THE LAW
THE TRAPS IN TRADE-OFFS

George Zdenkowski*

Emotions ran high when the NSW Court of Criminal Appeal held that Fred Many, convicted of a grotesque sexual assault, should have his sentence reduced in return for providing information to the police. The response was swift and mixed. Splenetic editorials poured forth. Kathryn Greiner, in her new role as radio talkback ideologue, condemned the practice. Her husband the Premier, more cautiously called for a review of the law. Attorney General John Dowd steadfastly pointed out (quite correctly) that it was a court, not a government, decision and that the decision did not break new ground. However, he later welcomed any review.

Peter Hidden, QC, Senior Public Defender, acknowledged the legitimacy of the practice in terms of the law but expressed reservations about the reliability of evidence thus obtained; he pointed to the recurrence of certain prisoners as willing informers and called for an inquiry into those aspects. The state's Labor Opposition jumped on to Hidden's coat-tails and endorsed the need for an inquiry. And Michael Yabsley, Corrective Services Minister, said he was uneasy about the situation.

Meanwhile, the media milked the confusion and resentment for all it was worth.

The ambiguous terminology `early release' (suggesting improper executive intervention) was wheeled out with relish. The boundary between court and government responsibility for the decision was blurred. The alleged benefit or detriment to the victims of opposing/supporting the practice of granting sentence reductions was simply asserted. The suggestion was made, incorrectly - that the Crown had no power to seek appellate review of sentences reduced in this manner.

* Examines the benefits and dangers of reducing informers' prison sentences.

The reduction of a prison sentence in return for information provided to the authorities has largely been presented by the media as a bizarre distortion of the criminal justice system, undermining public confidence and requiring immediate correction. Lest this be the trigger for hasty and ill-conceived piecemeal reform, let us place it in context.

Whatever the merits of the practice, sentencing discounts are well established and have a sound legal foundation. Moreover, it is but one of many entrenched practices in which offenders may gain concessions in exchange for benefits which accrue to state authorities. Other examples include sentencing discounts for guilty pleas, the granting of immunity from prosecution for provision of information, plea bargaining.

What is at stake is a clash between administrative pragmatism and a realisation of ideal justice. The compromises which are part of the normal operation of the system do not stem from some conspiracy by offenders. They are embraced by police, prosecutors and the courts and shored up by the law, policy and practice.

As to informers, NSW Chief Justice Sir Laurence Street put the principle in this way in 1986:

> It is well recognised in the authorities that, where assistance is afforded to prosecuting authorities, this is to be weighed in favour of an element of leniency being extended to the person standing for sentence. The authorities are to be found both in this country and in England.

The Australian Law Reform Commission in its report Sentencing to the federal government (1988) agreed after extensive national consultations which disclosed widespread support among police prosecutors, defence lawyers and judicial officers.

The usual rationale for this principle is that it is in the public interest that people be encouraged to come forward with such information and, secondly, it is recognised that prisoners who inform on fellow offenders (`dogs' in prison parlance) will be subjected to extremely harsh conditions in gaol because of the need to protect them throughout sentence. But the extent of the leniency granted may vary significantly having regard to the gravity of the offence and the quality of the assistance given.

This allows the courts a measure of quality control and militates against arguments in favour of fixed discounts.

On the other hand, giving a discount to informers can be criticised as unfair because it is really only open to the prosecution to engage in the practice and because it allows offenders to escape full punishment. Arguably, the reliability of evidence given in response to such an inducement is open to question. Moreover, the practice is largely secretive and unaccountable – there being no obligation on the police or prosecution to reveal any agreement or, if revealed, its details. The practice adds substantially to tension and resentment within the prison system. The `benefit' to the informer is arguably more apparent than real when one considers the reality of his/her life both inside and outside prison.

Finally, there is considerable potential for abuse of the process and corruption. If the government proceeds with the suggested review, it has some options: maintain the status quo; abolish the discount; retain the discount and introduce safeguards. If the government abolishes the discount, it should make clear to the community that this may result in a sacrifice of certain information and in correspondingly fewer convictions for serious crime.

If sentencing discounts are to be retained, reforms might be considered. Prosecutors should make full disclosure to the trial court and defence lawyers, before trial, of any benefits accrued by or promises of benefits to prosecution witnesses. Failure to make such disclosure should result in appellable error. The trial judge in such a case should be required to warn the jury about exercising caution in relation to such evidence. Such a warning is required in relation to evidence by an accomplice and, in certain circumstances, uncorroborated unsigned confessions.

An embargo could be placed on `recycling' of information so that the prison informer does not seek to achieve further clemency from the executive for the same contribution. (This would largely codify existing practice, although some cases seem to leave the door open in relation to 'on-going' developments.)

An interesting legal spin-off which has not been explored fully in the extent to which prison sentences will be measured in quality as well as in time. Traditionally, sentences have simply been set by reference to their length even though it has long been known that the subjective experience of imprisonment (due to health, security level, personality, available amenities and programs,

etcetera) can vary dramatically. The courts have set the term and the Corrective Services Departments have exercised enormous discretions within these limits.

The recognition by the courts that the qualitatively different (and harsher) prison experience of informers justifies a reduction in length of the prison term may provide the basis for similar arguments by prisoners whose prison regime is exacerbated by their constant segregation due to say, their HIV positive status or placement `on protection'. Courts may then be confronted with issues such as whether their permanent segregation is self-induced.

The third option for government mentioned is to maintain the status quo. However this stance would involve turning a blind eye to the problems and - importantly - to the allegations of possible corruption. It is one thing to acknowledge, however grudgingly, the legitimacy of the discount principle. It is entirely another to countenance corrupt practices. Hidden has drawn attention to evidence having been given (for corresponding advantage) by prison informers on multiple occasions. He has highlighted the need for caution and scrutiny and the danger, albeit theoretical of pressure by third parties (for example, police) on such informers to give such evidence and, possibly, to fabricate such evidence.

Some have argued that the decline in use of the `police verbal' (fabrication of alleged oral confessions to police by accused) has been accompanied by the increasing use of other techniques. One such device is to rely on alleged oral confessions by prisoners to their fellow prisoners. If they have been making multiple appearances, it would seem that some prison informers have developed priest-like qualities and attracted many confessions.

One of the ironies of the debate about sentencing discounts is the lack of acknowledgement of a much more dramatic (and admittedly more rare) departure from convention: the granting of complete immunity (or indemnity) from prosecution in exchange for provision of information to the authorities. Because these matters do not come to court (or sometimes even to public attention at all), it is difficult to estimate the extent of the practice with any accuracy.

Popular knowledge of the practice tends to be confined to high-profile examples - the `Mr Asia' drug trial, the case of Sir Anthony Blunt in England and the use in Northern Ireland of `converted terrorists'. The term `grass' and

`supergrass' have come into regular usage (they apparently have their origins in East London rhyming slang where a police informer was known as a `copper' and hence `grasshopper').

The criticisms made earlier of sentencing discounts for providing information based on unfairness, unreliability and lack of accountability, arguably apply with even greater force to the use of complete indemnities. The clash of pragmatism and ideal justice clearly goes well beyond sentencing discounts for informers. If the government seriously wants to tackle `the problem' – and not just hose down an uncomfortable experience – it will find that it is bristling with many related issues.