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 'jail-house 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.
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> [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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> [Murphy J in *Lawless* v R (1979) 142 CLR 657 at 682].

References

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3. R.N. Howie QC, Acting DPP, personal correspondence, 12 April 1994.
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5. ICAC, above, at p.97.
6. Grabosky, P., 'Prosecutors, Informants and the Integrity of the Criminal Justice System' (1992) 1 *Current Issues in Criminal Justice.*
7. R.N. Howie, QC, personal correspondence, 12 April 1994.
8. Hidden, P., *Reflections of Defence Counsel on Prison Informants,* Paper presented to University of New South Wales, Faculty of Law, Continuing Legal Education Seminar on Informers and the Criminal Law, 3 May 1993.
9. ICAC, above, at p.101.
10. ICAC, above, at p.79.
11. R.O. Blanch, DPP, personal correspondence, 11 August 1992.

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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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