



Presumption of Innocence – Allegation of unproved acts in Letters of Assistance and Police Clearance Certificates

**Submission to The Honourable Mr Bob Cameron,
Minister for Police and Emergency Services**

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The following is a submission of the Law Institute of Victoria, the Criminal Bar Association of Victoria and Liberty Victoria in relation to the current Police practice of alleging unproved acts in letters of assistance and Police clearance certificates.

Letters of Assistance

From time to time Police prepare letters of assistance (known by defence lawyers as letters of comfort) in support of a defendant on a plea of guilty where that defendant has provided ongoing assistance or information to Police in a major investigation.

Where a defendant has provided assistance to Police in relation to other persons' involvement in serious criminal matters, investigating Police may provide the Court with details of the defendant's assistance and the consequences of that assistance in respect of the ongoing investigation and/or any convictions obtained because of the assistance provided. Police may also advise the Court of any risk or other consequences to the defendant and/or his family which resulted, or may result, from the defendant's co-operation.

Providing substantial assistance to Police, particularly where there is a personal risk involved for the defendant and/or the defendant's family, can be a powerful mitigating factor in sentencing for serious offences where that assistance is properly acknowledged by Police during the sentencing hearing.

There is considerable public interest in encouraging defendants to co-operate with Police investigations in serious criminal matters. If offenders perceive that they are not receiving an appropriate level of support from Victoria Police in return, that co-operation will dry up. The current approach by Victoria Police of giving with one hand and taking away with the other is both unfair and short sighted. The NSW Court of Criminal Appeal in *R v Cartwright* (1989) 17 NSWLR 243 at 252-3 observed that:

It is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information.

In order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. It has come to our attention that Police have been including prejudicial material in the letters of assistance and have been refusing to provide the defendant's legal representative with a copy of the letter of assistance.

In some cases Police have denied defence lawyers an opportunity to peruse the contents of the letter at all, or to view the letter in a timely manner prior to the plea. Perusal of the document by the solicitor and counsel before the plea is essential to enable counsel to prepare his or her plea, to determine whether or not to call the Informant (or the author of the letter) to give oral evidence on the plea, or whether to allow the letter to be tendered on the plea at all. Provision of a copy of the letter in a timely manner is essential to enable counsel to properly prepare the plea in chambers and to take detailed instructions from the defendant in relation to matters contained in the letter. Retention of a copy of the letter is essential to assist counsel advising on an appeal. Where the defendant has provided significant assistance to Police at great personal cost to himself or his family, the defendant should also be entitled to provide the letter of assistance to the court in

subsequent matters, in the same way as a psychiatric or psychological report or personal reference may be used in several matters over a period of time.

Police continue to prepare letters for the court which contain allegations of uncharged acts which, in some cases, are so prejudicial that the mitigatory effect of the letter is significantly undermined. This practice not only deprives the defendant of an opportunity to seek a sentencing discount for assisting Police, potentially at considerable risk to his or his family's safety, but also has the effect of deterring such assistance in the future. In effect, the Police are giving with one hand and taking away with another. Where the defendant is unable to take advantage of the letter of assistance prepared by Police because of its prejudicial content, counsel's plea may be significantly hampered by what he or she is unable to put before the court, for fear of unproved acts being raised in rebuttal by Police. The defendant may also be at risk of receiving a higher sentence relative to those co-defendants who were able to rely on letters from Police recognising their co-operation in the investigation of serious crime.

Response from Victoria Police

The LIV wrote to the Chief Commissioner on 17 February 2009 requesting a review of current practices in relation to letters of assistance. The LIV requested that a draft of any letter of assistance be provided to the defendant's legal representative within a reasonable period prior to the date of the plea hearing; that Police consider any objections raised by the defence to aspects of the letter; that Police provide a copy of the final draft of the letter to the defendant's legal representative within a reasonable period prior to the plea hearing; that no letter of assistance is tendered to the Court without full and timely disclosure of its contents to the defence or without the consent of the defence.

The LIV has not received a response from the Chief Commissioner. However, the Intelligence and Covert Support Division advised in a letter of 3 March 2009 that, following discussions between Victoria Police, the Chief Magistrate and the Director of Public Prosecutions, defence lawyers will now be given an opportunity to peruse letters of assistance in a private room, but will not be permitted to have a copy of the letter. There was no indication as to when defence would be able to view the letter.

The LIV and the Victorian Bar, the pre-eminent representative bodies for defence lawyers in this State with representatives on all Court User Groups and other stakeholder forums, were not consulted by Victoria Police in relation to this policy position. Surprisingly, the County Court and Supreme Court also appear to have been excluded from these discussions, although the majority of cases in which letters of assistance would be tendered would be in the superior courts.

Victoria Police also advised the LIV on 3 March 2009 that letters of assistance, which are prepared by senior police, will continue to contain allegations of unproved acts where defendants "engage in criminal behaviour after being specifically instructed by police members not to do so". The reason provided for the continuation of this practice is because "it would be misleading of Victoria Police to detail only those matters that would conveniently suggest the defendant had reformed his or her behaviour and failed to disclose material providing a complete picture of the police/human resources relationship". Victoria Police also indicated that, where the defendant's lawyers object to any aspect of the letter of assistance, Police will withdraw the letter from the proceeding. There was no suggestion that Police would consider any amendment to the letter following discussions with the defence.

It appears that Victoria Police have a poor grasp of the role of letters of assistance on a plea in mitigation. A court is entitled to take into account, as evidence of remorse, acts by the defendant which have been of assistance to police in investigating serious crime, particularly where those acts have resulted in significant detriment or risk to the defendant or his family, or where the defendant is exposed to a significant risk of retribution during a prison term or on release from prison. Consideration will also be given to the conditions in which offenders must serve their sentence because of their status as a Police informer. The prosecution is not entitled to allege any adverse matters on the plea without the consent of the defendant or by proving the matter beyond reasonable doubt on the basis of admissible evidence.

Providing assistance to Police in an investigation ought not be interpreted by Police as a promise by a defendant that he or she will thereafter spurn a life of crime and join the side of the right. Similarly, a failure by a defendant to conform to such expectations by Police ought not undermine the value of his cooperation with Police in the investigation of serious crime. If a defendant provides assistance to police he should be entitled to be considered for an appropriate sentencing discount on the basis that his assistance indicates a particular level of remorse for the offences to which he is pleading guilty. Remorse is a separate sentencing consideration from the matter of character.

The Law

Section 16A(2) of the *Crimes Act* 1914 (C'th) provides, in relation to Commonwealth offences:

In addition to any other matters, the court *must* take into account such of the following matters as are relevant and known to the court:

- (f) The degree to which the person has shown contrition for the offence:
 - (i) by taking action to make reparation for any injury, loss or damage resulting from the offence OR
 - (ii) in any other manner.

Section 5(2) of the *Sentencing Act* 1991 (Vic) provides that factors which must be taken into account include:

- (g) the presence of any aggravating or mitigating factor concerning the offender or any other relevant circumstances.

Section 5 of the *Sentencing Act* 1991 also refers to reductions in sentence on the basis of an undertaking given by the offender to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence.

The Victorian Sentencing Manual (Judicial College of Victoria) provides guidance in relation to the relevance of various matters, both mitigatory and prejudicial, to the determination of sentence. A summary of the relevant discussion in the Victorian Sentencing Manual is given below.

It is well-established that where an offender has given assistance to the authorities this factor is to be weighed in favour of leniency. Assistance to the authorities will usually justify some mitigation of punishment, and where the assistance is of considerable value, the discount warranted will be greater. The discount given will depend in each case on the circumstances. At higher levels, co-operation may involve the implication of co-offenders

or provision of other information of assistance to authorities, and the giving of evidence in criminal proceedings. Co-operation at this level is sometimes considered to attract an 'informer's discount', where offenders assist authorities proactively, acting as 'under-cover' agents to provide information and evidence, commonly at greatly increased personal risk. It is for these offenders that the greatest discounts are reserved. Also relevant to the level of discount is the degree to which the co-operating offender is genuine in his or her co-operation, and finally the impact or potential impact of his or her assistance.

The 'informer's discount' is not the only basis upon which a co-operating offender may attract a reduction in sentence. Co-operation may be relevant to remorse and also to prospects for rehabilitation, and both factors may lead to a reduction of sentence independently of whether the offender qualifies as an informer. Significantly, co-operation will commonly have consequences for an offender in terms of the increased hardship of any custodial sentence to be served.

A number of courts have attempted to summarise the principles applicable to sentencing persons who have provided assistance to the authorities.

In *Duncan* [1998] 3 VR 208 (CA Vic), Callaway JA outlined the principles applicable to consideration of a plea of guilty and assistance to the authorities in sentencing:

1. Both a plea of guilty and significant assistance to the authorities usually justify some mitigation of punishment in the exercise of the wide discretion conferred on a sentencing judge. It is referred to as a 'discount' to make it clear that a sentence is never increased or made more severe because an accused person puts the Crown to its proof or declines to give such assistance
2. The distinction to which I have just adverted is practical, whether or not it is logical or easily understood. It serves to inhibit a wrong approach to sentencing. In that respect it is like the proposition that, whilst remorse is a circumstance of mitigation, its absence is not an aggravating factor
3. In the case of a suspended or partially suspended sentence, the discount applies to the sentence itself, because of s 27(3) of the Sentencing Act, and also in deciding upon the extent of its suspension
4. In other cases of imprisonment the discount applies in the first instance to the head sentence, because the latter is imposed on the hypothesis that the prisoner may have to serve every day of it. That is the common law (later incorporated in s 5(2AA) of the *Sentencing Act*).
5. Having affected the head sentence, the discount will inevitably affect the non-parole period. The plea or the assistance may even be entitled to additional weight at that stage, for example if it evidences enhanced prospects of rehabilitation
6. In appropriate circumstances the discount for assistance may be very considerable indeed. Even where it does not evidence repentance or foreshadow amendment of life, a large reduction may be made for purely utilitarian reasons dictated by the public interest. [Emphasis added.]

In *R v QMN; R v WD* [2004] VSCA 32 (17 March 2004) O'Bryan, A.J.A, held that:

... It is sentencing principle that an informer is entitled to an informer's discount when the circumstances of assistance given to the police are made known to the sentencing court. A substantial discount should be given to an offender who volunteers useful information about offences not known to the police.

Leniency is extended to an informer, firstly because it is in the interests of the community to encourage informer's, secondly because the informer is exposed to a risk in prison and within the community when the informer's conduct becomes known.

... What has happened is that the appellant has recently disclosed to his lawyers facts known to him before sentence, but which were not disclosed to the sentencing judge, for the purpose of obtaining a lower sentence than that imposed upon him. To disclose, or not to disclose, at the time of sentencing that you are an informer is a two-edged sword for obvious reasons. If the disclosure had been made in the course of the plea the sentencing judge would have been obliged to discount the sentence the judge regarded as appropriate. The discount will vary depending upon an appreciation of the risk that imprisonment will be a greater burden on the offender by reason of his being known as an informer. In the present case, it was contended that the risk might not become apparent until the appellant is released from gaol, for he lives in a community generally unsympathetic to informers. [Emphasis added]

Evidence of the assistance provided by a defendant to Police must be provided on the plea. Submissions from the bar table, even where made with the consent of the Crown, are not sufficient (*Schioparlan & Georgescu* (1991) 54 A Crim R 294).

The relevance of the offender's motive for providing assistance to authorities was discussed by the NSW Court of Criminal Appeal in *R v Cartwright* (1989) 17 NSWLR 243 at 252-3:

If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.

Evidence of remorse may be of little significance where it has been followed by further episodes of offending. However, where it is sought to disprove a claim of remorse, it will ordinarily be necessary to do so by leading admissible evidence (*Raimondi* (1999) 106 A Crim R 288).

The standard of proof in relation to matters to be taken into account in sentencing is well established. A sentencing court:

... may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities (*Storey* [1998] 1 VR 359).

Section 6 of the *Sentencing Act* 1991 provides:

In determining the character of an offender a court may consider (among other things):

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender; and
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.

Evidence of bad character may indicate persistent lawlessness in a particular regard or a propensity to commit particular crimes. In such cases bad character can impact on mitigation (*Robinson* [1975] VR 816). Subsequent criminal convictions may be relevant to the court's determination of the appropriate sentencing disposition. Unless relying on good character, the defence has no duty to inform the court about subsequent convictions. The prosecution has a duty to prove subsequent convictions and other relevant subsequent conduct whenever it is open to the court to fix a non-parole period (*Rumpf* [1988] VR 466 at 476). However, as discussed above, the court cannot take into account subsequent conduct that is not proved beyond reasonable doubt by admissible evidence.

Conclusion

It follows that allegations of subsequent criminal conduct by an offender are not relevant to a determination of the mitigatory effect of the offender's assistance to authorities. Whilst subsequent criminal conduct may be relevant to negative claims of remorse or to determine the character of the offender, it must be proved by the prosecution beyond reasonable doubt on the basis of admissible evidence.

As unproven allegations of criminal conduct contained in letters of assistance cannot be taken into account by the sentencing court, they have no probative value, may be highly prejudicial and must not be included in letters of assistance.

Recommendations for reform

Whilst it is acknowledged that there may be the need for confidentiality in relation to ongoing or sensitive Police investigations, it is not acceptable for any party to tender evidence to the Court which has not been provided to all parties in the case in a timely manner. The LIV, the Criminal Bar Association of Victoria and Liberty Victoria object to the current practice of providing prejudicial material in letters of assistance which is neither admissible nor relevant to the court's sentencing disposition.

It is recommended that the Minister establish a new protocol for Police Members providing letters of assistance in serious criminal cases. It is recommended that a revised protocol include the following provisions:

- Letters of assistance must include details of the nature of the assistance provided by the defendant, the benefit to any Police enquiries provided by that assistance and the consequences or risks incurred by the defendant or his family because of the assistance given;

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- Letters of assistance should be drafted in a way that does not disclose confidential information or operational details, whilst still revealing sufficient particulars to enable the Court to give appropriate weight to the offender's assistance on sentencing;
 - Unproved criminal acts must not be included in letters of assistance;
 - The Police Member drafting the letter of assistance must provide a draft of the letter to the defendant's legal representative within a reasonable period prior to the date of the plea hearing;
 - Police must settle the final form of the letter of assistance having regard to any objections or suggestions made by the defendant's legal representative;
 - Police must provide a copy of the final draft of the letter of assistance to the defendant's legal representative at least 48 hours or within a reasonable period prior to the plea hearing;
 - Letters of assistance must not be tendered to the Court without the consent of the defendant or his or her legal representative.

Police Clearance Certificates

Many persons seeking employment are required to obtain a Police clearance certificate in support of their application. The Law Council of Australia (LCA) is leading a campaign to encourage advocacy in response to a policy change which has led to the inclusion of pending charges as well as prior findings of guilt or convictions in Police clearance certificates. The inclusion of unproved allegations in Police clearance certificates undermines the presumption of innocence and may prejudice a person's ability to find employment for long periods whilst waiting for outstanding charges to be finally determined. The policy change is the result of police lobbying and is consistent with the Victoria Police policy to include pending matters and uncharged acts in letters of assistance.

The LCA wrote to the Federal Minister in November 2008 and received a response in March 2009 advising that the information to be included in any Police clearance certificate is a matter for local police. The LIV, the Criminal Bar Association of Victoria and Liberty Victoria consider that it may be appropriate to examine this issue concurrently with the matters discussed above in relation to letters of assistance, as both impinge on the right of all Victorians to be presumed innocent until proven guilty and to avoid penalties for offences which have not yet been proven at the appropriate standard.

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