PROSECUTORS, INFORMANTS, AND THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

by Peter N Grabosky[*]
Director of Research
Australian Institute of Criminology

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution ...
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> Experience should teach us to be most on our guard when the government's purposes are beneficent ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding.[1]

INTRODUCTION

No knowledgeable Australian would seriously contend that our criminal justice systems operate flawlessly. Among the more current concerns is the risk of mistake or caprice arising from reliance upon criminal informants for assistance in investigation or prosecution. Beyond the possibility that such reliance might result in the unjust conviction of an offender, or indeed, the conviction of a truly innocent person, there remains the risk that informants might engage in further criminal activity whilst engaged in service to the state.

The role of informants is of more than passing concern to public prosecutors, for obvious reasons: an informant may make or break a prosecution. The interaction between prosecutors and informants is in turn a function of what might be termed the scope of the prosecutorial role. Historically, prosecutors in the Anglo-Australian legal tradition embraced what might be described as a relatively narrow professional role, in which the prosecutor acts essentially on the instructions of a client. At the risk of oversimplification, this role might be likened to that of a "hired gun" or "letter carrier".

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1 Brandeis, J dissent, *Olmstead v United States* 277 US 438, 471–88.

This might be contrasted with an expanded prosecutorial role, in which the prosecutor actively seeks to assist "upstream" investigative agencies to improve their performance. This latter role, of course, has implications beyond the management of informants.

The discussion below will address the following issues:

- What legal and ethical problems might arise in the use and management of informants in criminal investigations and as witnesses for the crown?
- What safeguards might the prosecutor have in place to minimise the likelihood of these problems? What is the proper role for the prosecutor in the management of informants to ensure that
  - they do not commit crime in furtherance of an investigation?
  - they do not exploit their special relationship with the government to engage in collateral criminality for personal gain?
  - the recruitment and the deployment of informants is free of unconscionable conduct short of criminality?

Given that the issue of the prosecutor's appropriate use of informants is inextricably related to the wider question of the prosecutor's role in maintaining the integrity of the criminal justice system, what is the proper role of the prosecutor in the event that an investigation or prosecution becomes tainted by illegal or unethical conduct on behalf of the government?

A NOTE ON INFORMANTS

Assistance by private citizens in the investigation and prosecution of criminal offences is a familiar aspect of criminal justice in the English speaking world. In some instances, this service may be performed as an act of altruism or civic duty by a concerned citizen. In others, the contribution may be that of a crime victim, without whose assistance the tasks of investigation and prosecution become difficult if not impossible.

There are additional circumstances in which citizens may contribute to criminal investigation and prosecution. The primary concern here is with those in which the government offers a degree of remuneration or other inducement for (1) assistance of a covert nature; and/or (2) serving as a witness in criminal proceedings.

Individuals may be recruited to observe or to infiltrate a criminal enterprise, or to introduce an undercover law enforcement officer to participants in such an enterprise. Alternatively, a co-participant in a criminal enterprise may choose to abandon his or her partners in crime, and to assist the government in the investigation and/or prosecution of the offence. There are other circumstances, in which an unwitting person may be used as part of an undercover operation.

As in many other areas of public policy, the use of informants for purposes of investigating and prosecuting criminal offences may entail unforeseen costs and unintended consequences.

Persons engaged as informants for purposes of assisting in a criminal investigation are hardly selected at random. If not recruited directly from the milieu which is the very focus of investigative attention, they tend to be drawn from compatible social circumstances. As such, they are likely to be practiced in the art of deception, if not criminals themselves. Some may indeed be skilled in treachery. Rarely are they paragons of virtue and honesty.

Informants are thus unlikely to be motivated by a commitment to efficiency and effectiveness in the administration of criminal justice, much less to the rule of law. Some will be driven by mercenary considerations. Others may be attracted by the ease of access to illegal commodities which their participation may provide. For others, who are facing or who could face criminal charges, the motive will be indemnity from prosecution or perhaps a reduction in charges. Others still may be driven by vengeance, and may seek to use their position to settle old scores.

This fundamental contradiction between the interests of the informant and the interests of the government poses numerous problems for agencies of criminal justice. The use of informants may create opportunities and incentives for illegal or otherwise unethical behaviour, by informants alone or in collaboration with government investigators. Moreover, informants are often perceived as inherently unlikable souls, whose credibility may be doubtful. Their usefulness as crown witnesses thus has its limits, especially in Australia where there remains a cultural bias against informing or "dobbing in".

The challenge thus faced by government is to manage informants in such a manner as to minimise the risks of gratuitous criminality or otherwise questionable behaviour during the course of an investigation, and to minimise opportunities for tactical advantage by the defence in criminal proceedings.

While the use of informants may strike some idealists as inconsistent with the basic principles of a free and democratic society, pragmatists will argue that informants are essential to combat a range of low visibility criminal activity, particularly that involving corruption or drug traffic. Rather than join this debate, we shall acknowledge that authorities have used and will continue to use informants. The purpose of this article will be to suggest how, given this continued use, the risks of collateral harm to innocent third parties, to the legitimacy of the criminal justice system and to the rule of law may be minimised.

CRIMINAL CONDUCT BY INFORMANTS IN FURTHERANCE OF AN INVESTIGATION OR PROSECUTION

Is it appropriate for the government actively to induce or create a crime? What degree, if any, of governmental participation in a criminal enterprise is tolerable?

Undercover investigations, like the criminal activity against which they are directed, take place in the real world. By definition, they involve elements of stealth and deceit. They often involve conduct on the part of law enforcement officers and informants which, if undertaken by ordinary citizens, would entail criminal liability. The agent's purchase of drugs from a reputed drug dealer, the so-called "buy and bust," is but one example.

During the course of their service to the government, informants may engage in criminal conduct through overzealousness. They may engage in criminality in order to establish credibility with the target of an investigation, or for the purpose of obtaining evidence for use in an eventual prosecution. They may commit perjury during the course of proceedings.

Criminal conduct by an informant in furtherance of an investigation may take place at the conscious direction of a law enforcement officer, or with the officer's implicit condonation or passive tolerance. It may also be committed contrary to the officer's explicit instructions.

The extent of government complicity in an informant's criminality is a fundamental matter. At one extreme, the government may actually solicit the commission of a crime, one that otherwise would not have occurred, in order to further an investigation. That is, it may actually direct the informant to engage in criminal activity. In other circumstances, it may be vague in its instructions, leaving such details to the informant's discretion.

Of equal importance is the centrality of the criminal conduct to the investigation. Is the criminal conduct committed on behalf of the government essential to the success of the operation, or is it gratuitous? If essential, is the severity of the criminal conduct committed on behalf of the government disproportionate to the heinousness of the criminality which is the target of law enforcement efforts? At what point does the government become the engineer of the criminal enterprise, and the offence become an artefact of the investigation?

What if the government were to use an informant to set up a drug factory? Assume the government provided the informant with equipment and chemicals necessary to begin production, and even provided the premises for the factory. Assume then that the informant enlisted the menial assistance of an individual who, although knowingly involved in an illegal activity, contributed no expertise, ideas, funds, or capital equipment to the enterprise. Would it be appropriate to prosecute the menial assistant?[2]

What if an undercover police officer and two informants, each of the latter "working off" criminal charges and earning weekly non-contingent salaries, plan to commit a break-in. They enlist the "assistance" of a willing suspect, known to them as an habitual participant in burglaries. The suspect acts as a lookout while the officer and the informants commit the burglary. The suspect is subsequently charged. Would it be appropriate to prosecute the lookout?[3] Would it matter if, in the above case, the operation were to have taken place without the on-site participation of an undercover police officer?

Consider the "reverse sting" where an informant sells contraband to a suspect who is subsequently charged. Here one may wish to make a distinction between a target chosen at random, and a target selected on the basis of probable cause, or because of some apparent predisposition to commit the offence. Does it matter whether the sale is made by an undercover officer or by an informant? In some cases, the inducement offered an

2 *US v Twigg* 588 F 2d (3rd Cir 1978).
3 *State v Hohensee* 650 SW 2d 268 (Mo Ct App 1982).

informant, whether monetary or procedural, may be contingent upon the success of an operation. The use of contingent fee arrangements would appear to be particularly risky, as they may invite overzealous conduct on the part of the informant. In the event of a prosecution, they are also likely to be called into question by the defence.

What of a contingency fee offered to an informant to produce evidence against a particular suspect for crimes not yet committed? Consider a case in which an informant was promised payment contingent upon his successfully making criminal cases against others to whom he is to sell cannabis.[4]

It might be useful to distinguish between a precisely targeted operation against a known habitual offender with an obvious predisposition to continue a pattern of criminal activity, and what might be termed a "fishing expedition" which might ensnare developmentally disabled persons or other otherwise honest citizens with poor impulse control.

G T Marx urges that a distinction be made "between being corrupt and being corruptible".[5] Many if not most of us have fallen victim to high-pressure salespersons during our careers as consumers. So given the production pressures which law enforcement agencies sometimes face, and the variety of incentives which might be offered to informants to assist in "putting runs on the board", it would not require a great deal of imagination to envisage a situation in which extreme pressure may successfully be brought to bear on a suspect. Repeated, persistent nagging in the face of a suspect's reluctance to engage in criminal conduct may ultimately produce acquiescence. At what point does such persistent nagging become inappropriate? Would it matter if the informant had cultivated the suspect's friendship for the purpose of the investigation, and then exploited that friendship in order to induce the criminal act?

Should similar pressure be brought to bear upon persons chosen at random, or should such operations be limited to targeted persons whom the police have reasonable grounds to suspect will commit an offence? One might regard such practices as more palatable if they are used not for the facilitation of a crime, but after the crime has been committed. Are such practices tolerable under any circumstances? Is probable predisposition on the part of a suspect sufficient to justify a reverse sting? Is a suspect's predisposition to engage in criminal conduct sufficient to neutralise any amount of outrageous behaviour by, or on behalf of, the government?

In the conduct of undercover investigations, informants may engage in activities which are harmful to third parties, whether innocent bystanders or others who may be incidentally related to the target of an investigation. The burglary committed by government agents in order to make a case against the "lookout" was noted above.

What if the government were to engage the services of an informant who conducted a flagrantly illegal search of a bank officer's briefcase, in order to obtain evidence that a client of the bank had falsified an income tax return?[6] Would it matter if the informant

4 *State v Glosson* 441 So 2d 1178 (Fla 1st DCA 1983).
5 Marx, G T, *Undercover: Police Surveillance in America* (1988) at 23.
6 *US v Payner* 447 US 727 1979.

acted of his own motion, without any guidance or direction from officers involved in the investigation? Would it matter if it were the suspect's own briefcase which was the subject of the illegal search? Are there certain areas of activity in support of an investigation which are positively unthinkable? What if an informant illegally obtained access to the medical records of a suspect? Are there circumstances under which one might condone recruiting a medical practitioner or a priest to disclose confidential information about a suspect? What about a journalist?

What if an informant were to obtain access to information which revealed the details of a suspect's legal defence? Is any degree of penetration, legal or illegal, of the lawyer-client relationship acceptable?[7] What if a prosecutor succeeds in turning a co-defendant, who in the course of his debriefing, begins to disclose elements of the defence strategy?

Informants may engage in extremely coercive practices in order to make a case against a suspect. In one instance, an entrepreneur, whose failing business was urgently in need of an injection of capital, was approached by an informant and introduced to a drug dealer. He was told that he could make $60 million by financing a major cocaine transaction. The informant then introduced the entrepreneur to an undercover agent posing as a "banker," who offered to advance the funds to finance the deal. When the entrepreneur expressed reluctance to go through with the transaction, the informant threatened his life if he would not complete the deal.[8]

In another case, undercover agents posing as Mafia heavies, threatened a suspect with dire consequences unless he and his accomplice completed a scheduled drug deal. The suspect, genuinely believing that he had received an offer which he couldn't refuse, advised his accomplice accordingly. The deal was consummated, and both were charged.[9]

What considerations should govern the decision to induce or create a crime? Pragmatists will no doubt argue that the decision should be driven by the likely outcome of the operation — whether the probability of conviction would be enhanced or diminished. Those who take a wider view would weigh other factors. Regardless of the likelihood of conviction, the risk that the image of law enforcement and criminal justice might be tarnished by the operation in question may also merit consideration.

The fact that the government or its agents must, on some occasions, break the law in order to enforce it is an unhappy paradox of modern law enforcement. Under the circumstances, it seems that if such methods are to be used at all, they should be carefully controlled. Gratuitous illegality in furtherance of law enforcement may imperil the legitimacy of the criminal justice system. It is an affront to the rule of law.

There is one other dimension of informant criminality which merits mention, and that is perjury. Marx[10] cites an example of one informant who sought to fabricate evidence of judicial corruption by subsequently adding the words "That envelope on the table is for

7 See *US v Ofshe* 817 F 2d 1508 (11th Cir 1987).
8 Marx, above n5 10 at 130.
9 *US v Emmert* 829 F 2d 805 (9th Cir 1987).
10 Above n5 at 134-5.

you, Judge" to a tape recorded conversation which contained no other intimations of illegality. Contingent remuneration or contingent immunity may provide perverse incentives for an informant to fabricate evidence.

COLLATERAL CRIMINALITY BY INFORMANTS

Some informants, in the course of their engagement, may engage in criminal conduct to establish their bona fides or credibility with the target of an investigation. Assuming this activity is not so egregious as to constitute government domination of the criminal enterprise, one might regard this as acceptable. But are there limits, in terms of quantity or quality, to the permissibility of this conduct? How much is enough? If one or two drug deals are sufficient, can one condone ten? Realising that we are not dealing with a society of angels, and that some targets of criminal investigation are very nasty people indeed, what if the conduct in question were to extend to burglary, serious assault, or homicide?

What if the criminal conduct in question is entirely unrelated to the investigation for which the informant has been engaged? Is there a degree of collateral criminality which might be regarded as tolerable in order to ensure the informant's cooperation? If so, are there quantitative and qualitative thresholds?

Marx describes how informants may misuse false identification and credit cards and, in some cases, may even seek to sell government property used in an investigation. He notes one case in which an informant used his knowledge of an operation to defraud a number of innocent businessmen and women. In another case, an informant obtained a dummy $1.75 million certificate of deposit which he used as collateral for a bank loan. The informant used the loan to purchase real estate, then defaulted.[11]

Problems of informant criminality may endure long after the conclusion of court proceedings. Persons who have been relocated with new identities under a witness protection program may exploit this opportunity to protect themselves from creditors.[12] They may also lapse into a variety of other undesirable habits learned in previous careers.

ETHICALLY QUESTIONABLE CONDUCT BY INFORMANTS

Informants may also engage in a variety of conduct which, although not criminal, might be regarded as inappropriate. It may involve harassment, abuse, or invasion of privacy.

What if the government were to use an informant to introduce a drug dealer to undercover law enforcement officers. The informant recruited for the purpose is a prostitute and known drug user, who is at risk of extradition to face charges in another country. As a means of establishing rapport with the suspect, the informant develops an intimate physical relationship with him. Despite repeated instructions by the agent in charge of the investigation not to become sexually involved with the suspect, the

11 Id at 144-45.
12 Id at 158.

informant persists. She succeeds in introducing the suspect to undercover officers, a sale takes place, and the suspect is charged.[13]

Would the circumstances differ if it were an undercover police officer and not an informant who established the intimate physical relationship with the suspect? Would it be of concern if the officer in charge of the investigation were to turn a blind eye to the intimate relationship? What if the officer in charge were actively to encourage the development of the intimate relationship?

What if the government were to enlist the services of the vindictive former lover of a corrupt public official, to lure him to her hotel room and provide him with an illicit substance which he was widely suspected of using on a regular basis? Such an operation formed the basis for charges against Marion Barry, then Mayor of Washington, DC. What if the government were to enlist the services, on a contingent fee basis, of the former lover of a suspected drug dealer? The informant, who is addicted and who continues using the illicit substance during the course of an investigation, arranges a transaction, and the suspect of the investigation is charged.[14]

The use of such intrusive methods might be more palatable if used to investigate offences which have already occurred. Consider a case in which an attractive female informant was introduced to a murder suspect, and entered a liaison with him. So effective was she that the suspect proposed marriage. The informant, exploiting her position of trust and intimacy, sought to probe the suspect relating to matters which might be burdening his conscience. He confided to her that he has killed two people. The informant was carrying a transmitter in her purse; their conversation was monitored by local police, and the suspect was arrested soon thereafter.[15]

UNETHICAL CONDUCT IN THE RECRUITMENT AND THE DEPLOYMENT OF INFORMANTS

Informants are usually not your typical upstanding citizens. In addition to their access to targets of an investigation, informants may possess other properties which can be exploited by the government. They may be drug dependent. They may be emotionally manipulable. They may be financially vulnerable. They may be liable to prosecution, and to long terms of imprisonment.

What forms of coercion or inducement are appropriate in relation to the recruitment and deployment of informants?

Consider the following:

> Police, in possession of a valid search warrant, arrive at the house of a suspected drug dealer. The alleged dealer and her family are detained in the living room, while officers search the premises. After a period of time elapses, the youngest child of the alleged dealer, a five year old boy, expresses a need to visit the toilet. He is escorted there by an

13 *US v Simpson* 813 F 2d 1462 (9th Cir 1987).
14 *US v Miller* 891 F 2d 1265 (7th Cir 1989).
15 Marx, above n5 at 61.

officer, who promises the little boy five dollars if he reveals to the officer where his mother has hidden the drugs. The little boy promptly discloses a location in the back garden, where the drugs are found. Would it be appropriate to prosecute the mother based on the government's exploitation of the vulnerability of a five year old child? Would it matter that the child never received the five dollars which he had been promised?[16]

The role of the prosecutor in possible breaches of lawyer-client privilege was noted above. Under what circumstances, if any, would it be appropriate to do a deal with a solicitor for the defence to turn against her client? Let us assume that sufficient evidence exists with which to charge solicitor Bloggs with offences relating to the underreporting of income to the Tax Office. Should a prosecutor refrain from acting on this evidence in return for Bloggs' cooperation in disclosing incriminating evidence against one of her own clients? What if solicitor Bloggs, in addition to the above mentioned tax problems, had knowingly assisted her client in furtherance of a criminal enterprise? Would you then be prepared to turn the solicitor against her client?

Financial remuneration and the promise of indemnity from prosecution are commonly regarded as acceptable. But is it acceptable for the government to support an informant's drug dependence, either financially, or by the direct supply of the informant's substance of choice, in return for the informant's assistance?

If an informant has no enemies at the time he or she is engaged by the government, that very engagement is likely to create the potential for strong animosity in the event that the informant's identity is disclosed. Is it acceptable for the government to threaten to disclose an informant's identity or location, when such disclosure could result in the informant's death?

REMEDIES

Is there conduct, criminal or otherwise, which is so unconscionable that it indelibly taints a prosecution? How should a prosecutor respond when an informant engages in conduct that brutalises, abuses, harasses, invades privacy, or otherwise intrudes to an unacceptable extent upon people's lives?

What is the appropriate course of action for the prosecutor in such a case? Does one turn a blind eye? Rebuke the officer or officers responsible? Refuse to introduce any evidence derived from the improper conduct? Object formally, in confidence, to the chief executive of the investigating agency? Lodge a complaint with the appropriate review authority? Blow the whistle? Is there a point at which the misconduct of law enforcement agents is such that the DPP must refuse to prosecute? What other remedies might be available to a prosecutor?

It is easy enough to wish to remain at arm's length from a client's questionable conduct, and to insist that rectification is the responsibility of the errant agency and ultimately, of its minister. One may also appreciate the view that the resolution of factual or legal ambiguity is a matter for the court, and that the prosecutor should not usurp the

16 *US v Penn* 647 F 2d 876 (9th Cir 1980).

role of judge or jury. Given the passive role traditionally played by the Australian judiciary with regard to such matters as disputed confessional evidence[17] and non-disclosure of exculpatory evidence,[18] deference to judicial determination is unlikely to be an effective safeguard against investigative practices of questionable propriety, nor would deference to such agencies as ombudsmen and police complaints authorities, whose powers and resources are often insufficient to the task at hand.

It might be argued that the prosecutor's role should not be limited to that of the letter carrier. It is unquestionably the case that prosecutors make crucial decisions daily based upon their own professional judgment without deference to the preferences of those upstream or to the inclinations of those downstream.

I would argue that prosecutors have an important role to play in maintaining the integrity of the criminal justice system through their influence over those agencies they regard as their clients. No less important is the desirability of maintaining the prosecutor's own integrity and legitimacy. In the United States, it has been suggested that prosecutors have a responsibility to protect the integrity of the Court, and to "see that the waters of justice are not polluted".[19]

Prosecutors can be regarded as a subset of what Kraakman[20] refers to as "gatekeepers" — parties who are in a position to disrupt misconduct by withholding their cooperation from a wrongdoer. The model of a neutral, disinterested, independent professional operating at arm's length from the client would seem to be an appropriate one here.

The ongoing, cooperative relationship between prosecutors and upstream investigative agencies would seem to militate against an openly aggressive, adversarial approach to client illegality. For the prosecutor publicly to denounce illegality or otherwise unethical conduct on the part of upstream agencies would be a great boon to journalists, but might induce a "bunker mentality" on the part of the agencies in question. At worst, it might inspire bureaucratic "guerrilla warfare" on their part, which could take the form of an even greater assault upon the rule of law.

Where between the polar opposites of client's "lap-dog" and adversarial "mad-dog" does the prosecutor's role lie? Prosecutors are obviously in an extremely influential position. Aside from the infrequently exercised right of private prosecution, they enjoy an effective monopoly over prosecution. An investigative agency which objects to a prosecutor's high ethical standards cannot take its case elsewhere. It would seem that the prosecutor can exercise considerable leverage to ensure that the ethical standards of a

17 Byrne, P, "Judicial Directions on Disputed Confessional Evidence" (1988), 62/12 *Australian Law Journal*, at 1050; Flood, S, "McKinney and Judge" (1991), 15/4 *Criminal Law Journal*, at 287-295; Dixon, D, "Interrogation Corroboration and the Limits of Judicial Activism" (1991), 16/3 *Legal Service Bulletin*, at 103-106; *McKinney and Judge v The Queen* (1991) 171 CLR 468 (1991), 65 ALJR 241.

18 Lane, W, "Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors" (1982), in J Basten et al (eds), *The Criminal Injustice System. Australian Legal Workers' Group and Legal Service Bulletin*, Sydney, 174-192.

19 *Elkins v US* 364 US 206, 223 (1960).

20 Kraakman, R, "Gatekeepers: The Anatomy of a Third Party Enforcement Strategy" (1986), 2/1 *Journal of Law, Economics and Organization*, 53-104.

client agency approximate one's own. A tactful withholding of cooperation from a wayward client is one way in which a prosecutor may exercise such power. It might also be appropriate to disclose client illegality to the responsible minister or to the court in appropriate circumstances. A tactful threat of public disclosure may be a potent instrument of organisational social control.

One would hope that in the Australian legal system directors of public prosecutions are chosen for their tact, diplomacy, and persuasiveness as well as for their legal and administrative skills. It would seem that the mobilisation of those persuasive skills, in light of the formidable powers of non-cooperation which prosecutors command, can contribute significantly to improving the administration of justice.

Such an expanded role for the prosecutor is already envisaged, at least by the Commonwealth Government. "It is part of the DPP's function to ensure that deficiencies in Commonwealth criminal law or the procedures for its enforcement are drawn to the attention of the appropriate authorities for remedial action."[21]

To conclude this discussion of remedies, it might be appropriate to touch briefly upon remedies which could be made available to third parties who suffer harm as a result of an informant's criminality, whether collateral or in furtherance of an investigation. It seems entirely appropriate that an innocent citizen should be entitled to recover damages for losses suffered at the hands of an informant during the course of an investigation, or at the hands of a protected witness for the duration of his or her protection. A purist might even argue that the remedy should extend even to those losses which were not foreseeable to the agency which had engaged the informant's services.[22] In any event, one imagines that Australian governments would be disinclined to hold themselves to a standard of absolute liability for damages inflicted by wayward informants.

SAFEGUARDS

It has become trite, but just as apposite, to suggest that prevention is better than cure. It may be less trite to suggest that safeguards may be more cost-effective than remedies.

Lest there be any lingering doubt about the appropriate role of the prosecutor, it would appear that at least for the Commonwealth Director of Public Prosecutions, a wide role indeed is envisaged. For example, according to the DPP's corporate plan, the objectives of the organisation include:

- Contribution to the improvement of the Commonwealth criminal law and the criminal justice system generally.
- Assistance and cooperation with other agencies to ensure that law enforcement activities are effective.[23]

Moreover, the *Director of Public Prosecutions Act* 1983 (Cth) includes the power to issue directions and guidelines to the Commissioner of the Australian Federal Police and

21 Commonwealth Director of Public Prosecutions, *Information Booklet* (1989) at 6.

22 For a less charitable view, see *Powers v Lightner*, 820 F 2d 818 (7th Cir 1987).

23 Commonwealth Director of Public Prosecutions, *Annual Report, 1989-90* (1990) at 6.

to other persons who conduct investigations and prosecutions for offences against Commonwealth law.

Although the powers of the New South Wales Director of Public Prosecutions to influence police investigations are less explicit, the most recent policy of that office "reject(s) out of hand the view that prosecuting lawyers should not advise police during investigations".[24]

There thus appear to be no barriers, either in law or policy, to the prosecutor's playing a significant role in the management of informants. Indeed, since a number of these individuals require indemnities and undertakings not to prosecute — as a condition of their assistance in the investigation and/or prosecution of offences against the Commonwealth, the prosecutor's role is already central. One may deduce from the above that a degree of responsibility for breaches of law and/or ethics arising from the use (and misuse) of informants will rest with the prosecutor.

One need not embrace too expansive an interpretation of the prosecutor's role to suggest that prosecutors have a duty to prevent, detect, and disclose illegal or unethical conduct by agents of government. This is hardly an argument grounded in altruism. The prosecutor is the keystone of the criminal justice system. To a significant extent, miscarriages of justice and other malfunctions of the system reflect adversely on the prosecutor.

All of these arguments aside, there are very good pragmatic reasons for an active prosecutorial role in the management of informants. When the prosecutor gets to court, any flaws in the conduct of an investigation will be fair game for the defence. If an informant testifies as a witness, the terms of his or her engagement will also be of great interest to the defence. The crown's case will be at stake. The efficiency and the effectiveness of the prosecutor's office thus depends upon the contribution which the prosecutor can make to the design and monitoring of an investigation.

What concrete steps might the prosecutor take, therefore, in order to safeguard the integrity of operations using informants?

Presumably, undercover operations are not undertaken on an ad hoc basis. One would hope that they are conducted in accordance with specified guidelines and are subject to some degree of review and approval within the investigative agency.[25] Logic would seem to dictate that formal procedures should be in place to screen and to authorise all such operations, and that the prosecutor participate as a matter of course in this process. Authority to go undercover should not be granted without explicit endorsement by a prosecutor. It should perhaps be noted at this point that in the United States, the Attorney General's guidelines for FBI undercover operations require that any proposals to conduct

24 Blanch, R O, *Prosecution Policy and Guidelines of the Director of Public Prosecutions* (1991), New South Wales. Director of Public Prosecutions, Sydney at 15.

25 For a suggestion that such safeguards may be lacking in some Australian jurisdictions, see Findlay, M, "'Acting on Information Received' — Mythmaking and Police Corruption" (1987), 1/1, *Journal of Studies in Justice*, 19-32; Hogg, R, "The Politics of Criminal Investigation", in G Wickham (ed), *Social Theory and Legal Politics* (1987), 120-140.

such operations be endorsed by a federal prosecutor before their obligatory screening by a review committee.[26] In such a capacity, the prosecutor may well be of assistance to investigating officers, by indicating what evidence the crown may ultimately require, and whether the proposed operation would be likely to yield any unique evidentiary benefits.

Participation in the planning of an investigation may also be of direct benefit to the prosecutor, who, in anticipation of defence strategies, may be able to contribute to the structuring of an investigation so as to pre-empt a potential defence. For example, careful planning and control of an informant's interaction with the target of an investigation may preclude a defence of entrapment based upon the allegation the informant had unrecorded meetings with the defendant outside the presence of law enforcement agents.[27]

Given the inherent risks in using informants, what principles might govern their use?

It would appear self evident that informants, regardless of whether they are likeable or loathsome, should not be used gratuitously. Their use should be reserved for serious, not trivial matters. The old injunction against "burning the house to roast the pig", is applicable here. When the gravity of the target criminality dictates, informants should be used only as a last resort. If conventional investigation methods will suffice, use them. Are there alternative, less invasive, investigative strategies which are as likely to achieve the goal of conviction? If so, they should be employed. If an undercover police officer can perform a task as well as an informant, use the undercover officer. If an informant can be of use in introducing an undercover officer to the target of an investigation, the use of the informant should be limited to that role. The informant's participation in the investigation should cease when the defined task is completed.

Investigations involving the use of informants should avoid using criminal or otherwise ethically questionable methods unless absolutely necessary. When necessity dictates their use, they should be used only as required.

Officials responsible for managing investigations involving informants should be sensitive to potential harm to third parties. In the exceptional circumstances where the risk of such harm exists, it should be kept to an absolute minimum.

The targets of investigations involving informants should be chosen with care. They should not be fishing expeditions; investigations which might conceivably be seen to be politically motivated or in some way discriminatory should be considered with the utmost caution. Rightly or wrongly, the so-called "Greek Conspiracy" case was regarded by many as an attack on one of Australia's largest ethnic minorities.[28]

What arrangements might be put in place in order to achieve more rigorous scrutiny of the use of informants and of undercover operations in general? Undercover investigations, with or without the use of informants, are not conducted in a vacuum, for their own sake.

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26 McDowell, G E, "The Use of the Undercover Technique in Corruption Investigations", in US Department of Justice (ed), *Prosecution of Public Corruption Cases*, (1988) 101-114.

27 Jarrett, H Marshall, "Common Defenses", in US Department of Justice (ed), *Prosecution of Public Corruption Cases* (1988) at 235; for an example of such a defence, see *US v Feekes* 879 F 2d 1562 (7th Cir 1989).

28 Grabosky, P N, *Wayward Governance: Illegality and its Control in the Public Sector* (1989), Ch 6.

They are undertaken to produce evidence sufficient to achieve a successful prosecution. It may thus be argued that a prosecutor should be an integral part of an undercover operation from its inception. From the initial review of a proposal through the conclusion of an operation, the prosecutor is in a position to advise whether the practices in question are legal, ethical, and likely to produce the evidence required.

Among the considerations which might determine whether or not to proceed with an operation are the following:

- Will the foreseeable conduct of the informant remain within the boundaries of tolerable behaviour?
- Will the benefits derived from the operation exceed any costs which the operation may incur? Whilst one must concede that it may be difficult for persons whose raison d'etre is charging and convicting criminals to focus on a wider picture, interests of justice and economy demand that this be done.

There are other considerations beyond efficiency and effectiveness which should not be overlooked. Once an operation is in progress, it should be frequently reviewed by a monitoring group which includes prosecutorial representation. The prosecutor should review evidence as it emerges during the course of an operation, and should participate in the planning of strategy and tactics as the operation unfolds.

The testimony of a police officer is likely to be received with less incredulity by a jury than is the word of an informant. Police officers are, in theory, more accountable than informants.

Those cases in which the testimony of an informant is essential obviously entail substantial risk. In addition to the self-evident problems relating to a turncoat's credibility, informants have been known to have second thoughts about their roles. Key witnesses have been known to change their tune on the steps of the courthouse. A witness could recant in the middle of a trial. Even after the crown succeeds in obtaining a conviction, an informant/witness may repudiate his or her testimony, thus paving the way for allegations of a miscarriage of justice. Provisions such as Section 21 E of the *Crimes Act* 1914 (Cth), which permits the Director of Public Prosecutions to appeal against a reduced sentence when promised cooperation with law enforcement agencies has not been forthcoming, provide some disincentive to such conduct.

The informant's capacity for treachery was noted above. It has been said that one should say nothing to an informant that one would not wish to read in the newspapers or hear in open court. Indeed, "cooperating" witnesses have been known to act as double agents, disclosing the identities and tactics of undercover officers.

How best to prevent such nightmares from occurring? Prior to engaging an individual as an informant, his or her potential for criminal conduct and, if appropriate, his or her reliability as a witness should be carefully assessed.

Informants who are recruited for assistance in a criminal investigation should be carefully instructed about their role and their responsibilities. Particular attention should be accorded the boundaries of permissible conduct. A bright line should be drawn between that conduct which is acceptable, and that which is not.

The activities of informants should be closely monitored. Whenever possible, checks should be made to corroborate information provided by the informant. This may entail both human and electronic surveillance. Some consideration might even be given to the use of polygraph examinations of informants for purposes of verification. Problems of reliability inherent in the use of polygraphs, especially with sociopaths or persons devoid of conscience, would suggest that their usefulness is limited. As one prosecutor notes,

> Mistrust everything; look for corroboration on everything you can; follow up all indications that he may be fudging.
>
> Secure information on the witness' background, mental problems, probation reports, prior police reports, and prior prosecutors who have either prosecuted the witness or used him in court. What do they think about his credibility? How did the jurors react to him?[29]

Any history of medication or drug use should also be explored with a view toward neutralising a potential challenge to the witness' credibility. To guard against the withdrawal of cooperation by an informant/witness who might have second thoughts, it may be useful to have on hand a statement which has been signed and witnessed. Those officers managing the investigation should maintain sufficient contact and support to ensure that cooperation remains forthcoming. As one prosecutor experienced in these matters put it, "If you neglect the baby-sitting aspects of this business, you will get burned."[30] The potential for double dealing by informants cannot be ignored.

Whether or not the informant/witness is in custody, there may be significant risks to his or her safety. These risks may be posed by those who stand to lose from the testimony, or by those who find informants abhorrent in principle. The careful consideration which prosecutors give to proposals for indemnification of witnesses may make the following discussion gratuitous. The use of a foul smelling witness may give considerable ammunition to the defence. Moreover, perceived generosity to an indemnified witness may be seen by the jury as an inducement to lie. The smaller the inducement the better, and any linkage between performance and reward should be structured with great caution.

It may also be a good idea to record all conversations between investigative authorities, prosecutors and informants during the course of an investigation. Whilst this may appear inefficient, the resulting product may help rebut any suggestions from the defence that the crown may have failed to disclose any exculpatory evidence.

Given the jaundiced view which many jurors have of criminals as witnesses, there are a few strategic observations which one might make. It might already be obvious, but the witness should not be more culpable than the defendant. The accused should not look good by comparison. This means that "little fish" should be used against "big fish", not the other way around.

It may also be preferable to structure an agreement with a cooperating witness in such a manner that there remains an incentive to perform well.

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29 Trott, S S, "The Successful Use of Informants and Criminals as Witnesses for the Prosecution in a Criminal Case" (1988), in US Department of Justice (ed), *Prosecution of Public Corruption Cases* (1988) at 124.

30 Id at 127.

> Hold something back. The witness must perform first. If you give him everything to which he is "entitled" before he testifies, you may be unpleasantly surprised when he disintegrates on the witness stand. I prefer if possible to have such a witness plead guilty before testifying and sentenced afterwards.[31]

It has also been suggested that the prosecutor should pre-empt the defence, by using an opening statement to introduce the cooperating witness, his or her background, and whatever agreements have been reached. This may be accompanied by remarks to the effect that one isn't really pleased at having to adopt such a course of action, "but crimes aren't all committed in heaven, so all our witnesses aren't all angels".[32] Such a strategy is referred to by some as inoculating the jury.

From the above discussion, it might be concluded that the use of an informant in the course of an investigation is one matter, and the use as a witness for the prosecution in a criminal case is quite another. To quote an Associate Attorney General of the United States:

> Do not use such witnesses unless in the most careful exercise of your judgment such a move will significantly advance your ability to win your case. When you do, be prepared for war. Remember that the injection of a dirty witness into your own case gives tremendous ammunition to the defense, ammunition that is frequently more powerful than the benefit you expect. Juries expect prosecutors to be men and women of integrity. If you don't show the proper distance between yourself and the witness in court and if you have not handled your witness correctly beforehand, you might as well throw in the towel.[33]

CONCLUSIONS

What conclusions might then be drawn from the above pages?

- First of all, informants should be used only as a last resort. As a United States federal prosecutor once put it "The best way to control informants in undercover operations is not to use them at all".[34]
- Where possible, their use should be limited to facilitating investigations. Their use as crown witnesses should be limited to those cases in which their evidence is absolutely necessary to establish guilt.
- They should be used to investigate only the most serious offences.
- They should not be used in circumstances which entail a risk of significant harm to third parties.
- Directors of Public Prosecutions have a key role to play in ensuring that the use of informants remains legal and ethical.

In 1991, concern in England over apparent miscarriages of justice brought about the appointment of a Royal Commission on Criminal Justice. In a number of Australian jurisdictions, the criminal justice system would also appear to be functioning less than

31 Id at 126.
32 Id at 128.
33 Id at 121.
34 McDowell, above n26 at 108.

perfectly. In addition to the aforementioned "Greek Conspiracy" matter, one could cite various recent cases in Australia where investigative shortcomings, with or without the assistance of informants, have given rise to very costly judicial inquiries and even more costly compensation payments.[35] The question I pose generically is this. To what extent have prosecutors been responsible for these outcomes? What can prosecutors do to prevent similar outcomes from occurring in future?

I would like to close with two general observations.

Informants, along with surveillance and the manipulation of trust, may be necessary tools for law enforcement, but they are double-edged tools. If they are to be used at all, they should be used not indiscriminately, but surgically, in accordance with established principles and procedures. Inappropriate use of these most intrusive of investigative methods may contribute to the further erosion of trust which is the cement of an open and democratic society.

The Director of Public Prosecutions is independent, but only to a point. To be sure, the office is independent of political control or governmental direction. But it exists within a criminal justice system, and to the extent that a prosecutor introduces evidence which has been tainted by government misconduct, the prosecutor places an imprimatur on such lawlessness. The prosecutor's own integrity becomes tainted. The credibility, indeed, the legitimacy of the prosecutor's office is ultimately at stake.

The fact that in some Australian jurisdictions investigative agencies have been less than hospitable to the idea of prosecutorial involvement in the investigative process does not devalue the principle.[36] The choice which a prosecutor faces is whether to remain part of the problem, or to become part of the solution.

35 Carrington, K, Dever, M, Hogg, R, Bargen, J and Lohrey, A (eds), *Travesty! Miscarriages of Justice* (1991).

36 New South Wales, "Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges Against Harold James Blackburn and Matters Associated Therewith" Report of Royal Commission of Honorable Justice J A Lee (1990), 364-66.