world to deviance of various types. These behavioural patterns, recognised and labelled by prisoners, in the pungent argot of the dispossessed, form a collection of social roles which, with their interrelationships, constitute the inmate social system.[19]

A different interpretation is provided by those who see the inmate code as originating in and expressing the values of the outside criminal subculture. Cohen and Taylor in the course of their study of the experience of long-term imprisonment in a high security unit express a number of reservations about the standard sociological accounts of adaption to institutional life. They argue that "the depiction of subcultures, underlife, and secondary adjustment tells us little about the meaning of such phenomena to the group concerned, and the way they can be used, manipulated or exploited in diverse ways."[20]

Cohen and Taylor note that one of the key themes in the literature arising from concentration camps, labour camps and political prisons is "the notion that one had to resist any attempt to be changed: one had to do more than remain alive, one had to remain alive and unchanged."[21] Some of the psychologically based prison literature sees the inmate code as central to maintaining a resistance to change through psychological treatment or therapeutic community programs. Warden John C Watkins, speaking at the American Correctional Association Congress in 1964, identified the key to successful "modification of subcultures" as breaking down the inmate code and in particular the "thou shall not tell" "religion" of the "solid convicts". The aim is to break down loyalty to the inmate code and bring about a shift in loyalty to the prison administration. This is to be achieved by encouraging informing through the judicious use of rewards and

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16 Sykes, G, *The Society of Captives* (1958).

17 Sykes, G and Messenger, S, "The Inmate Social Code", in Johnston, N, Savitz, L and Wolfgang, M (eds), *The Sociology of Punishment and Correction* (2nd ed; 1970).

18 Id at 402.

19 Id at 405.

20 Cohen, S and Taylor, L, *Psychological Survival: The Experience of Long Term Imprisonment* (1973) at 133.

21 Id at 54.

individual "treatment", such as being placed under stricter control and told that someone has informed on them, leading Jessica Mitford to ask "who is 'rehabilitated'? The solid who refuses to inform on his fellows or the prison rat who succumbs to Dr Watkins?"[22]

Harry Wilmer, a psychiatrist involved in a group living program for inmates in San Quentin in the early 1960s, also argues that it is essential to understand the role of the inmate code and the "rat" in prison in order to promote a successful treatment program. However rather than trying, like Watkins, to encourage and manipulate prisoners into informing, Wilmer is concerned that the inmate code which forbids informing blocks the attempt to open up communication therapy. He argues that

> The 'snitch' role rigidifies the convict code or culture and reinforces the basic feeling of helplessness towards a dangerous and hostile world. When administration and security depend upon and foster snitching they perpetuate the warfare between police and criminal and assuage the guilt which the inmate might otherwise have for his hostile feelings towards police and all outside authority. Whatever positive feelings exist are thereby dissipated in further hatred and fear. The tighter the security the more potentially dangerous is the 'rat' concept to the captives and the greater need of custody to have informers from the very world they have closed off tightly.[23]

It will not have escaped notice that all the discussion so far has been in the masculine form. The vast majority of studies on the inmate code have focussed on male prisons and the role of women in informing outside the prison has been neglected. There are however a few studies of women's prisons. Rose Giallombardo in a study of a women's prison[24] and three institutions for female juveniles[25] concluded that female prisoner subcultures are derived from sex-role stereotypes imported from the wider society and that snitching is more common in women's prisons because women lack such a strong sense of solidarity. She also noted lesser inmate sanctions against informing in women's prisons. Ward and Kassebaum[26] reached similar findings. Ester Heffernan[27] did not directly compare snitching for men and women but identified three major subcultures rather than one. Joyce Ward[28] in her description of the social organisation of a women's prison in Britain noted the same apparent lack of solidarity and high level of informing as Giallombardo and Ward and Kassebaum, but explored a range of other interpretations. Ward concluded that the uncertainty which characterises decision making in prisons is responsible for snitching, not because the prisoners are women.

The research has not as yet located any Australian studies of informing in women's prisons but one woman prisoner we talked to argued that in fact informing in women's prisons is rare. This was attributed not so much to a strong commitment to inmate solidarity but to the fact that women's prisons were generally small and everything that

22 Mitford, J, *Kind and Usual Punishment* (1974) at 128.
23 Wilmer, H A, "The role of the 'Rat' in the Prison" (1965) 29/1 *Federal Probation* 44–49 at 49.
24 Giallombardo, R, *Society of Women: A Study of a Woman's Prison* (1965).
25 Giallombardo, R, *The Social World of Imprisoned Girls* (1974).
26 Ward, D and Kassebaum, G, *Women's Prison: Sex and Social Structure* (1965).
27 Heffernan, E, *Making it in Prison, The Square, The Cool and the Life* (1972).
28 Ward, J, "Telling Tales in Prison", in Kassebaum, G (ed), *Custom and Conflict in British Society* (1982).

went on was noticed. Examples were given of harassment and assault of women prisoners who were thought to have informed. The point was also made that in the major New South Wales women's prison the prison is run by a clique described as "non-political lesbians" who liked to run the prison in their own way and resented interference from police and Internal Intelligence Unit Corrective Service officers.

As for women informers outside the prison context few high profile women informers seem to have emerged into the public gaze, partly perhaps because serious and high profile crime is generally a masculine domain, partly because women informers are less likely to be actually revealed by their police contacts in the sense of being used to give direct evidence. Alan Block writing on organised crime notes the "discrepancies between the sexually integrated underworlds of the nineteenth century and the sexually segregated world of organised crime advanced by contemporary scholars".[29] He goes on the argue that in fact women have been part of the 20th century underworld "but have been effectively removed because of a belief in conspiracy as the engine of organised crime."

> Enamoured with proving some gigantic conspiracy hatched by the minds of master criminals (invariably men), writers have narrowed their focus so much that organised crime has been perceived as strictly parasitic, serving no needs and performing no functions apart from enriching criminals.
>
> In not connecting organised crime either to real communities or to concrete criminal justice agencies except for the police, researchers have structured untold numbers of women outside the social reality of organized crime.[30]

Whether the same could be said in the Australian context in the aftermath of studies such as Judith Allen's *Sex and Secrets*[31] is open to debate. Certainly the careers of the famous madams Kate Leigh and Tilly Devine are popularly known.

Prostitutes are often regarded by police as a source of information on the whereabouts of particular criminal identities, criminals planning jobs, movements of stolen property and drugs, known criminals suddenly with large amounts of money, and so on. A major theme in policing prostitution, although undeveloped in the literature, has been this intelligence gathering function using the threat of arrest of the prostitute, harassment or closure of the brothel, or offers of arrest of or protection from violent pimps/ boyfriends/ drug dealers, to elicit information. A prostitute working in the East Sydney lanes in the 1960s nicely encapsulates the lack of a clear cut antithesis between police and criminals in this comment: "A lot of girls were on with big time crims, after I broke up with a policeman I was on with a famous crim."[32]

The life and career of Sallie-Anne Huckstepp provides a more contemporary example of a high profile prostitute and heroin user who had lovers from amongst major drug

29 Block, A, "Searching for Women in Organised Crime", in Datesman, S K and Scarpitti, F R (eds), *Women, Crime and Justice* (1980) at 194.

30 Id at 209.

31 Allen, J, *Sex and Secrets* (1990).

32 Perkins, R, *Working Girls: Prostitutes, their Life and Social Control* (1991) at 133.

dealers and state and federal police. She lived a dangerous life exploiting the ambiguity of the police/criminal relationship through her attachments and her key location as a point of transmission in the circuits of drug dealing and armed robbery. This ambiguity was reflected in the fact that at the inquest into her death the coroner was unable to choose between a number of suspects, criminals and police, who might have wanted her dead, and no charges have been laid in relation to her killing.

A British undercover police officer with an aptitude for mixed metaphors describing his work with informants identifies ex-girlfriends of traffickers as potential informants: "A good source of information was birds. That saying about hell hath no fury is dead right. If a drugs dealer breaks up with his chick, he had better watch out. The chances are that she will squeal, and we weren't too fussy how the information arrived."[33] However an article on how to handle confidential informers in the American police journal *Law and Order* (articles in this journal conveniently give a "reading time" estimate under the author's by-line) by Det Sgt Vernon J Gerbeth betrays a concern at the seductive power of female sexuality:

> Another precaution that should be mentioned is the handling of female CI's. Women pose a unique problem in that there is always the question of whether or not there was any impropriety on the part of the male contact officer. Women are generally emotional, and any long term involvement between the male contact officer and the informant who is female can present a problem. It is a good policy to have a female contact officer assigned to a female informant, however this is not always possible.
>
> The female CI is very effective. She is likely to "know" men, and generally gets what she wants. She is often overlooked as a threat by the male criminal and more or less accepted as part of the scenery. She is usually in a position to know exactly what is going on and can be of valuable assistance to the enterprising detective.[34]

MOTIVATIONS FOR INFORMING

The classic account of informer motivations is provided by police narcotics agents, Malachi L Harney and John C Cross[35]. As the title suggests this is somewhat of a police manual and one of the only book length treatments of informing. The flavour is perhaps imparted by the brief: "Let us endeavour to outline some of the considerations which might impel our antisocial, or at least antipolice, informer to give us his essential cooperation."[36] So the following classification of motives is not addressed specifically to prison informers.

1. *The Fear Motive*, arising from self-preservation. If under arrest the suspect might be looking for "sympathy, extenuation, mitigation" may "furnish us with direct evidence against other criminals".

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33 Quoted in Dorn, N, Murji, K and South, N, *Traffickers: Drug Markets and Law Enforcement* (1992) at 131.

34 Gerbath, V J, "The Confidential Informant" (1979) 27/6 *Law and Order* 26–41 at 34.

35 Harney, M L and Cross, J C, *The Informer in Law Enforcement* (2nd ed, 1968).

36 Id at 40.

> It is almost the universal practice of the police, prosecutors and courts to recognize the valuable assistance to law enforcement in this attitude of the informer. This recognition is usually translated in a practical manner as a recommendation for a lesser sentence, a more favourable consideration for parole or probation, the acceptance of a plea to a lesser count in the indictment or through some other favourable action within the discretion of the prosecution.[37]

Or rather than fear of the law the fear can be fear of ones associates, a falling out among thieves "so there may come to us a frightened man who sees in the forces of law the lesser of two evils."

2 *Revenge Motives*, an "all-consuming desire for retaliation". This may arise from a lack of honour among thieves, jealousy, quarrels over women, being short-changed or undervalued.

3 *Perverse Motives*, such as wanting to eliminate competition, to strengthen his reputation as an informer in order to extort money from other criminals, the provision of false and misleading information in order to find out how much police know, or divert suspicion.

4 *Egotistical Motives*, as in the person who gets a kick out of telling a story and receiving attention, boosting their ego.

5 *Mercenary Motives*, as in those informers who do it for payment or reward.

6 *The Detective Complex*, as in those for whom crime detection is an attraction.

7 *Selective Law Enforcement* as in the informer who is opposed to certain types of criminal activity.

8 *Repentance or Desire to Reform*, through a desire to make restitution, repent or reform. Harney and Cross state that "this informer is infrequently seen, but he may be valuable".[38]

9 *Appreciation or Gratitude Toward Police or Prosecutor* stemming from "intelligent, discreet and considerate handling".

10 *Demented, Eccentric or Nuisance Type Individuals* as in the "busybody" and "screwball". While category 8, repentance or desire to reform warrants only 6 lines of Harney and Cross's text, this category requires 11 pages! Perhaps the Australian police special branch handlers of the Richard Searys of the world might draw some lessons from this classic exposition of relative priorities.

In the Australian prison informer context most attention has focussed on informing for reward, Harney and Cross's "mercenary" category. This has been described previously as a:

> developing market in criminality; the volunteering of testimony in exchange for a range of privileges. These range from formal grants of immunity or informer sentence discounts to (prisoners allege) actual early release, favourable classification or transfer decisions,

37 Id at 41.
38 Id at 48.

(36)

access to witness protection programs, recommendations for bail, favourable parole assessments, day release, contact visits, phone calls, property, drugs etc.[39]

While there is clearly a danger in reading motivation as being purely self serving, an expression of "rational choice", untainted by more complex cultural factors, such explanations tend to have greater surface plausibility, at least amongst prisoners, than the "turned over a new leaf, desire to repent, redress and reform" script staged by and on behalf of notable prisoner informants such as Ray Denning. It is not difficult to see why when one considers the extensive benefits obtained by and offered to Denning, the quid pro quo for which seems plainly to have been the offer of both information and alleged gaol yard confessions by other prisoners in high profile cases. Rewards obtained by Denning included immunities on two major armed robberies including Queensland's biggest ever pay-roll robbery, ("interstate blues that I'm promised will be dropped"), extremely favourable (and highly misleading) character evidence from police and senior prison officers when he came up for sentence on an escape charge in 1988, and when he appeared for the setting of a release date in 1991, police and prosecution failure in 1988 to notify the sentencing judge of offences committed while at liberty, charge reductions, speedy interstate transfer back to New South Wales from Victoria, a police recommendation for a $250,000 reward in the Hilton bombing case, special access to the media, and an initial favourable miscalculation of his release date.[40]

A major problem for the "change of heart" scenario is that it is supposed to have stemmed from around 1983 following his recapture after the 1981 escape. However he committed an armed robbery four days after escaping in 1988 and was caught in the lead up to another. Evidence to the New South Wales ICAC inquiry into informers in 1992 also suggested that while in prison in 1986 Denning was involved in a plan to smuggle a considerable quantity of heroin into Australia.[41]

INROADS INTO THE INMATE CODE ON DOGS

The existence of a strong criminal and prisoner code against informing and adherence to its proscriptions are open to a number of challenges. One of these is the increasingly familiar refrain that any prisoner solidarity has completely broken down with the advent of a drug subculture in the prisons. A second is the recognition that, far from being outcast, despised and weak, some of the key prison informers revealed in recent years have in fact been high profile and high status prisoners enjoying considerable power and influence in the prisons. This awareness coincides with similar revelations from Royal Commissions of inquiry and spectacular cases in recent years that some of the leading police informers in the outside "war against crime" and the "Mr Bigs" have not been the rather pathetic figure in the pub wearing a raincoat, the "Lonely" character in Callan, but

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39 Brown and Duffy, above n6 at 199.

40 Brook, R, "Raymond Denning's Best Planned Escape", in Carrington et al, above n6 at 83–103; Anderson, T, *Take Two: The Criminal Justice System Revisited* (1992) 328–9.

41 Anderson, above n40 at 332; Independent Commission Against Corruption, *Report on Investigation into the Use of Informers*, Vol 2 (1993) at 283–288.

people recognised as being significant crime figures, in some cases media "Mr Bigs" or "Mr Big-Enoughs", in their own right. A third challenge arises in the form of a whole set of changes in policing and prosecution practices dating from the early 1980s, initiated by the various inquiries into organised crime. These practices include a general shift to proactive policing and techniques, targeting of individuals and groups, electronic surveillance, the increased importance of immunities and sentence discounts, the establishment in some jurisdictions of specialised intelligence units within prisons, closer cooperation and interpenetration of police and corrections departments. Finally, certain changes that might be grouped uneasily under the heading of the shift to an information based society in which forms of power/knowledge derive largely from access to and the ability to feed into electronic media networks, have arguably had repercussion in the "closed" world of the prison. The following discussion will attempt to briefly flesh out these developments.

"YOU CAN'T TRUST A DRUGGIE"

Much of the code against informing in prison has historically been oriented around protecting, or at least not disclosing, internal prison activites such as the making of home brew, bookmaking, planned escapes, holding of weapons, presence of contraband, commission of assaults and sexual assaults against other prisoners and, more recently, holding and use of drugs and drug dealing. It is the last, drug dealing and the emergence of a drug culture, which has been blamed by many prisoner commentators for the breakdown in the solidarity against informing in what has become a familiar refrain. Examples of this position can be seen in the quotes from Dugan, McNeil and Elmore Leonard at the beginning of this paper.

It is important to note that what seems at times a rather nostalgic and conservative evocation of the "good old days" when you could trust crims to know the rules and obey the codes, like not stealing from each others' cells, does not only emanate from prisoners. As befits the close and ambiguous relationship between career criminals and detectives, police are also heard to bewail the passing of the days when crims were crims and you could trust them, to put their hands up to crimes they had committed, "to cop it sweet", not to inform on police, and so on. While drug dependency has been exploited as a weakness in eliciting information, there is a danger to police that the junkie figure who has just given up his supplier, or agreed to become an informant, or set up a buy and bust, could also be encouraged to later reveal the nature of the deal or relationship with particular police, to other police or investigators.

While there is a tendency to see in the criminalisation of a particular type of illegal drug use and supply the origins of an entirely new culture opposed to the traditional inmate code, it is important to note the continuities, particularly in the relationship between criminality and policing. It bears remembering Vidocq, that remarkable criminal and adventurer who became chief of the Paris police and is seen as the father of the detective branch of the police. As Foucault remarks, in Vidocq

> delinquency visibly assumed its ambiguous status as an object and instrument for a police apparatus that worked both against it and with it. Vidocq marks the moment when

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> delinquency, detached from other illegalities, was invested by power and turned inside out. It was then that the direct, institutional coupling of police and delinquency took place: the disturbing moment when criminality became one of the mechanisms of power.[42]

It is these "complicities that crime formed with power" that are missed by commentators who assume that policing is the corrective application of investigative techniques to a preconstituted delinquency. Rather, in the figure of the informer, criminality becomes part of the currency that can be traded in the circuits of exchange through which a field of illegalities is produced, circulated, differentiated and managed. Indeed the prized informer is he who, like Vidocq, Denning and Neddy Smith, has an excess of criminality and the knowledges surrounding it, to trade. A paradox that does not entirely escape public notice is that those most heavily inscribed within an identifiable criminality have most to give and most to gain. The first-time drug dealer who is arrested on entering the market has nothing to offer and frequently will receive a heavier sentence than the long time player who can manipulate the prospect of a favourable exercise of police or prosecutorial discretion. This may take the form of licencing him to continue dealing on provision of information, or to identify others in the trade in exchange for rewards such as the reduction in the amount of drugs seized, immunities, sentence discounts and so on.

Rather than creating a new culture and relationship, the criminalising of a particular form of drug market extends and multiplies the circulation of criminalities, providing an over-abundance of infractions, opening up ever more opportunities for simultaneously working both within and against the forces of the illegal market. Whereas a more traditional criminal enterprise such as armed robbery provides only limited avenues of participation and knowledge to a defined and relatively small group of people, the widespread circulation involved in illegal drug markets amplifies those avenues and increases the flows of information and power between participants.

In some senses then the complaints of "staunch" prisoners of the old school about the breakdown of traditional inmate cultural codes is a complaint against the supersession or at least the waning of a more traditional, enclosed, craft-type delinquency based on long apprenticeships through the juvenile detention system and characterised by a career in which, to use Shirker's words, form is established, over time, for all to see. Superseded by a legion of newcomers who are insufficiently acculturated in the rituals of collective insubordination and "copping it sweet". Hence the common references to "plastic gangsters", those who are seen as "instant" criminals, who have not paid their dues, and who are self engrossed, all show, unreliable, and like their alien choice of drug (heroin), motivated largely by self gratification. It might be said that the newcomers represent a "massification" of criminality, a move away from the traditions and practices of self identified and highly differentiated criminal subcultures often based on family, friends and area loyalties. With such a shift of personnel in the inmate culture comes a proliferation of opportunities for personal advantage through plugging in to the

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42 Above n1 at 283.

information flows and networks of policing/delinquency in such a way that status is less clearly established, fixed and authorised by oppositional codes.

INFORMERS, ENFORCERS AND INSTITUTIONAL 'ORDER'

A second challenge to the strength of a dominant inmate code prohibiting informing is the status of particular key prison informers. While they may be disliked or feared, prisoners such as Denning, Heuston, Gidley, Wade etc do not correspond with the image of the informer as a weak and low status individual. An individual like Denning is a former folk hero of prisoner resistance. Some of the other key prison informers have been relatively powerful in the prison hierarchy, constructing their power out of physical intimidation, ability to manipulate the system to obtain better conditions and privileges not generally available to other prisoners, and tacit or in some cases active licencing by prison authorities to run sections of the prison as long as order is maintained and prison disturbances prevented. Giving evidence of alleged prison confessions in the trial of Tom Domican and Roy Thurgar known prison informer Ernie Wade admitted that he had stabbed more than 50 inmates and assaulted more men than he could count as a debt collector for prisoners and prison officers selling drugs. Admitting he had also used violence on behalf of prison officers to enforce discipline in the gaol, Wade said in court: "I either assault them or stab them or belt them over the head with something".[43]

Marquand and Roebuck in a study of the "Building Tender" ("snitch") system operating in a Texas prison describe an open and highly formalised system of informing. "Building Tenders" (BTs) are an organised network of paid informants who function as surrogate guards. While being "hated but also envied, feared and respected", no stigma was attached to their deviant role.[44] The system is well described in their conclusion:

> the official informers, called BTs and turnkeys, worked for and openly "co-operated" with the staff. These snitches, the most aggressive, older, and criminally sophisticated prisoners, were not deviants or outcasts. In turn, they cultivated additional snitches and with the staff's help placed these allies in jobs or positions throughout the institution. Ordinary inmate behaviour as well as that of low-ranking guards was under constant scrutiny. Therefore, the staff knew almost everything that occurred within the institution, permitting proactive control which prevented, in may instances, violent acts, group disturbance and escapes.
>
> The ordinary inmates, as individuals, considered the inmate-guards as "rats"; however they lacked the influence, prestige and power to define and label them as such, that is to impute deviancy to the BT-turnkey role. Selection as a BT or turnkey meant assignment not to a deviant category but rather to an elite corp of pro-staff inmates. Within this system, the only deviants were the unruly ordinary inmates and weak lower-ranking

43 *Sydney Morning Herald* 21 June 1989.

44 "Marquand, J W and Roebuck, J B "Prison Guards and 'Snitches'" (1985) 25/3 *Brit J Criminol* 217–233 at 218; see also Marquart, J W and Crouch, B M (1984) "Coopting the Kept: Using Inmates For Social Control in a Southern Prison" (1984) 1 *Just Q* 491–509.

guards. Both these groups were stigmatised and labelled deviant by the staff and inmate-agents within the prison.[45]

This is obviously an extreme example, and it is noteworthy that in a 1980 class action civil suit *Ruiz v Estelle* a federal court judge ruled that this form of prisoner control was corrupt, pervasive and deviant, holding it unconstitutional. Marquand and Roebuck note that "after purging the BT system, a power void resulted which generated an escalation in violence".[46] However the prison careers of some of the key prison informers in New South Wales mentioned above, such as Ernie Wade, lend support to the view that at certain times and in certain prisons prison administrations have relied upon particular, high status, heavy prisoners who are also informers to maintain institutional order through violence.

There has been a parallel recognition emerging through some of the Royal Commissions into organised crime and inquiries into specific incidents, including attempts to dismiss or discipline particular police officers, that some of the most powerful and autonomous detectives in recent years have enjoyed the confidences and even friendships of some of the people constantly referred to in the media as leading organised crime figures. Roger Rogerson for example had Neddy Smith and Chris Flannery among his informants. Whatever else might be said about them, such men hardly conform to the "stereotypical image of the informant as a weak figure, inhabiting the fringes of the criminal milieu hence a vulnerable link for police to exploit".[47] Rogerson was only eventually dismissed from the New South Wales police for publicly revealing that Smith was one of his informants. As Hogg notes, "it has become increasingly clear from recent cases that many powerful criminals act as police informants and do so from a position of strength, which derives primarily from their inside knowledge. The idea that there is a necessary, clear-cut and fixed antithesis between police and criminals is mistaken."[48]

THE RISE OF PROACTIVE POLICING AND THE INFORMATION ECONOMY

A third condition which challenges the strength of the inmate code against informing is a whole set of developments that can be grouped under the heading of the shift to proactive policing and the rise of the information economy. Hogg outlines some of the new types of development: "plans to introduce electronic surveillance of offenders in some Australian jurisdictions, computerisation of fingerprint records, the extension of state powers and capacities for phone-tapping, the development of DNA fingerprinting, and the proliferation of other computer-based technologies and strategies for surveillance and intelligence gathering."[49]

45 Id at 232–233.

46 Id at 232.

47 Hogg, R, "The Politics of Criminal Investigation" in Wickham, G (ed), *Social Theory and Legal Politics* (1987) at 135.

48 Id at 135.

49 Hogg, R, "Criminal Justice and Social Control: Contemporary Developments in Australia" (1988) 2 *J St Just* 89–122 at 99.

Hogg outlines the significance of the development of new computer technologies developed out of the various Royal Commissions and in particular the Costigan Commission.[50] Three key aspects of these developments of relevance to informers are the development of computer matching and tracking techniques which generates a different attitude to information gathering, encouragement for the cultivation of informers through witness immunities, and the development of targeting strategies.

The capacity to record and store large quantities of data on computer has led to a revaluing of what would formerly have been regarded as largely irrelevant information. Previously unless the information pointed directly to involvement in criminal activity it was seen as of little use. But now the information, innocent in itself, might be of considerable significance when matched against a range of other items of information, associations, networks, times, places, other activities, travel, accommodation, and so on. "The effect of this approach is to demand as extensive a system of surveillance and intelligence as possible, which is thereafter open to more specific forms of analysis and use."[51]

One such more specific use is the trend to actively target particular individuals and groups on the part of law enforcement agencies. This is one of the clearest indications of the shift away from traditions of reactive policing, reacting to citizen complaint, to proactive policing in particular areas, especially those involving largely consensual activities such as illegal drug use and supply. It is significant that the outbreak of prison informing in New South Wales and to a lesser extent Victoria seems to have arisen around very high profile cases which the police were under strong pressure to "solve" (Walsh Street trial, Hilton bombing) or in which key individuals targeted by law enforcement agencies (Domican) were involved. It is not the run of the mill break and enter accused who is alleged to have confessed to participation in serious crimes to known prison informers in a prison yard. Such "confessions" might be more plausible than those allegedly emanating from political activists with a history of opposition to policing practices such as police verbal or from career enforcers and underworld heavies. That they do not tells us more about the current state of proactive policing priorities and evidence gathering techniques than it does about any notion of correspondence with actually occurring events.

The promotion of informing and undercover techniques can be seen in the practices of undercover entrapment, stings, arranged drug buys, the production of drugs under police sponsorship (Bungendore), officially authorised luxury car theft (Operation Trident Queensland), and prison informants. The offering of witness immunities, witness protection and sentence discounts were encouraged by several of the Royal Commissions, the Royal Commission into Drug Trafficking (1984) (Stewart Commission) in particular: "The Commission considers that any serious attempt to combat organised crime in Australia will require a greater willingness among Crown law officers to grant immunity to potential key witnesses, as well as a properly organised and funded protection scheme."[52]

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50 Costigan, F, *Royal Commission on the Activities of the Federated Ship Painters and Dockers Union*, Final Report, Canberra, AGPS (1984).

51 Above n49 at 100.

42

Justice Stewart castigated investigators and prosecutors for their apparent reticence: "It appears to the Commission that there has never been a sufficient effort to cultivate the informer in organised crime, especially the informer who is or has been part of the criminal syndicate".[53] The momentum for the cultivation of informers built up from such calls was increased with a continual stream of press and electronic media reports encouraging the forces of good in the war against organised crime. Prior to Sharon Davis' "Justice Gone to the Dogs" in December 1990[54] which triggered the ICAC inquiry only Andrew Keenan in the *Sydney Morning Herald* in a seminal piece in April 1988[55] raised any doubts about the credibility of some of the informers and the desirability of practices such as granting immunities to serious criminal offenders who in certain cases seemed to be more dangerous and deeply implicated than many of those they had been granted immunity to inform on.

PRISONS IN A POSTMODERN WORLD

Finally, and most speculatively, a few observations on the way in which the development of an information based economy, or as some prefer it, a postmodern society, might affect the nature of the prison experience and indirectly the strength of the inmate code.

The dominant metaphor of the prison is that of enclosure, segregation, separateness, behind high walls or razor wire those incarcerated are kept "out of sight" if not always "out of mind". Much of the discussion of the inmate code takes this enclosure, this separation, for granted, and reads the inmate code as the response to the "pains of imprisonment" in the "society of captives". Much of the political struggle around prisons involves the attempt to "penetrate" the secrecy of this closed world, bringing the light of accountability to bear on its dark recesses. In particular, penal practices which cut prisoners off from the outside world, the censorship of mail, the denial of reading matter, the restrictions on and the harassment of visitors, lack of access to the telephone, media access to prisons, are all subject to challenge.

While the struggle over communication in these forms continues, the explosion in the technology of communications opens up many other channels which are not so easily cut off or scrutinised. Many prisoners now have televisions or access to television. While computers and fax machines are not yet common in the prisons they are increasingly used for educational courses. Prisoners who wish to be informed of events and the sensibilities of the "outside" world have now better prospects than ever before. Indeed the intensity of the communication flows may be such as to challenge the very notion of an "inside" and "outside"; we are all, to some extent, inside the play of information flows and media simulations.

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52 *Royal Commission of Inquiry into Drug Trafficking, Report*, by Justice Stewart, Canberra, AGPS (1983) at 531.

53 Id at 563.

54 Davis, S, "Justice Gone to the Dogs: Criminal Informers in our Justice System", ABC Background Briefing, 9 December 1990.

55 Keenan, A, "Do Police Use 'Tainted' Supergrasses?" *Sydney Morning Herald* 13 April 1988.

There are clearly counter tendencies, such as one described previously as the "new transportation", whereby new prisons are sited off in the hinterlands, well away from the populations they are supposed to serve, away from families and friends who are supposed to remain invisible, away from public transport routes, by the side of country roads where no-one walks.[56] However there are limits to this new exclusion. Satellites know such places. The connectedness of prisons with events in the outside world, particularly in the realm of criminal justice, policing and the courts, is shown by the speed with which prisoners came forward in both the Gundy and Brennan cases to proffer information that might assist the police to portray the two unarmed and unfortunate men, both shot by paramilitary police squads, David Gundy fatally, as more involved in criminality than they in fact were. Neither of these despicable pieces of character assassination were ultimately successful. But they were one response of police under threat. What were the mechanisms by which these false testimonies were so quickly forthcoming and what does the speed of their emergence tell us about the contemporary "isolation" of prisons and prisoners from the outside world of constant political crises and images?

The increasing recognition of the way power is no longer possessed or wielded but implicated in information flows and exchanges has led to a diminution of an oppositional politics founded on struggles by unified participants waged over a fixed territory, whether as manoeuvre or position. The new technology can pass over the heads of the bureaucratic censors, the substitutionist vanguard, the official, direct to those with a screen. Traditional forms of politics organised around the party, its rules, discipline and authority are diminishing. Forms of fixed identity politics shaped by unified class, gender or racial subjectivities are coming under the fragmenting challenge of discursively constituted subject positions, fractured and plural subjectivities.

While we may expect prisons to be among the most recalcitrant of sites they will not be totally immune from some of the effects of these tendencies. I have already discussed the extent to which penal relations have undergone considerable change under the hammer of the drug subculture. Traditional inmate cultures, organised in part around a proscription on informing, will come under challenge in the same way as political cultures based on established lines of authority and authorised interpreters of the word have come under challenge. Rather than merely reading the resultant ambiguity and uncertainty as a loss of ethics it could be interpreted as heralding a new ethics of personal responsibility and choice, constantly contested, shifting, open to reconsideration, against the comforting certainties of received, prescriptive, and often rhetorical codes.

To say this is not to promote the demise of inmate codes of solidarity and hostility to informing. But neither is it to pay lip service to their heroic nature. Rather it is to move from the realm of fixed essences of good and evil to a concern with the specific conditions under which certain sorts of behaviours become judged, and the reliability, integrity and accountability of the institutions, practices and ethics in and through which those judgments are made.

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56 Brown, D, "Jailhouse Blues" *ALR*, April 1992 at 32.

SUN HERALD 13/4/91

EXTRA

Danger in growth of

HILTON BOMBING: The aftermath.

□ DAVID BROWN, Associate Professor in Law at the University of NSW, has just completed a major study of what he calls "the prison informant industry". It was prompted by evidence given by convicted criminal Raymond Denning in the Hilton Hotel bombing trial and the furore over the sentence reduction for notorious criminal-informant Fred Many.

THERE have always been informants in criminal justice but now there is a growth industry in the use of *prisoner* informants.

Prisons are becoming reservoirs of evidence on tap to shore up or, in some cases, initiate prosecutions.

A number of conditions are sustaining this growth industry.

First, the police verbal, the fabrication of confessional evidence by police, is falling into disfavour.

Juries are becoming increasingly reluctant to believe uncorroborated confessions denied by the accused.

The evidence of prisoner informants provides a convenient non-police replacement for police verbal, a privatisation of the verbal.

Second, in NSW, in particular, a repressive

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Sun-Herald [illegible]

EXTRA

prison informers

and punitive prison regime fosters the trade in testimony.

The deterioration in prison conditions, over-crowding, increase in violence and assault, longer sentences, abolition of remissions, property confiscation policy, all increase the pressure to find new forms of personal advantage, new incentives within the system.

The emerging incentive is the volunteering of testimony in exchange for a range of privileges.

These range from granting immunity or sentence discounts to, according to prisoners, early release, favourable classification or transfer, access to witness protection programs, recommendations for bail, favourable parole assessments, day release, contact visits, phone calls, property, drugs and so on.

A third condition is the increase in the power and influence within prison departments of specialist intelligence units and the breakdown of the traditional separation between police and prison departments.

Again, this is most marked in NSW in the form of the Internal Investigation Unit (IIU) run by Ron Woodham.

Set up in the late 1970s, the IIU has recently gained considerable

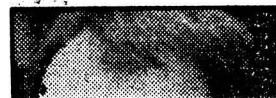
same prison together after 1979.

In Fred Many's case the sentence discount was awarded in part for his evidence in a conspiracy-to-murder trial involving Tom Domican and Peter Drummond.

In allowing Many's appeal and giving a four-year discount the NSW Court of Criminal Appeal held that his "assistance in this and other matters here mentioned was significant, substantial and true".

But some nine months earlier the Court of Criminal Appeal had upheld Domican and Drummond's appeal against conviction on this charge precisely on the ground that Many's evi-

RAYMOND DENNING: He named Anderson.



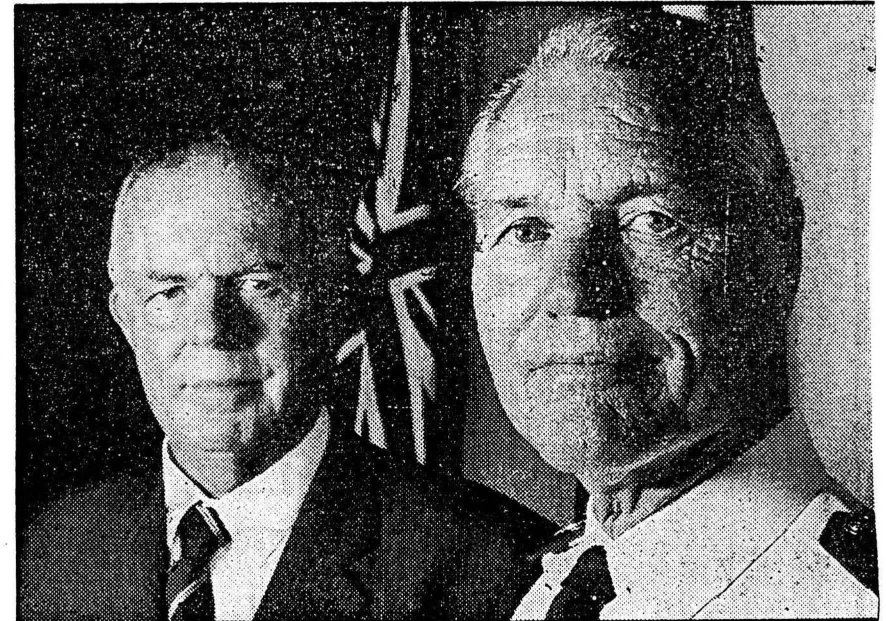
is on record as saying that "the Crown can't be too fussy who its witnesses are".

Evidently, it is not. For it has relied on witnesses such as a brain-damaged informant who did not know what day, month or even year it was and an informant of who a magistrate said: "If ever there was a proven liar in a courtroom it was (the informant)".

The time has arrived to institute an inquiry into a number of cases where convictions have been obtained based on the evidence of prisoner informants. Prisoner informants could be offered immunity against prosecution for perjury if they gave evidence before such an inquiry.

They could be asked whether their evidence in particular cases was true and, if not, whether it was induced or recruited and by whom.

If it appears that the informant's evidence was false or improperly induced, the inquiry should also examine whether the convictions should stand.



EX-POLICEMEN IN CHARGE OF JAILS: Ross Nixon (left) and Angus Graham.

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or transfer, access to witness protection programs, recommendations for bail, favourable parole assessments, day release, contact visits, phone calls, property, drugs and so on.

A third condition is the increase in the power and influence within prison departments of specialist intelligence units and the breakdown of the traditional separation between police and prison departments.

Again, this is most marked in NSW in the form of the Internal Investigation Unit (IIU) run by Ron Woodham.

Set up in the late 1970s, the IIU has recently gained considerable power in decisions over classification, prison transfers and the witness protection program.

These are valuable bargaining chips and prisoners allege that the IIU has been at the forefront of recruiting prisoner informants.

Particular claims of inducements are currently before the Independent Commission against Corruption.

The activities of the IIU and the access to prisons enjoyed by certain detectives, claimed by prison officers to be "running" particular prisoner informants, are examples of the increasing intermeshing of prisons and police under the Greiner Government.

This intermeshing is symbolised by the appointment of two retired police chiefs — Angus Graham and Ross Nixon — to head the Department of Corrective Services.

It is not the giving by prisoners of evidence *per se* that is objectionable. There is a place for prisoner evidence and people should not be disbelieved merely because they are in jail.

The key issues are the *reliability* of the evidence and the *integrity of the legal processes*. On both these fronts there is much to worry about in the new growth industry.

Reliability is clearly in question in the Hilton Hotel bombing trial of Tim Anderson.

Raymond Denning claimed that Anderson reaffirmed his responsibility for the bombing in a conversation in prison in 1984. But prison records show conclusively that they were never in the charges precisely on the ground that Many's evi-

RAYMOND DENNING: He named Anderson.

TIM ANDERSON: Denied prison talk.

FRED MANY: Conflicting stories.

dence was unreliable. Many gave the court three wildly conflicting versions of events.

In assessing the reliability of evidence we might reflect on the fact that some prisoner informants have been used repeatedly in different cases.

One has figured in five different murder cases.

It is rather stretching the bounds of credulity to believe that in the rumour-mill atmosphere of a prison, inmates would continue to confess serious crimes to known prison informers.

Prisoner testimony must be subject to the most rigorous scrutiny lest evidence be manufactured merely for the purpose of exchange.

The NSW Attorney-General, John Dowd, QC,

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THE LAW

Prisoner informants: the new growth industry

Prisoner informants have played a key role in several well-publicised criminal trials
David Brown *looks at the implications*

Prisoner informers are playing an increasingly significant role in the Australian criminal justice system, figuring prominently in some of the most controversial cases of recent times. They were there at the Hilton bombing trial, the Grassby prosecution, Tom Domican's various conspiracy-to-murder trials, the charging of Darren Brennan, and the Walsh street police shootings case.

In the Hilton case, prisoner informant Ray Denning received indemnities against major armed robbery charges in Queensland in exchange for information. Favourable character evidence has been given on his behalf by detectives, and he now speaks of applying for the $100,000 Hilton bombing reward. Fred Many, convicted of sexual assault and attempted murder, received a four-year discount on his sentence from the NSW Court of Criminal Appeal partly in recognition of his evidence in a conspiracy-to-murder case. That decision was upheld by the High Court in February this year.

The role of informants in criminal justice has a long history. What is distinctive about current developments is the use of *prisoner* informants. Why this striking growth?

Juries are becoming increasingly reluctant to believe uncorroborated confessional evidence supplied by police but denied by the accused. The introduction of tape and video recording of police interrogation in most Australian states will make outright fabrication of confessional evidence more difficult. And the High Court has recently added a corroboration warning requirement.

In this climate the evidence of prisoner informants provides a convenient civilian alternative to police testimony. As senior NSW public defender Peter Hidden has noted, evidence from prisoners can appear persuasive to juries suspicious of police evidence. Prisoners, he says, 'are often down to earth, appealing characters who appear to have no motive to lie... some are very skilled liars... who have learnt to work the system'.

Especially in NSW there is a second reason. The repressive and punitive regime instituted by prisons minister Michael Yabsley fosters a trade in testimony. Prisoners who turn informants can expect privileges — informal grants of immunity and sentence discounts, for example, or favourable parole assessments and other special treatment.

A third factor is the rise of the new investigative agencies like the National Crime Authority and the increase in the power and influence within prison departments of specialist intelligence units. The traditional institutional separation between police and prison departments is breaking down. Again, this is most marked in NSW, where the Internal Investigation Unit (IIU) has recently gained considerable power in decisions over classification, prison transfers and the witness protection program. Prisoners allege that the IIU has been at the forefront in recruiting prisoner informants using these valuable bargaining chips; specific allegations are being investigated by the NSW Independent Commission Against Corruption (ICAC).

This is not to say that evidence should be discounted merely because it is offered by a prisoner. But on the central issues of the reliability of the evidence and the integrity of legal processes there is much to worry about in the new growth industry.

In the Anderson case, for example, Denning claimed that as well as the 'telephone' incident Anderson reaffirmed his responsibility for the Hilton bombing in a conversation in prison in 1984. Yet prison records show conclusively that they were not in the same prison after 1979. In the Many case the NSW Court of Criminal Appeal held that Many's 'assistance in this and other matters here mentioned was significant, substantial and true'. But some nine months earlier the Court of Criminal Appeal had upheld Domican and Drummond's appeal against conviction precisely on the ground that Many's evidence was unreliable!

In assessing the reliability of the evidence we might reflect on the long pedigree of what is a small and select breed of informants. Eric Heuston cropped up in the Beach inquiry in 1978 in relation to three well-publicised cases. Beach described Heuston as 'tainted', 'devious', 'a shadowy figure', a well-known informer who had set up fellow criminals, in some cases for crimes of which he was himself suspected, including murder. Beach described it as a 'vice' that police 'should be content to rely on evidence from such

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a tainted source'. Vice or not, the NCA (six times) and NSW police and Director of Public Prosecutions have used Heuston repeatedly since Beach's findings, most recently in the various prosecutions of Tom Domican.

In some cases the informants have eventually been completely discredited in court, as was the case with 'Mr Smith', used repeatedly by the NCA. Others, like Fred Many, have changed their testimony repeatedly. The recipients of these 'confessions' are often from the same small group of known informants, with one figuring in five different murder cases. Some informants have claimed that their earlier testimony was induced by incentives held out by police.

Which is where the concern for the integrity of the legal process arises. There must be a range of much stricter mechanisms of regulation and accountability, to ensure that testimony is not being bought. While there are some inadequate guidelines in relation to immunities and sentence discounts, other incentives and inducements claimed by prisoners are far more subterranean and unregulated. Attorneys-general and officers of the state directors of public prosecutions need to be reminded that the prosecution is required to exercise an independent assessment of the credibility of the Crown's evidence, with an eye to the Bar rules and to ethical duties.

In NSW, in addition to the ICAC investigation into prisoner informants and the NSW attorney-general's announced review of the sentence discount, it is also time to institute an inquiry into a number of cases where convictions have been obtained based on the evidence of prisoner informants. If it appears that the informant's evidence was false or improperly induced the inquiry should also examine whether the convictions should stand.

An inquiry is currently under way in Los Angeles into 200 murder cases in Southern California where convictions were obtained through reliance on the testimony of prisoner informants. Sixteen people convicted in those cases are on Death Row. The inquiry was established after one prominent informant admitted manufacturing evidence in numerous cases.

Equally forthright responses are needed from Australian state and federal government agencies to the various problems thrown up by the growth industry in prison informants. ●

David Brown is an associate professor in law at the University of NSW

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FEATURE

Prisoner Informants

THE PRIVATISATION OF POLICE VERBAL?

David Brown

The province of reward is the last asylum of arbitrary power
Jeremy Bentham 1825

The evidence given by prisoner informant, Ray Denning, in the Hilton bombing trial against Tim Anderson, the recent furore surrounding the sentence discount obtained by Fred Many, and the charging of Darren Brennan serve to illustrate a shift of sites in the manufacture of confessional evidence from police station to prison yard: a privatisation of police verbal.

In exchange for information in a range of matters former folk hero and escapee Denning has received indemnities against major armed robbery charges in Queensland. Favourable character evidence has been given on his behalf by detectives in relation to serious charges where he has appeared before the courts.

Fred Many who was convicted of sexual assault and attempted murder after seizing a 15 year old girl from the street, locking her in the boot of his car, repeatedly raping and then strangling her and leaving her for dead, received a four year discount from the NSW Court of Criminal Appeal which was upheld by the High Court in February this year. Many's discount was in part a reward for giving evidence in a trial in which Tom Domican and Peter Drummond were charged and initially convicted of conspiracy to carry out a prison murder. The NSW Court of Criminal Appeal in upholding Many's appeal and setting a four year sentence discount said "it is not disputed that his assistance in this and the other matters here mentioned was significant, substantial and true". But some 9 months earlier the NSW Court of Criminal Appeal allowed an appeal by Domican and Drummond against their conviction after Many gave three wildly conflicting versions of events to the Court. Acting Chief Justice Kirby said that Many's conflicting versions of events went to the very heart of the truth of what he said at the trial. Many also gave evidence against Domican and Drummond in a charge of conspiracy to murder the head of the Corrective Services Department Internal Intelligence Unit, Ron Woodham. Both were acquitted of this charge.

Darren Brennan was charged with robbery by the police a few days after he had been shot in the face by a member of the NSW Tactical Response Group. The robbery charge was later withdrawn after a prisoner informant claimed he had been coerced into making the allegations against Brennan.

While the role of informants in criminal justice has a long history what is distinctive about current developments is a growth industry in the use of prisoner informants. Prisons are becoming reservoirs of evidence on tap to shore up, or in some cases initiate, prosecutions. The modus operandi runs along these lines. A prisoner or prisoners give evidence that in conversation another prisoner admitted committing a particular crime. Sometimes a general broadcast of guilt is alleged. In Anderson's case for example, Denning alleged that in a conversation on the prison "telephone" (shouting into the toilet pipes after pumping out the water) Anderson claimed to have carried out the Hilton bombing (quite contrary to Pederick's later story). Denning was forced to admit that if this happened any of up to ten prisoners in adjoining cells could have heard the conversation. Denning also claimed that Anderson reaffirmed his involvement in a conversation in prison in 1984. But prison records show conclusively that they were never in the same prison together after 1979.

A number of conditions are sustaining this growth industry. First, police verbal, the fabrication of confessional evidence by police, is falling into disfavour. Juries are becoming increasingly reluctant to believe uncorroborated confessional evidence denied by the accused and not backed up by any of the available sources of independent verification. The introduction of tape and video recording of police interrogation will make outright fabrication of confessional evidence more difficult. And the strong push in the case law, initiated by the late Justice Murphy and forcefully continued by Justice Deane, to require a corroboration warning in relation to contested confessional evidence where police have failed to use available recording technology, has just recently won over the majority in the High Court in McKinney and Judge v R (unreported 22 March 1991 91/005).

In short the evidence of prisoner informants provides a convenient non-police replacement for police verbal, a privatisation of the verbal. As administrative and legal regulation

of police interrogation increases so does the attractiveness of the (evidentially) largely unregulated prison year or cell as a site for the production of prosecution testimony. Other benefits ensue. Senior Public Defender Peter Hidden has noted that evidence from prisoners can appear persuasive to juries suspicious of police evidence:

They (prisoners) are often down to earth appealing characters who appear to have no motive to lie ... some are very skilled liars ... who have learnt to work the system.

Second, the repressive and punitive regime in NSW prisons instituted by Minister Michael Yabsley fosters a trade in testimony. The deterioration in prison conditions, the overcrowding, the increase in levels of violence and assault, longer sentences, the abolition of remissions, the property confiscation policy, all increase the pressure to find new forms of personal advantage, new incentives within the system. The emerging incentive is a developing market in criminality, the volunteering of testimony in exchange for a range of privileges. These range from formal grants of immunity or informer sentence discounts to (prisoners allege) actual early release, favourable classification or transfer decisions, access to witness protection programs, recommendations for bail, favourable parole assessments, day release, contact visits, phone calls, property, drugs etc.

A number of conditions are sustaining this growth industry. First, police verbal, the fabrication of confessional evidence by police, is falling into disfavour . . . .

Second, the repressive and punitive regime in NSW prisons instituted by Minister Michael Yabsley fosters a trade in testimony . . . .

Third, the increase in the power and influence within the Department of Corrective Services of the Internal Investigation Unit

Third, the increase in the power and influence within the Department of Corrective Services of the Internal Investigation Unit (IIU) run by Ron Woodham. Set up in the late 1970s the IIU has recently gained considerable power in decisions over classification, prison transfers and the witness protection program. These are valuable bargaining chips and prisoners allege that the IIU has been at the forefront of recruiting prisoner informants. Particular claims of inducements are currently before the NSW Independent Commission Against Corruption (ICAC). The activities of the IIU and the access into the prisons enjoyed by certain detectives, claimed by prison officers to be "running" particular prisoner informants, are examples of the increasing intermeshing of prisons and police under the Greiner government. An intermeshing symbolised by the appointment of two retired police superintendents to head the NSW Department of Corrective Services.

Well, what is wrong with this you may ask, is there not a public interest in destabilising any notion of honour among thieves? Indeed it is important to be clear exactly what it is that is objectionable about these practices. It is not the giving by prisoners of evidence per se. There is a place for prisoner evidence and people should not be disbelieved or their evidence discounted merely because they are prisoners. The key issues are the reliability of the evidence and the integrity of the legal processes. On both these fronts there is much to worry about in the new growth industry.

In assessing the reliability of the evidence we might reflect on the fact that some of these prisoner informants have been used repeatedly in different cases. One has figured in five different murder cases. It is rather stretching the bounds of credulity to believe that in the rumour-mill atmosphere of the prison prisoners would continue to confess the commission of serious crimes to known prison informers. In some cases the informants have eventually been completely discredited in court. In others they have changed their testimony repeatedly. In yet other cases informants have claimed that their earlier testimony was induced by incentives held out by police or members of the IIU.

The point here then is that in the context of an increasingly brutalised and impoverished prison regime prisoners are rendered peculiarly vulnerable to pressure. Pressure from prison, police and prosecution authorities appearing to offer incentives to testify. Pressure from other prisoners hostile and violent towards informers ('dogs' in prison parlance). Prisoner testimony that another prisoner confessed to a crime may in fact be honest and reliable. It may not. But the conditions of its emergence and making must be subject to the most rigourous scrutiny lest evidence be manufactured merely for the purpose of exchange. In the testimony bazaar prisoners are hardly "free" contractual agents and have little to offer. Save claims to knowledge of conversations potentially exchangeable against the length and conditions of their own punishment.

Which is where the concern for the integrity of the legal process arises. There must be a wide range of much stricter mechanisms of regulation and accountability, to ensure that testimony is not being bought by the state. However sensitive the issues and dangerous the role of informant there is nevertheless a need for openness in the processes and a clear articulation of the criteria on which particular decisions are made. Whatever one may think about the merits of an informer sentence discount, as in Many's case, at least it is made in public and can be the subject of public debate and criticism. Some of the other incentives and inducements claimed by prisoners are far more subterranean and may never be revealed. Serious questions arise about the ethics of prosecution authorities in relying on the evidence of particular prisoner informants, over and over again in different cases.

The NSW Attorney-General is on record as saying that "the Crown can't be too fussy who its witnesses are". That it is not is evident. Evident in its reliance on witnesses such as the brain damaged informant who did not know what day, month or even year it was, or the informant described by a magistrate in the following terms: "if ever there was a proven liar in a court room presided over by me it was (the informant)". The Attorney-General and the officers of the DPP need to be reminded that the prosecution is required to exercise an independent assessment of the credibility of the Crown's evidence, with an eye to the Bar Rules and to ethical duties.

Responses to the multitude of issues thrown up by the increased use of prisoner informants need to be taken up on many fronts. The National Crime Authority has been among the most generous in doling out immunities and has repeatedly used certain informants later completely discredited. Hopefully the current inquiry by the Parliamentary Joint Committee on the NCA will shed some light on these issues. In NSW in addition to the ICAC investigation into prisoner informants and the NSW Attorney-General's announced review of the sentence discount

it is also time to institute an inquiry into a number of cases where convictions have been obtained based on the evidence of prisoner informants. Whilst it would involve a certain irony consideration could be given to an offer of formal immunities against prosecution for perjury to particular prisoner informants to give evidence before an inquiry. They could be asked whether their evidence in particular cases was true and if not whether it was induced or recruited and if so by whom. If it appears that the informant's evidence was false or improperly induced the inquiry should also examine whether the convictions should stand.

An inquiry is currently under way in Los Angeles into 200 murder cases in Southern California where convictions were obtained through reliance on the testimony of prisoner informants. Sixteen people convicted in those cases are on Death Row. The inquiry was established after one prominent informant admitted manufacturing evidence in numerous cases. He obtained the information which gave seeming veracity to his evidence through phone calls to the District Attorney's office. Posing as a police officer he obtained information from the file. An article in the American Bar Association Journal quotes the President of the California Attorneys for Criminal Justice as saying that these cases represent:

an unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement officials who are running a training ground for snitches over the county jail, and prosecutors who are taking what appears to be the easy route, rather than putting their cases together with solid evidence.

In addition to initiating the review of 200 murder cases the Los Angeles County Attorney's office has also made two procedural changes. The Director of Criminal Law must give his approval before an informant can be used at trial and corroborating evidence is necessary.

Similar open recognition and forthright responses are urgently required from Australian state and federal government agencies to the various problems thrown up by the growth industry in prison informants.

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Academics for Justice

In the aftermath of the astounding conviction of Tim Anderson in the Hilton bombing trial a group of academics founded Academics for Justice. Following on from the Gundy, Blackburn and Brennan fiascos the Anderson conviction tapped widespread disquiet over a recent series of apparent miscarriages of justice in Australia. The response was extraordinary. Within two weeks over 300 academics around Australia signed a petition calling for a Royal Commission of Inquiry into the Hilton bombing. In addition the organisation has received letters of support and submissions from many people in all walks of life, indicating the deep levels of public concern over justice issues.

Common elements of concern which emerge from many of the cases include the way in which police investigations are carried out, the way in which prosecutions are conducted and the manner in which news media present cases.

Academics for Justice held a well attended one day conference, "Where Justice Fails", in Sydney in February. Speakers included Dr Paul Wilson on Miscarriages of Justice, Barrister Tom Molomby on the Guildford four and Birmingham six cases, David Brown of UNSW Law School on the Growth Industry in Prison Informants and Russell Hogg from Macquarie Law School on the Anderson case.

A book based on papers given at the conference will be published shortly. Inquiries about the book or the group can be directed to Russell Hogg, the Law School, Macquarie University.

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Prison informers

Where the grasses are greener

David Brown

> *'What all this comes down to is that wrongful means must not be used to achieve noble ends.'*
>
> Report, Vol. 1, p. 188

The NSW ICAC has issued a contradictory but possibly useful report on prison informers giving a rare glimpse into a secret part of the justice system.

The two-volume NSW Independent Commission Against Corruption (ICAC) *Report on the Investigation Into the Use of Informers* released in January is both constructive and problematic. Constructive in its acknowledgement that what many 'judges and legal commentators' have been saying about the dangers of the use of informers by criminal justice agencies has been, to use Commissioner Temby's words, 'demonstrably true' (Vol.1, p.58).[1] Constructive in its various recommendations aimed at stemming abuses, ensuring greater safeguards, and promoting more positive duties of disclosure and accountability on the part of criminal justice agencies.

Problematic in that once again we seem to have much wrongdoing but few wrongdoers. Former head of the Internal Investigations Unit and current Assistant Commissioner of the NSW Department of Corrective Services, Mr Ron Woodham, was found to have acted corruptly in relation to two matters and is recommended for disciplinary charges, one of the only two such recommendations in the Report. Woodham has since challenged the 'corrupt' finding in the NSW Supreme Court.

Problematic in the failure to coherently examine the jurisprudence of reward and to connect this discussion with the key issues of the nature of the prison regime and the forms of power exercised within it. Problematic in the inconsistency between the general theme that the end does not justify the means and the pragmatic approach to the use of informers which permeates the Report.

The Report in brief

In the Preface to the first volume, four themes are identified: the nature of 'favours' (p.vii) received by informers; the issue of whether the end justifies the means; the 'stark lack' (p.viii) of accountability mechanisms; and the need for the proper flow and handling of information by public officials.

In relation to the first theme the Report found that 'some prisoners were recruited in an unprincipled manner' (p.49) in 'covert' ways. The Commissioner saw the 'covertness' founded on:

> the assumption that benefits should be hidden, and that at the Commission hearing they should be denied where practicable, this presumably on the basis that the ICAC would condemn the provision of rewards to informers. [p.54]

A not unreasonable expectation one might have thought. Interestingly the next sentence reads: 'But that is not and never was the case'.

The Report adds that there is not 'anything wrong with such rewards, so long as appropriate safeguards are in place and appropriate disclosure made . . .' (p.62). The major recommendations of the Report are therefore

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concerned with establishing safeguards and promoting disclosure. The key requirements here are seen as a 'sceptical' attitude on the part of authorities (p.59), the 'fullest possible knowledge being possessed in relation to potential criminal witnesses' and their use 'only where substantial external support for what they say exists' (p.60). The last of these had already received the judicial imprimatur of the High Court in an important recent judgment in *Pollitt v R* (1992) 66 ALJR 613.[2]

Specific recommendations include:

- the strengthening of existing DPP guidelines on the use of informers,[3] such guidelines to apply also to police (p.80) and Corrective Services officials (p.83);
- each agency (and especially Corrective Services where files were in an 'appalling order and condition' (p.86) and where there had been systematic non-compliance (p.106) with defence subpoenas for information) should be required to collect information in 'a coherent fashion';
- consideration of legislation to require a formal statement setting out 'any and all considerations promised to or received by' the informer to be filed in court whenever an in-custody informant seeks to give evidence for the Crown of any alleged jail-yard confession (p.82); and
- consideration of the provision of a 'disclosure certificate' by the police officer in charge of the case that all unused material has been disclosed to the prosecution (p.98).

The last of these indicates Commissioner Temby's belief that the major problem lies in the failure of the police to disclose information about negotiations with informers to the DPP and hence the failure in turn to inform the defence and courts.

The case studies in the second volume of the Report are detailed and revealing. The nine case studies break down as follows: three prison murders (Holden, Mawson, Delprado), two prison bashings (Bragge and Booth), the targeting of an alleged prison and criminal heavy (Domican), the attempted discrediting of the victim of a police shooting (Brennan), the targeting of a political activist (Anderson), and the targeting of allegedly corrupt police (Operation Raindrop).

The nature of the cases indicates that the use of prison informants is reserved for particularly difficult to solve cases involving high profile or targeted individuals. It is not a mass practice used in run of the mill cases and while it seems to have developed in response to the partial demise of the police verbal (fabrication of confessional evidence by police) it is far from a complete substitute. Reports of the death of the police verbal are exaggerated, which might be pointed out to those instructing counsel appearing for the Police Service at the current ICAC inquiry into the relationship between certain police and criminals. At times it has seemed that such instructions are to deny the existence of police verbal, a somewhat forlorn and incredible enterprise.[4]

What the Report reveals

There is much in these case studies that reveals the networks through which prison informers were recruited, the wide range of rewards they were offered and the ways in which information about these processes was withheld from defence lawyers and from the courts. To that extent the case studies tend to contradict the claim made in the first volume that:

> there is no evidence that the rewards provided were consistently excessive, and absolutely no evidence that Woodham or anyone else provided benefits in order to obtain false statements from prisoners inculpating others. This investigation has not established any systematic misconduct on the part of public officials, whether viewed as groups or individuals. The abuses that occurred were relatively isolated. The suggestions which were made before the investigation commenced — that prison informers were being used to obtain unjustified convictions — are devoid of substance. [p.53, emphasis added]

There is a significant tension in the Report between such rather sweeping general overview statements and specific evidence on which one would hope such statements are based.

Whether the rewards provided were 'consistently excessive' is perhaps a matter of opinion. But let us be clear as to what those rewards were as revealed in the Report:

- actual early release;
- significant sentence discounts;
- indemnities for other, in some cases very serious, offences;
- recommendations for substantial financial rewards (in Denning's case $250 000);[5]
- statements (which were in some cases false and in others omitted key information such as the commission of further offences) in favour of informers at bail hearings, sentence hearings, applications for sentence discount hearings, applications for parole, applications for fixed sentences;
- consideration in relation to outstanding charges;
- assistance to friends or relatives with charges, bail;
- assistance with inter-state transfers;
- transfer into the Special Protection Prison;
- lower security classification;
- the movement of prisoner associates (in one case a sexual partner);
- access to programs and work release;
- greater access to phone calls;
- greater access to extra visits and to contact visits;
- turning a blind eye to drug possession, drug dealing, bashings;
- the promise to remove material from prison files;
- the placing of false information on prison files.

As to there being no evidence that officials provided benefits in order to obtain false statements, this is contradicted in particular cases, for example Anderson who was supposed to have confessed to Ray Denning on an occasion when they were not even in the same prison. And indirectly contradicted at other places in the Report, for example where it is stated 'as to actual lies told by informer witnesses, it is probably true to say one could investigate from now until the end of the century and not run out of examples' (p.59). It strains credulity to assume that officials had no idea that benefits were being offered in exchange for lies in relation to this 'end of the century' pool of examples. Indeed it assumes that 'lies' spring fully formed from the mouths of informers rather than being the *negotiated* product of the recruitment, coaching and inducement practices of key police and corrective services officials, practices which are clearly spelt out in relation to many of the case studies in Volume 2 of the Report.

As to there being no evidence that prison informers were being used to obtain unjustified convictions, the NSW Court of Criminal Appeal begged to differ in the Anderson appeal (*Anderson* (1991) 53 A Crim R 421) on just such a basis. Indeed Mr Temby quotes the coded communication between

two of the five prisoners in what he describes as 'a queue of informers that formed up behind Denning', 'expressing pleasure that "we can get someone convicted even when he is innocent like Anderson"'. Were it not for the good sense of both juries and appeal courts in some of the nine case studies and in other unexamined cases, many other unjustified convictions would have occurred. In other cases involving informers, miscarriages *have* arguably occurred.[6]

Indeed the Report acknowledges the potential for miscarriages of justice:

> At the present time the course of justice in criminal prosecutions could be perverted by various failings demonstrated in evidence, in particular lack of known and consistently applied policy in relation to the handling of informers, severe deficiencies in record keeping, frequent failures by the Crown to provide information to the defence in accordance with its legal obligations, and failure by Corrective Services to obey subpoenae in accordance with law. [Vol 2, p.ix]

But if 'suggestions . . . that prison informers were being used to obtain unjustified convictions — are *devoid of substance*' then it seems the worries are all in the future conditional, potentialities only, which is reassuring indeed.

Yet at another point in the Report it is stated:

> I cannot say whether the blanket approach adopted by Corrective Services personnel, whereby non-privileged documents from 'P' files were kept away from the courts, led to miscarriages of justice. That question was not investigated, as being beyond the terms of reference. However the possibility must be recognised, and that serves to emphasise how grave the situation has been. [p.106]

Simultaneously it seems, miscarriages of justice or 'unjustified convictions' are absolutely ruled out, a possibility, and in relation to a specific practice, a possibility which was not investigated.

Not to put too fine a point on it, there are numerous contradictory positions adopted within the space of a few pages, indicating either a certain lack of intellectual rigour or a desire to have it every which way. For example on page 60 it is said:

> All involved in the prosecution process — police investigators, prosecutors, judges, and, in the case of prison informers, officials from Corrective Services — should desire that convictions be recorded only against those who are objectively guilty.

Yet on page 66 it is said:

> the purpose of a contested trial is to decide whether or not the accused is guilty according to law. The trial does not aim to ascertain objective truth . . .

Now granted these are complex issues of legal philosophy, but the question remains, *which is it to be*?

Guilt: ends and means

Does 'objective guilt' exist, already formed, prior to and outside of the operations of the criminal justice system or is the category of legal guilt at least in part a product or effect of that system? For what it is worth my vote goes to the latter position. The Report's confusion over such basic issues is again illustrated in the somewhat rhetorical conclusion to Volume One which quotes Aldous Huxley:

> Good ends . . . can be achieved only by the employment of appropriate means. The end cannot justify the means, for the simple and obvious reason that the means employed determine the nature of the ends produced.

I read this as saying that ends and means are connected, that ends are a product of means and cannot be evaluated separately from them. But the paragraph which approvingly introduces this quote of Huxley's offers the paraphrase 'What all this comes down to is that wrongful means must not be used to achieve *noble* ends' (p.118, emphasis added). But is not Huxley saying that we cannot talk of 'noble ends' in and of themselves without a consideration of the means used to achieve them?

To be more concrete, let us say hypothetically a police officer planted heroin on a suspect. Is it meaningful to say that this is an illegitimate means to the 'noble end' of securing the conviction of a suspected heroin user/supplier? Surely the end becomes somewhat less than *noble* once illegitimate means are used, not the least because it is not the role of the police officer to make a decision about the guilt of a suspect and then fabricate the evidence to accord to that belief and ensure that result.

Again all this might be seen as just a slip, the criticism semantic nit-picking. But if it is just a slip I suggest it is a revealing one, illustrative of considerable conceptual confusion. Of course this is not to suggest that such confusion might not have certain productive consequences for the ICAC, currently under attack from many quarters including its architects. Providing something for everyone: criticism, approval, condemnation, clearance, reform; all to be raked over and publicly re-presented through the medium of a news media likely to focus on the most sensationalist findings, picking and choosing (often from the press release rather than the Report itself) colourful quotes, not with reference to inconsistencies and contradictions but according to sets of undisclosed criteria of newsworthiness.

Ultimately though, the theme of the end not justifying the means does not really work in the Report to provide any very helpful guidance on the difficult decisions involved in determining the reliability of potential evidence emanating from prison informers and addressing concerns over the integrity of criminal justice processes. This is in part because there is little connection between general moral prescriptions such as 'The truth is an absolute' to be found on the final page of Volume One and the specific material and discursive practices through which a range of criminal justice agencies construct and produce a 'truth' or 'truths' for the particular purposes of determining legal culpability in relation to criminal charges. As in so many areas, absolutist or fundamentalist notions of truth tend to operate as a barrier to developing more nuanced and effective ethical standards precisely because they limit the roles of agency and reflexivity in the evaluation of human conduct. In providing generalist statements of principle which bear only in the most remote and abstract way on the complex legal and ethical contexts in which criminal justice officials are actually acting, they provide both little effective guidance and absolve individuals from being held responsible for the consequences of their own actions.

The nature of the prison regime

Another disappointment in the Report is the failure to link the abuses associated with the use of prison informants to an analysis of the nature of the prison regime. There is some discussion in the Report on the motivations behind perjury. Explanations provided include 'personal advantage', 'boredom', 'to engender some action', 'because they are induced to do so by threat or payment' (cf the claim previously discussed that there was no evidence of providing 'benefits in order to obtain false statements from prisoners inculpating others'

p.53). And in adopting Justice McHugh's discussion in *Pollitt* that the unreliability of prisoner informants 'arises not so much because the prisoner has been convicted of serious crime but because the character of that person has been altered for the worse by exposure to the values and culture of prison society' (p.57) the Report moves beyond the facile pathologising of prisoners practiced by many critics of the use of prison informers. This view, common amongst talkback radio ideologues is that prisoners are not to be believed merely because they have by definition been convicted of crimes and therefore are inherently untrustworthy or liars. Such views are another version of convict taint and forfeiture and the ICAC does well to follow Justice McHugh and move beyond them.

However while acknowledging the role of the 'values and culture of the prison society' a remarkable disconnection is achieved in that such values and culture appear to have been generated entirely autonomously of the activities of those who run and govern the prison. Autonomous of the battery of disciplinary and normalising practices laid down in Prisons Acts, Rules and Regulations and in the day to day routines and regimes of prison life. Strangely, one might think, the structures and agencies through which prisons are actually run seem to have no effect in shaping the prison values and culture.

A consequence of this sleight of hand is that discussion of the nature and history of, to take but one example, legitimate incentives within the prison system such as a proper remission system, is deemed irrelevant to the issues discussed in the ICAC Report. But the dubious growth in prison informers has been fuelled by repressive policies in relation to prison conditions,[7] the introduction of fixed parole terms under the banner of 'truth in sentencing' and especially the abolition of remissions in a number of states. This is particularly the case in NSW, where most of the problems and abuses seem to have arisen.

The promotion of informing as one of the few remaining incentives in the prison system encourages manipulative and dishonest behaviour, brings the criminal justice system into disrepute, and induces cynicism against a system which is seen to have a price for everything, in which even criminality can be turned into a commodity. Quite what would be wrong with a formalised system of remissions and other incentives oriented around the promotion of positive values associated with education, participation in programs, work, cultural activities, and so on, is not clear. Perhaps the difficulty is that this might put an onus on governments to actually provide such services!

The future of informing

Ultimately Commissioner Temby places the 'prime responsibility for fixing up the system' back on the DPP, the Police and Corrective Services. He adds that 'much will depend upon the willingness of senior officials in those organisations to recognise the need for, and implement, change' (p.83.) It will be interesting to see how these agencies respond to the Commissioner's challenge, given that this is arguably akin to putting the ball back where it was before.

Doubt as to the commitment of at least one of these agencies is justified on the basis of a brief 'postscript' to the report. On 11 November 1992, nearly at the end of the inquiry, the ICAC received a letter from the Office of the Solicitor, NSW Police Service, requesting that the Report 'not refer to the name or other identifying characteristics of 16 individuals', together with a request for permanent suppression orders. Among the 16 were Cavanough, Cook, Denning, Heuston, Many, Wakefield and Waters, in short the key informers, who together with their handlers had been the major subject of the whole inquiry.

The application was denied, the Commissioner describing it as having 'no proper basis' (p.112). He adds that the fact that the application was even made 'demonstrates an attitude which is protective, possessive, and excessive'. The application also signals the unrepentant nature of the police service in relation to the demonstrated abuses which emerged during the Commission's hearings and which now have been detailed in its Report. Such a response makes a faith in the preparedness of the key criminal justice agencies to voluntarily take up the Report's main recommendations appear somewhat naive.

In the week the Report was released a successful action was taken in the Administrative Law Division of the NSW Supreme Court by several police officers, investigated as part of the separate ICAC inquiry into the 'relationship between police (especially past and present 'Detectives and criminals . . . with particular reference to defined areas of criminality, including armed robberies and illegal gambling'). Justice Cole ruled on January 29 that allowing allegations by criminal informer Neddy Smith against the officers in open hearing unnecessarily damaged their reputations and amounted to a denial of natural justice.[8]

Commissioner Temby quickly announced his intention to appeal and moved hearings into closed session, noting that the decision would have significant implications for the future public conduct of Royal Commissions. The appeal was heard before the NSW Court of Appeal in February and judgment was delivered on 30 March.[9] Chief Justice Gleeson, with whom Justice Mahoney agreed, in the majority, upheld the Commissioner's appeal, holding that while there were clearly dangers to the reputations of the police officers involved the Commissioner had not made any error of law in exercising the statutory discretion open to him to hold the hearings in public.[10] Gleeson CJ stated that 'there is a fallacy in passing from the premise that the danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires that proceedings be conducted in all respects in such a way as to minimise damage to reputation' (p.13).

Justice Kirby, President of the Court of Appeal dissented. Arguing that 'the categories of procedural fairness are not closed' he placed particular weight on 'the limitations which Mr Smith placed upon the testing of his evidence' (p.31) in holding that procedural fairness required a different exercise of the discretion. The limitation referred to was Smith's indication that, as Gleeson CJ put it, he was not willing 'to implicate criminals who were not police officers', adding his bemusement at 'why he might think he would be at greater risk of reprisals from alleged criminals who were not police officers than from alleged criminals who were police officers is not apparent'(p.5). Noting that his approach was 'necessarily confined to the peculiar facts of this case' Kirby P concluded that 'Natural justice forbade, in the circumstances, the conduct of an inquiry in public in which a notorious criminal secured a free kick against persons who he accused in public but denied the chance of fully testing and answering in public those accusations' (pp.38-9).

This skirmish over the conduct of the continuing inquiry into the relationship between police and criminals featuring

notorious criminal Neddy Smith in the key role as informer in relation to alleged police involvement in armed robberies highlights the uneasy relationship between that inquiry and the Informers Report.[11] Much media comment on the Report referred to the irony of the ICAC criticising police, corrective services and prosecution agencies for their handling of informers while at the same time relying heavily in its other inquiry on an informer such as Neddy Smith.

While the ICAC does run the risk of infringing its own prescriptions on informers the irony is not as clear as has been suggested given the actual findings of the Informers Report, as outlined above. For the Report seems to be run through with a sense that the various 'stratagems' were well intentioned, 'noble ends', and a supportive attitude to the use of informers. An attitude forged under the banner of generalist statements of principle such as the one quoted earlier that 'The truth is an absolute' with its attendant call to public officials: 'the only safe approach is to deal honestly with all. Honesty cannot be selective' (p.118).

The ICAC Report has usefully contributed to public exposure of the abuses and dangers involved in the use of prison informers. This exposure, together with an increasing awareness amongst the judiciary and the general public from whence juries are drawn, of the many dangers in the use of prison informers, dangers productive of miscarriages of justice, may work to stem the further growth of some of the practices so revealed. It seems unlikely however that this will be the last we will hear of the use of prison informers. The ICAC itself will see to that.

References

1. The report is remarkably coy in not nominating the 'various commentators' referred to, although some of the culprits emerge from Justice McHugh's judgment in *Pollitt's* case (see ref.2.) where citations *are* given. This discrete approach to the citation of sources is compounded by the absence of any bibliography to the Report, reducing its usefulness as a resource and research document. Perhaps this complaint is mere academic affectation, but given the time and resources allocated to the inquiry, compliance with the usual norms of citation and reference might have been expected. For those who do not have *Pollitt* close at hand the articles cited by Justice McHugh are: Brown, D. and Duffy, B., 'Privatising Police Verbal: The Growth Industry in Prison Informants', in K. Carrington, M. Dever, R. Hogg, J. Bargen and A. Lohrey (eds) *Travesty! Miscarriages of Justice*, Pluto Press, Sydney, 1991, pp.181-231; Brown, D., 'Prisoner Informants: The New Growth Industry', (1991) *Australian Society* June; Gibney, J. and Woodyatt, T., 'Gaolhouse Verbal', (1991) 16 *Legal Service Bulletin* 16. For a comment on the ICAC Informers Report see: Brown, D., 'Justice on the word of criminals: a conundrum', *Sydney Morning Herald* 1.4.93.
2. In the leading judgment on this point Justice McHugh pointed out that the conventional corroboration warning 'seems inappropriate' in relation to the evidence of prison informers for the reason that if the accused is already in custody charged with an offence there will already of necessity be some independent evidence connecting the accused with the crime. So that paradoxically a conventional corroboration warning might actually operate to the disadvantage of the accused: 'such a direction might unwittingly induce the jury to believe that it is safe to act upon the evidence of a prison informer because his or her evidence is 'corroborated' (p.57). Justice McHugh went on to state that 'because evidence by prison informers is inherently unreliable, it follows that a confession allegedly made to a prison informer must be the subject of a direction at least as stringent as that required when a disputed confession is alleged to have been made while the accused was in police custody' (p.58). So that the jury should be directed that it is dangerous to act on the evidence of a prison informer unless 'substantially confirmed by independent evidence' and that 'only in the most exceptional case, if at all, could the evidence of a fellow prisoner be regarded as independent evidence for this purpose'. Justices Deane, Dawson and Gaudron, and Toohey supported this conclusion with varying emphases.

   In *R v Clough* (NSW CCA, 3 September 1992, unreported) Hunt CJ at CL 'gathered' a number of propositions from the *Pollitt* judgments (at pp.15-17) and went on to suggest that while the direction to be given:

   > must be moulded to fit the circumstances of the particular case, and not follow any set formula, it should, however include warnings-
   >
   > (a) that the experience of the courts over the years has demonstrated that the evidence of such witnesses is potentially unreliable, together with an explanation as to why that is so;
   >
   > (b) that it is for that reason necessary to scrutinise the evidence of the particular witness in question with great care;
   >
   > (c) that in the absence of evidence of substantial confirmation provided by independent evidence that the confession was in fact made, it is dangerous to convict upon the evidence of that witness;
   >
   > (d) that such independent evidence is unlikely to be provided by a fellow prisoner, because he is likely to be motivated to concoct his evidence for the same reasons; and
   >
   > (e) that, having regard to the potential unreliability of the evidence, there is a risk of a miscarriage of justice if too much importance is attached to it. [pp.17-18]

3. On 16 February the NSW DPP issued an amendment to prosecution guidelines as recommended in the ICAC Report. Under s.13 of the *Director of Public Prosecutions Act* 1986 Guideline 11 dealing with prosecution duties of disclosure was amended by the addition of a section dealing specifically with informers. The addition (in italics) states:

   > The guiding principle is always full disclosure of the case-in-chief for the prosecution and all other evidence relevant to the guilt or innocence of the accused *including, in the case of informers to be called as witnesses:*
   >
   > *(a) the informer's criminal record;*
   >
   > *(b) whether Police or Corrective Services have any information which might assist in evaluating the informer's credibility, particularly as to:*
   >
   > *(i) motivation,*
   >
   > *(ii) previous animosity against defendant(s)/accused,*
   >
   > *(iii) favourable/different treatment by corrective services,*
   >
   > *(iv) mental health/reliability of informer,*
   >
   > *(v) the extent to which public officers have given evidence or written reports on behalf of the informer (e.g. to Courts, Parole Boards)*
   >
   > *(c) whether any monetary or other benefit has been claimed, offered or provided;*
   >
   > *(d) whether the informer was in custody at the time of giving assistance;*
   >
   > *(e) whether an indemnity has been granted or requested;*
   >
   > *(f) whether any discount on sentence has been given for assistance in the matter;*
   >
   > *(g) other current or former criminal proceedings in which the informer has given evidence or was proposed to give evidence.*
   >
   > Such full disclosure may only be limited where there is a real need to protect the integrity of the administration of justice, including the need to prevent the endangerment of the life or safety of witnesses or interference with the administration of justice.
   >
   > In addition on the same date an amendment was issued by the DPP to the statement of prosecution policy dealing with informers.

4. See Brown, M., 'Questions draw hint that the bad old days may linger', *Sydney Morning Herald* 23.11.92. Disgraced former detective Roger Rogerson had earlier shown surprising candour in relation to police practices of verbaling and planting evidence in comments during both a television and print media interview. 'Verbals are part of police culture. Police would think you're weak if you didn't do it . . . The hardest part was thinking up excuses to explain why people didn't sign up . . . they're still doing it.' Murphy, C., 'Tailor made confessions', *Sun-Herald* 13.10.91, p.22.

   And on planting or 'loading up' suspects:

   > Someone would either tap you on the shoulder or come knocking on your door and you'd be given a present . . . the planting of a gun or explosives . . . you know, a couple of sticks of geli, found in their car or in their possession . . . it's so much easier to plant drugs because they're so small . . . it was all done in the interests of, ah, truth, justice and ah, and ah, keeping things on an even keel, and keeping the crims under control. ['Police Story', ABC TV *Four Corners* September 1991]

5. For more detailed treatments of the many benefits obtained by Raymond Dennning see: Robert Brook, 'Raymond Denning's Best Planned Escape', in K. Carrington and others (eds), above, pp.102-128; Anderson, Tim, *Take Two: The Criminal Justice System Revisited*, Bantam Books, Sydney, 1992, pp.83-104; 319-352, especially p.329.
6. See for example *Chidiac v The Queen* (1991) 65 ALJR 207; *Doney v The Queen* (1990) 65 ALJR 45; Brook, R., 'The Conviction of Neil Chidiac: Verdict Unsatisfactory', CEFTAA Occasional Paper, Sydney, 1992. And see generally Carrington and others, above.
7. Previous work has emphasised the deterioration in prison conditions under punitive NSW prisons Minister Michael Yabsley as a major condition encouraging the use of prisoner informers, along with the increasing limita-

tions on police verbal and the rise in the power of the Internal Intelligence Unit of the Corrective Services Department. (Brown and Duffy 1991, above, pp.198-202). But some of the individual cases investigated by the ICAC occurred prior to the Yabsley regime and the IIU was established in 1985. It may have been worth investigating whether another condition for the rise of prison informants was the state of the internal administration of the Department of Corrective Services during and after the scandal surrounding the early release on licence scheme in NSW in the early 1980s and the role of key senior officials common to both periods. The Jackson licence release scheme was referred to the ICAC in August 1988 by then Premier Greiner (*SMH* 'Jackson's jail release scam to go to ICAC' 19 August 1988). For a detailed treatment of this period see Chan, Janet, *Doing Less Time*, Sydney Institute of Criminology, 1992.

8 *Lance William Chaffey & Ors v Independent Commission Against Corruption* Supreme Court of NSW Administrative Law Division 29 January 1993 unreported.

9. *Independent Commission Against Corruption v Chaffey & Ors* NSW Court of Criminal Appeal 30 March 1993 unreported.

10. Under s.31(1) of the *Independent Commission Against Corruption Act* 1988 the Commissioner has a discretion to hold hearings 'in public or in private, or partly in public and partly in private'. The legislation had been amended in 1990, the earlier form of s.31(1) providing that 'a hearing shall be held in public, unless the Commission directs that the hearing be held in private'. The amendment was prompted by the concerns of the Joint Parliamentary Committee of Parliament set up under s.63 of the *ICAC Act* 'to monitor and to review the exercise by the Commission of its functions' that 'reputations can be unfairly and unnecessarily damaged in public hearings'. Under s.31(3) 'the Commissioner is obliged to have regard to any matters which it considers to be related to the public interest.' Section 12 provides that 'in exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concern'.

11. A further development in this inquiry is the laying of a charge of contempt of the ICAC against *Sydney Morning Herald* reporter Ms Deborah Cornwall. The charge relates to her refusal to reveal her sources in relation to an article in which she quoted an unnamed police officer stating that 'it was Neddy who dobbed in' a nominated prisoner for a murder and that this person 'might be interested to know that. He is doing life at the Bay as well'. Mr Temby has argued that the statement was wilfully false information designed to discredit Smith and warn off other potential ICAC informants. The journalists code of ethics protecting the confidentiality of sources is not usually regarded as extending to the provision of knowingly false information. While Ms Cornwall appeared to acknowledge before the ICAC that she had been misled, in a later hearing before the Supreme Court her counsel challenged the contention that the statement was obviously false. The matter has been set down for late April. See Malcolm Brown, 'Herald reporter to face contempt charge', *SMH* 26.3.93; Brown, Malcolm, 'Contempt charge to go to hearing', *SMH* 27.3.93.

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Solicitors advising farmer retirees might well bring proceedings testing the applicability of these methods of calculating pensions when faced with particular needs of their clients. Resolving this uncertainty would certainly help farmer retirees take more decisive action over the handing down of the family farm. Another uncertainty is the fact the *Social Security Act* is always being amended.

The eligibility of farmers for pensions depends on findings of fact which are subjective in nature, and by implication, unpredictable. The current approach to assessing pensions is based on a new government policy as yet untested in the courts. The implication is that farmers are welfare recipients, not the holders of clear entitlements.

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LAWYERS AND SOCIAL WORKERS IN COLLABORATION

The School of Social Work at the University of New South Wales is conducting research into ways of facilitating and improving collaboration between social workers and lawyers. The project is funded by the Law Foundation of New South Wales and aims to examine areas of practice in which the roles of the two professions overlap or where they share common skills and knowledge.

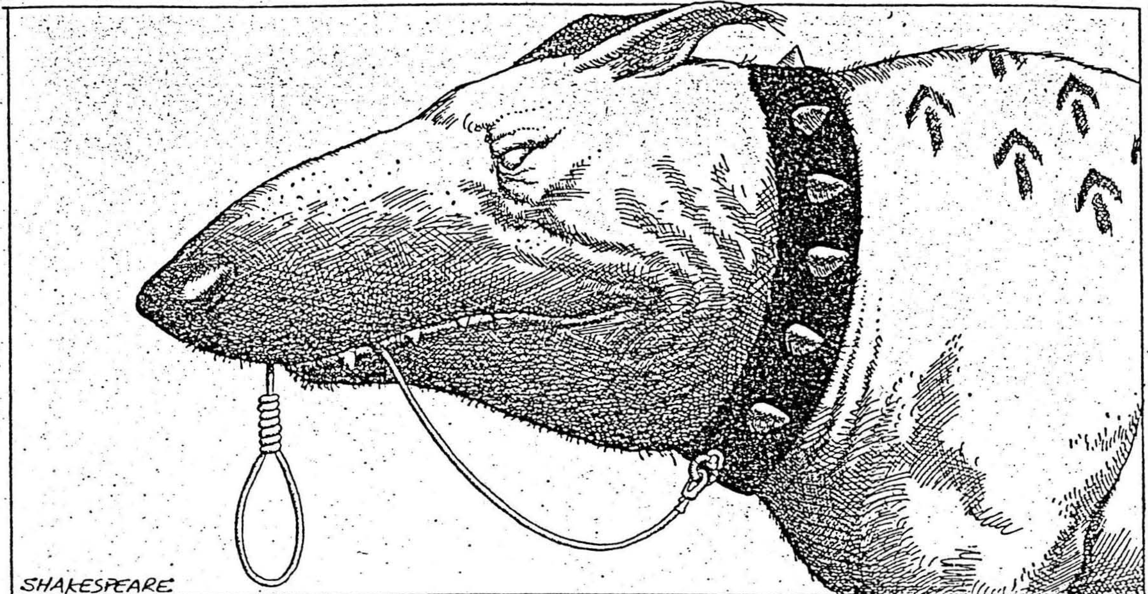
The research will identify the respective tasks undertaken by social workers and lawyers in these areas, and the clarity of mutual understanding. It will place particular emphasis on articulating and publicising innovative strategies for collaboration between the two professions. A further aim is to develop new methods of teaching such skills and strategies to undergraduate students and in continuing education.

The researchers will conduct interviews with practitioners of both disciplines as well as convening group discussions on key issues identified. The results of the research will be published in early 1994 and will be disseminated as widely as possible.

The coordinator of the project, Mick Hillman, is the social work placement supervisor at Kingsford Legal Centre in Sydney. The centre is a compulsory placement for students enrolled in Australia's only combined Social Work/Law degrees program.

If you are interested in discussing or participating in this research, please contact Jane Hargreaves, (02) 697 4764 or Mick Hillman (02) 398 6366.

The Sydney Morning Herald Thursday April 1 1993



Justice on the word of criminals: a conundrum

Criminal informers have been the mainstay of the ICAC's operations, despite complaints that they may ruin the reputations of honest men and women. DAVID BROWN argues that unleashing the "dogs" subverts the criminal justice system.

THE NSW Independent Commission Against Corruption (ICAC) has from its inception been a controversial institution. Proposed by the Greiner Opposition in the lead-up to the March 1988 NSW election, its establishment after the Coalition victory came under heavy attack.

The ALP was fearful that it would be used in a highly political fashion to rake over Labor Government dealings. Others were concerned that its investigative powers were too broad and that traditional legal protections were being abandoned.

The former Commonwealth Director of Public Prosecutions, Ian Temby, appointed the foundation Commissioner of the ICAC, dispelled the first fear by declaring himself more interested in dealing with current issues than in raking over the past.

While the ICAC has been profoundly political, it has not been party political. Ironically, its main political opponents now are in the Government which established it: the National Party, irate at the North Coast land deals inquiry, and the many supporters of Nick Greiner, angry over ICAC's role in bringing about the resignation of the Premier.

The second ground of attack has continued on many fronts. On January 29, Justice Cole in the Administrative Division of the NSW Supreme Court, upheld an application by four police officers who sought a declaration that allowing allegations by the criminal informer Neddy Smith against the officers in open hearing unnecessarily damaged their reputations and amounted to a denial of natural justice.

Commissioner Temby appealed and moved the hearings of the inquiry into the relationship between police and criminals into closed session, noting that the decision would have significant implications for the future public conduct of royal commissions.

On March 30 the NSW Court of Appeal upheld the Commissioner's appeal against Justice Cole's decision. Chief Justice Gleeson, with whom Justice Mahoney agreed, held that while there were clearly dangers to the reputations of the police officers involved the Commissioner had not made any error of law in exercising the statutory discretion open to him to hold the hearings in public.

Justice Kirby, President of the Court of Appeal, dissented, denying the appeal. He held that: "Natural justice forbade, in the circumstances, the conduct of an inquiry in public in which a notorious criminal secured a free kick against persons whom he accused in public but denied the chance of fully testing and answering in public those accusations."

The Commissioner may now decide to conduct the hearings in public but the issue is not settled with an appeal to the High Court likely.

This skirmish over the conduct of the controversial inquiry into the relationship between police and criminals in relation to alleged police involvement in armed robberies and illegal gambling, highlights the uneasy relationship between the inquiry and the ICAC's *Report on the Investigation Into the Use of Informers* released in late January.

Much comment on the release of the *Informers Report* noted the irony of the ICAC criticising police, Corrective Services and prosecution agencies for their handling of informers while at the same time relying heavily in its other inquiry on an informer such as Neddy Smith, who had indicated that he was not willing, as Chief Justice Gleeson put it, "to implicate criminals who were not police officers". However the irony is not as clear as has been suggested given the actual findings of the *Informers Report*.

> "But as Aldous Huxley, quoted at the end of the report, puts it, "the means employed determine the nature of the ends produced"."

The report appears in two volumes. The longer second volume provides nine major case studies involving informers on which the ICAC took evidence in hearings. There is considerable detail here of the mechanisms of recruitment by police and the internal investigations unit (IIU) of the NSW Corrective Services Department, the wide range of rewards offered (including early release, sentence discounts, indemnities, recommendations for rewards) and the way in which information about these processes were withheld from defence lawyers and the courts.

The first volume provides an overview of the inquiry and outlines recommendations for safeguards and disclosure.

These are based on the proposition that it is quite acceptable to provide rewards to informers, subject to appropriate safeguards and disclosure. To this extent then there is no *direct* conflict with the ICAC use of Neddy Smith in itself. The question is whether "appropriate safeguards" have been observed.

The key requirements are identified as being a "sceptical attitude" on the part of authorities, the fullest possible knowledge being obtained about the potential criminal witnesses, and their use only where "substantial external support for what they say exists".

The report outlines a range of specific recommendations. These include strengthening prosecution guidelines dealing with the use of informers, a guarantee that all unused material has been disclosed by police to the DPP and legislation for a mandatory statement setting out any benefits offered to in-custody Crown witnesses proposing to give evidence of alleged "jail yard" confessions. Such alleged confessions are among the most dangerous, implausible, and easily induced forms of evidence emanating from informants.

These recommendations and others make a constructive contribution to the task of countering the "unprincipled recruitment" and other abuses prevalent in the use of informers and particularly prisoner informers, in criminal trials. A key theme in the report is that the end does not justify the means and that covert activity and lying by State officials and prisoner informants "endangers the criminal justice system".

In other respects, however, the report is disappointing. There are inconsistencies between this central theme and the actual conduct revealed by various criminal justice officials in the detail of the case studies.

For the report seems to be run through with a sense that the various "stratagems" were well intentioned, with "noble ends" in mind. But as Aldous Huxley, quoted at the end of the report, puts it, "the means employed determine the nature of the ends produced".

Once again we have much wrongdoing, but few wrongdoers. Moreover the main role in taking up the various reform recommendations is reserved for the very criminal justice agencies implicated in the abuses — necessarily in one sense, given that many of the recommendations suggest voluntary action.

But certain of these agencies, particularly the NSW Police Service, have done little to indicate that they accept the legitimacy of public disquiet over the use of informants, unless, that is, they happen to be informing against police officers. While such an attitude persists it is difficult to see how much faith can be placed in voluntary self-regulation.

Another disappointment in the report is the failure to link the abuses associated with the use of prison informants to an analysis of the nature of the prison regime. In particular, some discussion of legitimate incentives such as a proper remission system might have been expected.

The promotion of informing as one of the few remaining incentives in the prison system encourages manipulative and dishonest behaviour, brings the criminal justice system into disrepute, and induces cynicism against a system which is seen to have a price for everything, in which even criminality can be turned into a commodity.

Quite what would be wrong with a formalised system of remissions and other incentives oriented around the promotion of positive values associated with education, participation in programs, work, cultural activities, and so on, is not clear. Perhaps the difficulty is that this might put an onus on governments to actually provide such services!

While the rise of prison informing can be seen as a "privatised" partial replacement for the police verbal, the fabrication of alleged confessional evidence by police, its main incidence has been restricted to high profile cases, relatively few in number.

Nevertheless it has been a worrying development, subversive of the integrity of the criminal justice system and capable of producing serious injustice.

Public exposure of its dangers, to which the ICAC *Informers Report* has usefully contributed, will hopefully stem its further growth. It seems unlikely, however, that this will be the last we will hear of the use of prison informers. The ICAC itself will see to that.

David Brown is an associate professor of law at the University of NSW.

Prosecutors' *Secrets* THE DPP'S INFORMERS INDEX

Beverly Duffy

Criminal defence lawyers in NSW are missing out on a valuable source of information for cross-examination.

The Informers Index was established by the NSW Office of the Director of Public Prosecutions (DPP) in June 1991. The index is a record of the dealings of the prosecution system with informer-witnesses. It includes information concerning an informer's previous criminal record; whether the informer was in custody at the time of giving assistance; details of rewards received or requested by the informer and any public evaluation of their evidence in other matters.[1]

The index includes matters from June 1991, as well as details about people who have been granted immunity from prosecution since 1987.[2] At present there are approximately 800 informers on the index.[3] For the purpose of the index an informer is defined by the ICAC as

> a person who had given information to the police as a consequence of some knowledge that had come into the possession of the person through intimate or direct contact with one or more alleged offenders (e.g. prison informers, co-conspirators).

The index was created under the DPP's new Informers Policy (Prosecution Policy No. 5), which was introduced in September 1991. According to the *Prosecution Policy and Guidelines of the DPP,* 'the index will allow *this Office* in some cases to make a more informed decision as to the reliability of a particular witness' (emphasis in the original). Importantly, under the DPP policy, the index is also supposed to assist defence counsel: 'The information on the index will generally be made available on request to the defence as it relates to a particular witness in a case'. However the prosecution should not wait to be asked for this information: if there is any material relevant to a particular case then the prosecutor is obliged to disclose this to the defence, including information from the index. The DPP policy states:

> *If the informer is to be used as a witness* anything relevant to the decision of the tribunal of fact whether or not to believe the evidence *must be disclosed to the defence in a timely manner.* [emphasis in the original]

On 16 February 1993, the relevant DPP Guideline, No.11, was also updated to complement the new policy. Clearly, given the nature of the material on the index, it is an extremely valuable source of material for vigorous cross-examination of informer-witnesses.

Attempts to confirm whether an informers index or its equivalent exists in the Commonwealth DPP have had a limited result. I faxed two questions to the Office recently asking whether an index existed and if not, whether the Commonwealth DPP felt there was a need for one. The official response on 29 April 1994 was to inform me that the office was finalising the establishment of an informers register which will be operational in the 'near future'. Whether defence counsel will have access to information on the register has not yet been considered.

Background

A series of celebrated cases in the late 1980s generated considerable public disquiet over the alleged misuse of prison informers.[4] Two of the most prominent of these were the Hilton Bombing case in which former pris-

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oner-activist Ray Denning falsely implicated Tim Anderson in the bombing, and the sentence reduction awarded to Fred Many, a prisoner serving a lengthy sentence for rape and attempted murder. Calls for an inquiry by the media, Opposition and Department of Corrective Services led to the announcement in April 1991 of an investigation by the Independent Commission against Corruption (ICAC) into the use of prison informers. The DPP's new informer policy and Informers Index were introduced after the announcement of the ICAC investigation.

The establishment of an informers index was partly inspired by a similar initiative in Los Angeles which had its own 'jailhouse informant' scandal a few years earlier. One of several reforms introduced by the Los Angeles District Attorney to prevent future misuse of informer-witnesses was the establishment of an informants' register. Officers from the NSW DPP and the ICAC Commissioner, Ian Temby, visited the Los Angeles District Attorney's Office to discuss this and related reforms.

In its 1993 report, the ICAC commented favourably on the DPP Informers Index and its continued use, but stressed that it should be 'assessed empirically' and 'kept under review'.[5] There is no evidence that such a review has occurred or is planned (see *Reviewing the index* below).

An assessment of the index, based on correspondence from the Office of the DPP and anecdotal evidence from prominent criminal lawyers indicates the index is not working as planned. While the index may be assisting officers of the DPP to make informed decisions as to the reliability of informer-witnesses, its present usefulness for defence lawyers and defendants is doubtful because lawyers are generally unaware of its existence and prosecutors are not enlightening their not-so-learned friends.

The secret index

Only two out of 13 prominent Sydney criminal law practitioners contacted for this article were aware of the existence of the index, even though the majority had been involved in informer cases since its introduction. John Korn, a criminal defence barrister for the past 25 years has been involved in at least a half a dozen matters involving informer witnesses over the past three years, yet he had never heard of the index:

> I've never been told about this Informers Index . . . I'm staggered that I didn't know about it . . . I'm one of the busiest criminal trial practitioners in Sydney and I've never known about it . . . and I'm staggered that none of my colleagues ever mentioned it.

Solicitor Greg Gould, an accredited specialist in criminal law was also unaware, until recently, of the DPP's new policy on informers:

> At no stage have I ever been in a hearing at committal proceedings where the prosecution has risen to its feet and said – listen, you don't have to go to all that trouble – there's an Informers Index from which that information's freely available.

There are two reasons why defence lawyers do not know about the index. First, they have failed to monitor significant recent developments in prosecution policy. The Index was mentioned briefly in the DPP's 1991-1992 and 1992-1993 *Annual Reports* and announced in the December 1991 issue of the *Law Society Journal*. While the DPP's efforts to publicise the new index could hardly be described as vigorous, defence lawyers have to take some responsibility for their failure to keep up-to-date. It would seem it is not only practising lawyers who are unaware of the index. In an article about prosecutors and the integrity of the criminal justice system, Peter Grabosky advises prosecutors to conduct a careful assessment of an informer's reliability before approving their use as a witness, yet there is no mention of the index and its role in assisting State and Commonwealth DPP prosecutors to make assessments.[6]

The second reason why lawyers do not appear to know about the index is because prosecutors are failing to tell them, even though this is prescribed by their own policy and guidelines. The Acting Director of Public Prosecutions when asked why there had been few requests from defence lawyers for information from the index, suggested it was because of the 'comprehensive disclosure policy of my Office'.[7] Interviews with senior defence lawyers contradict Mr Howie's explanation. For instance, according to John Korn:

> I've never been told by any Crown yet that 'we're going to call an informer' . . . the notion that the prosecution comes up to you and discloses all this material is a myth, it's not true . . . it's just not happening.

Defence lawyers complain that prosecutors' failure to disclose relevant information about informers means they have to elicit these facts during cross-examination. Barrister Phillip Boulten is currently involved in a case involving an informer-witness:

> I have a case in the pipeline where the accused has been committed for trial and where so far the DPP has not provided an advice as required by these guidelines . . . we know through cross-examination at the committal hearing that the person who is the key crown witness received some benefit upon their sentence for giving information.

Defence lawyers often have to rely on subpoenae to educe important information about informers. In 1993 Peter Hidden, QC advised his colleagues:

> Unless and until all relevant information about prison informers is made available to the defence as a matter of course, as the ICAC report envisages, the most powerful weapon against the informer is the subpoena.[8]

There are two problems with relying on subpoenae to discover relevant facts about informers. First, lawyers have to ask the right questions and this takes time, diligence and experience. Defendants represented by counsel who lack these qualities are clearly disadvantaged. But even the most thorough and knowledgeable lawyer can not issue a subpoena for documents she does not know exist. For example, 'P-Files – Department of Corrective Services' files about witness protection prisoners – were 'a well-kept secret' until they were unearthed by ICAC. It may also be the case, as Commissioner Temby found with the Department of Corrective Services, that files and records are so badly organised, full of gaps, or completely missing that 'compliance with a subpoena for documents becomes a matter of extraordinary difficulty'.[9]

Second, subpoenae may be set aside by courts on the basis of privilege. In informer cases, privilege is often argued on the basis of the potential danger posed by revealing the identity or any other details about the informer. While it is obvious privilege is justified in certain circumstances, the ICAC inquiry revealed numerous instances where the refusal to comply with subpoenae could not be justified.

Solicitor Greg Gould has been confronted with privilege arguments on numerous occasions:

> There are several cases in which I've been involved where . . . the prosecution has allowed the defence lawyers to be confronted by privilege arguments from the State Crown Solicitor in relation to the very matters which the index seeks to disclose.

The disclosure of information about informers by police and prosecutors to the defence was a key issue in the ICAC Informers Inquiry. Commissioner Temby was critical of prosecutors' failure to disclose information about informers, accept-

ing evidence from a senior crown prosecutor that 'some [prosecutors] are more fair than others'.[10] However, he was loath to 'force changes' by recommending legislation. His preference was to strengthen and make more objective, existing DPP guidelines, although he conceded legislation would have to be considered if prosecutors failed to demonstrate greater objectivity and trustworthiness in providing information.

Can we afford to rely on the professional integrity of prosecutors to ensure material about informer-witnesses is passed on? Has the DPP's new informers' policy strengthened prosecutors' predilection for disclosure? John Korn is not confident:

> . . . regrettably it's my view and I believe the view of a lot of my colleagues appearing for the defence . . . that within the last five years in the DPP, there is clearly an increasing attitude of the importance of winning . . . the ethos that it's important to win is I think, quite prevalent down there.

Reviewing the index

Although the ICAC recommended the Informers Index should be 'kept under review' and 'assessed empirically', there is no mention of who will be responsible for this and when. Concerns about the operation of the index have been raised on a number of occasions by myself and David Brown, Associate Professor of Law at the University of NSW. In August 1992, the former DPP, Mr Reg Blanch refused a request from David Brown to be interviewed about the index, stating: '. . . I advise I do not give interviews of this nature as a matter of policy and because of the time involved'. Mr Blanch did agree to respond in writing to a series of questions about the index. In his response, he admitted his Office did not keep a record of requests from defence counsel for information from the index and was 'unaware' of whether any information from the index had been withheld from defence lawyers.[11] This response indicated that suitable data with which to assess the index empirically, was not being collected. David Brown wrote to the ICAC Commissioner on 17 August 1992, expressing these concerns:

> I understand that a major issue dealt with at the recent ICAC informers inquiry was the need for government agencies to maintain reliable and complete records and files. I am concerned that Mr Blanch's response indicates inadequate procedures in the DPP to ensure accountability regarding the Index.

The Commission responded on 7 September 1992:

> . . . the commission presently regards the information which it has . . . as adequate for the purposes of the preparation of the report on the investigation.

More recently I put the same questions to the Acting DPP, who, like his predecessor, refused an interview 'as a matter of policy and because of the time involved' stressing in the next paragraph: 'That is not to say that my Office is not committed to openness and accountability'. Mr Howie's written response does not reveal any improvements in data-collection, claiming 'figures were not available' in response to four of my nine questions.

Mr Howie's response to a question about monitoring the index is most revealing of the DPP's perception of the purpose of the index:

> Q: What systems do you have in place to monitor the effectiveness of the index? How do you know it is serving the purpose for which it was set up?
>
> A: The basic purpose of the Index is to assist my Office to make informed decisions as to the reliability of informer witnesses . . . the decision whether to call the witness is a more informed decision than would otherwise be the case.
>
> [R.N. Howie QC, personal correspondence12 April 1994]

Conclusion

If the DPP is as open and accountable as Messrs Howie and Blanch would have us believe, then it should be monitoring and encouraging the use of the index. This is clearly not happening. The inaccessibility of the index is depriving defence lawyers, and more importantly, defendants, of vital information with which to vigorously test prosecution cases. The index has great potential to help realise the principle of 'full and timely' disclosure: and yet it seems hardly anyone knows about it.

> The prosecutions' suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial.
>
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by and controlled by police. Police may be involved in entrapping a child at one end of the process and sitting in judgment at the other end with no independent review or safeguards in between.

Conclusions

Police are gatekeepers and their role is crucial in bringing about reform. A great deal of effort has gone into policy development but it has yet to filter down to the Special Operations area, let alone constables on the street.

The fact Operation Yugo is regarded by police, and no doubt many of the public, as a success is an indication these types of activities will continue and even escalate. In May 1994 the police announced a similar 'success' involving four phony pawnshops and the arrest of more than 135 suspects.

Who will watch over police conduct ? At the moment no one.

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The Sydney Morning Herald

Many's release raises legal – not political – questions

The Many case raises the issue of balance between giving information about criminal activity to the authorities and trading away criminality for a reward, as DAVID BROWN reports.

NOW that Fred Many has been released, the issue of how he obtained an informer sentence discount of four years warrants further examination.

The spotlight might usefully be shifted from politicians to the main players, for the reality is that the key decisions were not political but relatively mundane exercises of legal discretion. It is to the police and prison authorities, the National Crimes Authority, the Director of Public Prosecutions and the courts that we should look for answers.

Many received the reduction largely for information concerning an alleged plot by Tom Domican and Peter Drummond to kill Bill Vandenburg in prison. The Court of Criminal Appeal in December 1990 (not July 1989 as stated in the *Herald* chronology on March 2 and March 3) reduced Many's sentence by four years, saying: "It is not disputed that his assistance in this and the other matters here mentioned was significant, substantial and true".

But if it was not disputed the resounding question is: Why not? For some nine months earlier the NSW Court of Criminal Appeal had allowed an appeal by Domican and Drummond on this same charge on the ground that fresh evidence cast substantial doubt on Many's credibility as a witness, given that Many, as Acting Chief Justice Kirby observed, had given four different versions of events.

If the court was aware of its own previous decision calling Many's credibility into doubt, it is difficult to see how the discount could have been granted. If it was not aware of it (the later decision was by a differently constituted court), the public is entitled to know why.

There are three rationales commonly given to justify informer sentence discounts: to disrupt any notion of honour among thieves, to encourage the giving of information to authorities and to reward the informer for harsher conditions in prison. The rule of thumb here is a discount of one-third on the basis that 12 months under restricted "protection" conditions in prison is equivalent to 18 months' "normal discipline".

Informer sentence discounts are not in my view objectionable in themselves. The key question is the reliability of the evidence provided by the informer. This requires a full examination by the sentencing court of the circumstances surrounding the "volunteering" of the information, the relationship between the informer and police and prison authorities, the nature of any incentives offered.

The fear is that information may be manufactured or tailored to suit the immediate evidentiary needs of police and prosecution authorities in other cases in exchange for a battery of rewards such as indemnities, sentence discounts, cash, bail, better access to prison visits and so on. Sufficient examples have emerged in recent years to give a real grounding to these fears.

There is no party at the sentence hearing with a strong adversarial interest in seeing that such an inquiry is conducted. The job of the defence lawyer is not to throw doubt on material which may lead to a reduction of sentence. The Crown is in the position of having encouraged or promoted the veracity of the informer in other cases, often pending ones, and of relying heavily on his police and prison handlers. In the absence of an adversarial party, the judge is not in a good position to probe coded references to "valuable assistance rendered in other matters".

This was the key problem in the Many sentence discount hearing. It is one that has been largely overlooked, was not adequately dealt with in the ICAC informers inquiry and deserves an answer. The issue is not the narrow one of whether Many committed perjury but whether the claims made about the reliability of his assistance were adequately scrutinised in the light of the Court's own previous decision. It is not one, contrary to the Attorney-General's claim in his "Open Letter to the People of NSW", that has clearly been remedied by the 1992 amendments to the law.

The claim in the open let[illegible] "under today's laws, prison[illegible] ers can no longer manipul[illegible] system" is more an express[illegible] hope than fact. A current prac[illegible] sentence is for information o[illegible] tance to authorities in other [illegible] be handed up to the judge in a[illegible] envelope. But material in [illegible] envelopes hardly invites e[illegible] scrutiny, either of its reliabilit[illegible] history, even if there were [illegible] present with an interest in pro[illegible] such scrutiny.

The bottom line of the Man[illegible] is this. There is a clear public [illegible] in encouraging the giving of in[illegible] tion about criminal offences [illegible] authorities in the hope of clea[illegible] serious crime.

But there is also a public int[illegible] ensuring the openness and inte[illegible] the criminal justice system [illegible] perception develop that seriou[illegible] nality can be traded away for [illegible] It would not be surprising if m[illegible] the "People of NSW" were un[illegible] impression that that is exactl[illegible] has happened in the Many c[illegible]

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