

Submission to the Royal Commission on Management of Police Informers The Honourable Margaret McCurdo AC, Commissioner

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1. This submission is intended to contribute generally to paragraphs 4,5 and 6 of the terms of Reference set out for the Royal Commission.
2. In doing so, the submission focuses on the ethics of state agents using informers, on the basis that a moral philosophical foundation for the deployment of informers is as important to the integrity of informer management (in which the public has a vested interest) as is statutory regulation and organizational procedure. Whilst it does not necessarily follow that that which is lawful is also and consequently morally justified, when it exists moral justification invests that which is lawful with the qualifying characteristic of legitimacy.
3. This submission is supplemented by two additional submissions:
 - a revised draft of an unpublished Briefing Paper produced for the Australian Research Council Centre for Excellence in Policing and Security; and
 - a submission to the *Consultation Process on Authorised Professional Practice for Undercover Policing* in the United Kingdom (2016);both of which seem relevant to the more general inquiries of this Royal Commission into the management of informers.
4. In the author's professional police practitioner experience police investigators, especially those in specialist roles, are often motivated by a sense of mission. The 'mission' can be construed and articulated in a variety of perceptions, not necessarily mutually exclusive: a crusade against crime; a desire to put 'bad people' in prison; a desire to help crime victims; a desire to join (and so enjoy the benefits of association with), to contribute to and to maintain, the professional status and reputation of a specialist unit; a desire to achieve prescribed performance measures; a desire to achieve the personal and professional kudos associated with being known as a 'good thief-taker' or as a cop who always gets his or her man. The values that fuel these motivations seem often to be deeply-held personal and/or professional convictions, anchored (consciously or subconsciously) to ego. Lack of success can be taken personally, damaging the sense of personal and/or professional self-worth. These motivations in turn contribute to and are contextualised within organizational culture and specialist unit sub-cultures. Temptations arise to achieve desired success at any cost: ends are held to justify means. Motivations emerge inclining individuals to rationalise – or disregard - infringements of procedural norms. The boundaries of appropriate and acceptable conduct are crossed.
5. In managing investigators so tempted, or already engaged in improper, corrupting practices it can be helpful to propose a resetting of the individual moral compass by refocusing motivation and mission towards an external navigational reference. A context in which success is defined differently and does not necessarily bring with it automatic personal kudos, whilst lack of success does not necessarily impugn the practitioner either. To achieve this practitioners need a new mission narrative.
6. That is the rationale for this submission. In working towards this objective, it is suggested, insights emerge into the use of "human sources who are, or have been, subject to legal obligations of confidentiality or privilege".

Reshaping the Narrative: A Moral Foundation for the Management of Informers

7. The fair, impartial, honest, and proper operation of the criminal justice system is a common good to which all individuals within the criminal justice system's jurisdiction and subject to its authority, whatever their legal status, have both collective (as members of the community served by the system) and individual moral claims.¹
8. A criminal justice system that is perceived to be operating fairly, impartially and properly is consequently perceived to be operating with legitimacy. A system so featured and thus characterised has moral worth, and so is worthy of community respect and support. Multiple studies have shown that individuals who regard the criminal justice system has having operated fairly, impartially, and properly, accept decisions arrived at through such operation, even when the decisions have adverse consequences for the individuals concerned.²
9. The criminal justice system is taken to include as constituent elements both actors operating within the system and the processes by which the system operates.
10. Actors of the criminal justice system include the judiciary, lawyers, court administrators, state agents involved in the administration and undertaking of investigation, state agents involved in the administration and undertaking of sanction, third parties for the time being subcontracted to undertake investigation and/or sanction services, and members of the public in the roles of information-providers (informants - including informers - and witnesses) or fact-finders (jurors).³
11. Processes include the use of statutory investigation powers to acquire and secure information and physical or digital evidence, and to bring suspected offenders before the courts; and the rules of evidence and procedure that govern trial management.
12. The criminal justice system is compromised to the extent that any of the actors operating within it fails to undertake their role fairly, impartially, honestly, and with regard to proper process.
13. When the criminal justice system is so compromised, the collective and moral claims of the community and individuals are (put at risk of being) infringed because the unfair, partial, dishonest, and improper operation of the criminal justice system contravenes the common good.

¹ "One of the reasons for the existence of the criminal justice system is to create distance from the grief, anger and understandably vengeful human emotions felt by a victim. The decoupling of the victim's intimate engagement from the prosecution allows rationality and rules of law to intervene." H. Kennedy, (2004), *Just Law: The Changing Face of Justice – and Why It Matters to Us All* (London: Vintage), p. 24.

² Such studies have been briefly summarized in D. Meyerson, 'Why should justice be seen to be done?' *Criminal Justice Ethics*, 34(1), (2015), pp.64-68. <http://dx.doi.org/10.1080/0731129X.2015.1019780>.

³ Whilst recognising the vocabulary employed by this Royal Commission, for the purposes of this submission it is thought useful to distinguish between 'informants' as a general category of individual who provides information - such as reporting a road traffic collision, or reporting the occurrence of crime, or when acting as a witness - from the sub-category of information-providers (labelled here and elsewhere in my work as 'informer') who do so to mitigate personal disadvantage, or in expectation of material reward or beneficial consideration, or for revenge, and/or in circumstances in which deceit, dishonesty, and breach of trust are employed in the acquisition or supply of information.

14. The role of the state agent investigator within the criminal justice system is to identify, secure, collate, and provide to prosecutors all relevant information about matters at issue, both incriminating and exculpatory. The fair, impartial, and proper execution of this function underpins the validity and legitimacy of decision-making and fact-finding by other criminal justice system actors in later stages of the criminal justice process. (This role obligation brings with it collective moral responsibility on the part of investigators for decisions and findings made in subsequent post-investigation stages of the criminal justice process.)
15. Informers are a source of information utilized by investigators. Informers have especial value to investigators because informers can supply information to investigators about the investigation subject on the basis of the informer's personal relationship with the investigation subject. This is sensitive information that investigators are unlikely to be able to acquire by other means. It can be of significant value in enabling decision-makers and fact-finders within the criminal justice systems to undertake their roles effectively.
16. This tactical dependence on exploiting the personal relationship that the informer 'X' has with the investigation subject 'S' necessarily involves using deceit to breach the trust that S uses to manage his or her relationship with X. Trust is the measure by which any individual manages interactions with other individuals. Individuals make decisions about how much they reveal of themselves and their intentions to others, based on the circumstances of the relationship and the amount of trust they feel safe in investing in the other individual.
17. To the extent that an informer uses deceit and breaches individual trust, the informer is acting unfairly and dishonestly and in doing so infringes S's moral interests in being able to manage the relationship in a way that serves the best interests of S. (It can be argued that the breach of trust gives rise to a parallel moral harm in these circumstances, namely an intrusion into S's privacy.) It is unlikely that S would invest trust in X if S was aware that X was passing information to the police that the police could then use to the disadvantage of S. S might conclude that his or her best interests were better served by terminating association with X.
18. As an aside, the problematic moral complexity of using informers is further complicated when an informer is not a freely-acting volunteer, but has been conscripted in coercive circumstances in which being manipulated as an informer is the lesser or least of multiple disadvantageous options confronting the individual.
19. An informer acting as such does so on behalf of, and has probably been tasked by, state agent investigators. Therefore, and with reference to the common good of the criminal justice system, information obtained by police investigators using informers is acquired in circumstances that infringe the fundamental principles of fairness, impartiality and honesty upon which the proper operation of the criminal justice system is founded. The operation of the criminal justice system is thus compromised, and the moral claims of S and the wider community in the fair, impartial and proper operation of the criminal justice system, are infringed.
20. On occasion – and only ever exceptionally rather than as a norm - methods that are intrinsically morally harmful may yet be morally justified. Occasional police use of coercive methods, such as arrest and search, provides an example of this. Arrest, detention, search of premises and property infringe the moral interests of an individual through the denial or restriction of their autonomy. Yet use of such methods is sometimes necessary to fulfil the

proper purpose of policing to the extent that such purpose is to protect legally-enforceable, moral rights by presenting information and persons to be held to account to decision-makers in the criminal justice process.⁴

21. In the investigation of serious crime, the moral claim of an individual not to have their interests so infringed is counter-veiled by the moral claims of other individuals and the community in general to be able thrive autonomously in a safe society, free from unjustifiable harm. Laws properly enacted invest the police with coercive powers, use of which infringes individual moral interests but only in circumstances permitted by law, and even then, only when the discretion to use such powers is applied appropriately (a moral judgement). Just because investigators can, does not mean that they should. When it is not necessary to use coercive powers, it seems necessary not to use them.
22. No morally harmful method is justifiable in circumstances where the same desired outcome could be obtained by less harmful means.
23. The use of informers engages significant, multiple moral harms. For example (and not necessarily exhaustively):
 - a) the circumstances in which the informer is persuaded to act on behalf of the police may be coercive – the informer is manipulated into a position in which acting in what appears to be their best interest really involves the mitigation of disadvantage rather than the promotion of well-being and the opportunity to thrive (in reality the best interest of the individual concerned may not be to act as an informer but the coercive conscription circumstances will be presented otherwise as investigators seek to manipulate, and in doing so maybe deceive, the individual concerned);
 - b) in which circumstance the assistance provided by the informer is not freely given, nor unconditionally volunteered, and any reward or beneficial consideration may not adequately recompense and compensate for the effort, stress, and risks intrinsic to carrying out the informer function;
 - c) deceit is used to disguise the ulterior purpose of X when exploiting the relationship with S to provide information about S already known to X or to acquire new information that the police can use against S – this is an intrusion of S’s privacy, an infringement of S’s moral interest in living a life free from undue let and hindrance;⁵
 - d) specifically, the use of deceit amounts to a betrayal of trust within a personal relationship;
 - e) specifically, the use of deceit tends to undermine and compromise the values and operation of the criminal justice system;
 - f) the police informer handlers are likely to deceive the informer (through deliberate dishonesty or through withholding the full facts) about the precise circumstances of their being deployed;
 - g) betraying S is likely to put X (and/or X’s dependents, wider family or friends) at risk of retribution being undertaken against him/her/them by S;

⁴ This, very briefly and insufficiently, summarises the ‘moral theory of policing’ proposed in S. Miller & J. Blackler, *Ethical Issues in Policing*. (Aldershot: Ashgate, 2005), Chapter 1, and elaborated in S. Miller, *The Moral Foundations of Social Institutions*. (Cambridge: CUP 2010), Chapter 9. The practical application of this theory in relation to informer-management is explored in C. Harfield, ‘Police informers and professional ethics’ *Criminal Justice Ethics* 32(1), (2012) pp.73-95, <http://dx.doi.org/10.1080/0731129X.2012.696960> ; see especially pp.76-77.

⁵ It could be argued that the strength of such a claim is undermined in circumstances in which S is engaged in conduct likely to be materially and/or morally harmful to others.

- h) X is likely to suffer personal harm in the form of longer-term stress-related mental health issues even if his or her role is not discovered by S, keeping secrets is stressful, especially when personal safety depends upon it;
 - i) reliance upon information unfairly or improperly obtained devalues the fundamental principle of honesty and due process on which the criminal justice system depends;
 - j) if X is to be protected from testifying at the trial of S, then to this extent S is denied opportunity to exercise a fundamental right within the adversarial justice process, the opportunity to challenge one's accusers and test their account through cross-examination (a right all the more significant given that recourse to covert investigation methods also evades the privilege against self-incrimination).
24. Justification for instigating these actual or potential multiple moral harms can only be founded upon counter-veiling moral claims that are weighty indeed. At best, it looks like a consequentialist harm management calculation: the likely harms to individuals and the community interest as a whole if an informer is not utilized must significantly outweigh the multiple harms intrinsic to the using of an informer.
25. The practical implication of this is that the use of informers is only ever likely to be amenable to moral justification in the investigation of crime that is seriously harmful in both moral and material terms.⁶
26. In the wider context of the public interest in the common good of a criminal justice system, each procedural stage of which is characterized by fairness, impartiality, honesty and regard to due process, use of deceit by state agents or those acting on their behalf desensitizes others to the harm of using dishonesty in a process dependent upon and characterised by honesty. Setting such an example may act as a disincentive to others to behave honestly in their dealings with the criminal justice system. The use of informers represents a moral gamble on the part of authorities, at stake community respect for (and perceptions of the legitimacy of) the criminal justice system.
27. A legislature made up of duly elected community representatives; an executive to give effect to legislated and espoused social values and public goods; and a criminal justice system to adjudicate and resolve disputes within and disruptions to a safe society in which individuals may thrive, are the three social institutions fundamental to a liberal democracy.
28. Thus, of all the harms itemised above associated with the deployment of informers, it is the harm to the values and operation of the criminal justice system, and so the harm to the individual and collective community moral interests in the criminal justice system as a public good, that is most serious in the extent of its adverse consequences. If the criminal justice system ceases to have the respect of the community, if it ceases to be perceived as having legitimacy, if it ceases to enjoy community consent to its authority, then society and the community as a whole are the poorer. No individual held to account can be confident in being fairly treated. The wider community has no cause to feel protected by a system not operating as it should. Resentment and resistance to authority will be fostered, rendering society more hostile, less safe. Individuals may go so far as to take the law into their own hands. Precisely the outcome that the criminal justice system exists to prevent.
29. Nevertheless, on occasion (exceptional rather than the norm), the proper operation of the criminal justice system in protecting and providing for a safe society may depend on the

⁶ It is not necessary for the purposes of this submission to try to define 'serious harm'.

decision-makers and fact-finders having information provided by, or acquired as a consequence of, the deployment of informers. It will only be justifiable when the harms of not having such information convincingly outweigh the harms inherent in a system otherwise characterized by integrity recruiting and exploiting individuals as informers.

30. In this account it is the fair, impartial, honest, and proper functioning of the criminal justice system that is the navigational goal for investigators because of the crucial role they play in identifying, securing and collating all the relevant information that the system decision-makers and fact-finders need to carry out their roles. The value of an investigator to society, their social worth, lies not in individual arrest statistics, nor in conviction statistics. Ultimately, they do not work for themselves, they do not work for their specialist department or unit, they do not work for their police agency. They work for the public and common good that is a fair, impartial, honest and properly functioning criminal justice system, in which the role of investigator is a fundamental component.
31. Compromising the honesty element of that public good through the deceitful use of informers is sometimes, and only ever exceptionally, amenable to moral justification. The circumstances in which informers may be utilized, and the daily management and governance of informers can and should be provided for through legislation but statutory provision can only achieve lawfulness: legitimacy is achieved when the authorization for deployment, the planning for deployment, the decision to deploy, and the management of the deployment are all recognized as moral judgements, to be made with proper moral consideration as to the harmful consequences inevitably associated with the making of such judgements.⁷

So can the recruitment of legal counsellors as informers be morally justified?

32. Given that police investigator recourse to informers can be, on occasion, morally justified, can the narrative above be applied without amendment in circumstances in which it is proposed to engage as an informer someone who is or has been subject to legal obligations of confidentiality or privilege? (In this discussion let the proposed informer subject to legal obligations be signified by 'Y'.)
33. The answer would appear to be no.
34. That is because the relationship between Y and S is of a different character from that between X and S. Taken together with Y's other relationships in these circumstances, there is greater nuance and therefore greater moral complexity.
35. In the role of legal professional service provider Y has three specific role-based obligational relationships:
- a) The obligations of a professional service provider to a client (in this case S);
 - b) The obligations of a profession member to the wider profession; and
 - c) The obligations of an 'Officer of the Court' to the criminal (or as it may be, civil) justice system.

⁷ C. Harfield, 'Law, morality, and the authorization of covert police surveillance', *Australian Journal of Human Rights* 20(2) pp.133-164, <https://doi.org/10.1080/1323-238X.2014.11882153>.

36. Thus, Y must act in ways that simultaneously:
 - a) represent the best interests of the client;
 - b) are consistent with professional good practice and which do not infringe professional codes of conduct or impugn the reputation of the profession; and which
 - c) promote and maintain the fair, impartial, honest and proper operation of the criminal justice system.
37. There is no obvious conflict of interest created by the co-existence of these different obligations. Proper execution of the first two sets of obligations will contribute towards the proper execution of the third. Indeed, to that extent a mutual dependence between the different obligational relationships may be discerned.
38. Given the role of the criminal justice system as a fundamental social institution, Y's third obligational relationship serves the common good of the community; it operates in the public interest.
39. Where Y employs deceit in any one of these professional obligational relationships, not only is that relationship compromised, because of the mutual dependence either or both of the other relationships may also be compromised.
40. Specifically, where Y undertakes to act as a police informer covertly providing information to the police about S, information that clearly will be used to the detriment of S and that S would not otherwise instruct Y to provide to the police, then in the professional context Y has breached the professional obligation of client confidentiality and in the individual relationship context Y has betrayed the trust of S. In doing so Y has likely infringed obligations to act in accordance with good practice and professional codes of conduct.
41. But in doing so has Y not also served the wider community interest in ensuring that information of relevance can be put before the courts? And does that not seem ultimately to serve the purpose of the criminal justice system, which is a common good?
42. Not so. Not so because Y acting as a police informer is inconsistent and incompatible with the first two professional obligational relationships identified above, and consequently compromises the third. Y's professional obligations as an actor contributing to the proper operation of the criminal justice system do not extend to acting as a police informer within that system. Y's professional obligations as an actor contributing to the proper operation of the criminal justice system depend on Y properly discharging his or her professional obligations towards S.
43. Just as Y, an Officer of the Court, must not deliberately deceive the Court on behalf of S, neither must Y deliberately deceive S by obtaining information under the guise of professional confidentiality (in this case further protected by the principle of legal privilege) and then passing that information to the police. To do so violates S's moral interest and claim to be the recipient of fair and impartial treatment by the criminal justice system and its actors, and the moral interest and claim to be the recipient of good professional practice when seeking professional service help.
44. The criminal justice system cannot operate impartially if Y acts unfairly and dishonestly in respect of S's interests in and moral claim to the proper operation of the criminal justice system when called to account before the system.

45. In short, Y should not act as a police informer because to do so subverts and perverts, and therefore corrupts, the fair, impartial, honest, and proper operation of the criminal justice system. Such corruption of system and purpose contravenes the public and individual interest in the common good of the criminal justice system.
46. It follows that police and other state agents who seek to recruit legal counsellors as informers are themselves engaged in conduct that will subvert and pervert – and so corrupt - the proper purpose and processes of the criminal justice system, coincidentally subverting and perverting – and so corrupting – the professional service provider and consequently the profession.

Police management of informers

47. The implication of this narrative is that the law and police procedures concerning the recruitment and management of informers ought to be directed towards preserving the integrity and fair operation of the criminal justice system, not directed towards the perceived needs of police performance.
48. It has long been an organizational cultural norm within public investigation and law enforcement agencies that investigators jealously guard and restrict access to individuals they have cultivated as informers. Managers respond with the mantra that an informer is not an individual's asset but an organizational asset.⁸ (Which in turn leads to organizations jealously guarding access to informers from other organizations even though the informer might also have information of value for other organizations and the fulfilment of their role within the criminal justice system.)⁹
49. But even the organizational perspective is untenable because it privileges organizational interest in performance over the public interest in the fair, impartial, honest and proper operation of the criminal justice system. The argument of this narrative is that the efficacy, integrity and legitimacy of the latter should always take precedence over the former.
50. Commodifying informers as assets dehumanizes the informer. In turn, dehumanization desensitizes investigators and investigation managers to the moral implications of exploiting informers. Police (or as may be customs, or border force) investigators and managers reference their decisions to immediate, short-term personal and organizational performance need rather than to the permanent and prevailing societal need in respect of the criminal justice system as a common good, and the features of that system that characterize it as a common good.
51. It is a suggestion that may be met with significant organizational cultural resistance, perhaps even incredulity on the part of individual investigators and managers: investigators should not manage informers. Indeed, they should have no association whatsoever with

⁸ See, for example, ACPO & NPIA (2007). *Practice Advice on Resources and the People Assets of the National Intelligence Model*. (Wyboston: National Policing Improvement Agency).

⁹ This individual and organizational mind-set of ownership creates the vulnerability of dependence and that is a vulnerability which can be exploited by sophisticated and astute individuals purporting to act as informers, but in fact motivated to manipulate investigators and agencies to the advantage of the purported informer.

informers.¹⁰ By the same token, those responsible for the daily management of informers should not be directly involved in investigations. Such functional separation (discussed in the paper accompanying this submission, *Risk and Resilience in Managing Covert Human Intelligence Sources*) follows the principle of the separation of powers, and the separation of information-gathering from fact-finding and decision-making in the criminal justice system. In such an organizational functional architecture specific investigator requests for assistance from a dedicated informer management unit are made via an intermediary intelligence-tasking process.

52. It is a first step towards a culture and processes that better serve the integrity interests of the criminal justice system, and which can ensure that necessary moral judgements to be made by managers and handlers regarding the exploitation of informers are unclouded by investigation management considerations (which may give rise to a conflict of interest).¹¹
53. Informers will nearly always be in a position of extreme vulnerability, for one reason or another. And agencies that utilise and rely informers are consequently also vulnerable. Because individuals are willing or are circumstantially coerced into using deceit and betraying trust in order to obtain information for an investigating agency does not necessarily mean they are not significantly discomforted by doing so, or that that are capable of recognising and managing the risks inherent in doing so. The stress to which informers are subjected does not necessarily facilitate sound judgement-making on the part of the informer. Because individuals are willing or are circumstantially coerced into using deceit and betraying trust in order to obtain information for an investigating agency does not mean they should be treated with disregard and disdain by those who benefit from the deceit and betrayal. In reality, informers are used as tools. A tool is only as useful and good as the care that is taken of it.¹²
54. Informer management engages simultaneously the moral interests and claims of S, of the informer X, of third parties towards whom X may have to display deceit,¹³ of those managing the informer, and – more importantly – the moral interests of the community and all individuals and actors in and/or subject to the authority of a criminal justice system, that the system should be characterised by fairness, impartiality, honesty to achieve an integrity that founds its legitimacy. Informer management should serve that end.

¹⁰ An argument can be made that investigators might draw to the attention of dedicated informer managers, individuals encountered by the investigator who may be suitable for recruitment as informers, but beyond that investigators should have no informer contact and should not be advised whether or not the recommended recruitment eventuated.

¹¹ C. Harfield, 'Law, morality, and the authorization of covert police surveillance', *Australian Journal of Human Rights* 20(2) pp.133-164, <https://doi.org/10.1080/1323-238X.2014.11882153>.

¹² For some egregious, shocking and fatal examples of this see S. Stillman, 'The throwaways' *New Yorker*, 3rd September 2012, available at: www.newyorker.com/magazine/2012/09/03/the-throwaways.

¹³ Such third parties will be those collaterally present in the operational arena when X is encountering S. Other relevant third parties include S's family and dependents.

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The author has published academic peer-reviewed work on laws relating to, and the use of informers, including:

2018 – *Covert Investigation* (Oxford University Press, UK, Fifth Edition; revised & updated) [co-authored with K. Harfield] 978-0-19-882853-2 (pbk) 275pp

2018 – ‘Undercover policing – a legal comparative perspective’ in M. den Boer (Ed.) *Comparative Policing From A Legal Perspective* (Edward Elgar, Cheltenham), pp.153-168, 978-1-78536-910-0; eBook = 978-1-78536-911-7.

2014 – ‘Law, morality and the authorization of covert police surveillance’ *Australian Journal of Human Rights* 20 (2), 133-164 <https://doi.org/10.1080/1323-238X.2014.11882153>

2013 – ‘Risk and the management of integrity’ in A. MacVean, P. Spindler & C. Solf (Eds) *Handbook of Policing, Ethics and Professional Standards* (Routledge), Chapter 16: pp.156-166, 978-0-415-63075-7 hbk; 978-0-203-09740-3 ebk. [co-authored with K. Harfield]

2012 - ‘Police informers and professional ethics’ *Criminal Justice Ethics*, 31(2), pp.73-95; advance publication available online at <http://dx.doi.org/10.1080/0731129X.2012.696960>

2010 - *The Social Implications of Covert Policing* (Workshop on the Social Implications of National Security, 2009) Edited by S. Bronitt, C. Harfield, & K. Michael, (Centre of Excellence in Policing and Security jointly with the University of Wollongong, Centre for Transnational Crime Prevention (Faculty of Law)), ISBN: 978-1-74128-193-4 (hardcopy) ISBN: 978-1-74128-194-1 (online)

2010 – ‘The governance of covert investigation’ *Melbourne University Law Review* 34 (3), pp.773-804 http://www.mulr.com.au/issues/34_3/34_3_4.pdf

2009 - ‘The regulation of covert human intelligence sources’ in R. Billingsley (Ed.) *Covert Human Intelligence Sources*, (Waterside Press, Hook), pp.43-56

As an Associate Investigator with the Australian Research Council Centre for Excellence in Policing and Security [CEPS], Griffith University, the author produced a Briefing Paper on *Risk and Resilience in Managing Covert Human Intelligence Sources*.

Risk and resilience in managing covert human intelligence sources

Clive Harfield

Police recourse to informers operates in an environment of moral ambiguity (Harfield 2012) and there have been high-profile examples of informer-related crime, corruption and mis-management (Wood 1997; Police Ombudsman for Northern Ireland 2007; Crime and Misconduct Commission 2009; HMIC 2012). In a striking role-reversal English Regional Crime Squad Detective Constable John Donald was 'turned' by criminal Kevin Cressey to become Cressey's informer in exchange for cash (Clark 2001:39). Donald's case is an example of people corruption. In an example of the corruption of organizational purpose, Eaton Green, known by British police to be wanted for serious crimes in Jamaica nevertheless was utilised as a Metropolitan Police informer whilst simultaneously committing violent crimes in London. Green's ongoing serious criminality was ignored because of his perceived value as an informer (Williamson and Bagshaw 2001:50).

In Australia former New South Wales Crime Commission [NSWCC] Assistant Director Mark Standen was convicted in August 2011 of conspiracy to import precursor chemicals for narcotic production and of perverting the course of justice (Miranda 2012).¹ His co-conspirators included one of Standen's informers, James Kinch.² Standen's relationship with Kinch was complex and is reported as having been corrupt from the outset. Having initially fabricated evidence against Kinch in a previous investigation, Standen subsequently lobbied to have those charges dropped and Kinch became an informer (Jacobsen et al, 2011). At Standen's trial NSWCC Commissioner Phillip Bradley, Standen's immediate supervisor, testified to Standen's lax adherence to informer handling policy and procedure (Jacobsen 2011a), from which ineffective (if not lax) supervision might be inferred.³ Standen exploited the opportunity presented by inadequate informer-handler management within his organization to seek personal enrichment by unlawful means.

In the United States a study on the use of informers by law enforcement agencies and prosecutors in the state of New Jersey identified that informer-provided intelligence, rather than independent investigation by officers themselves, routinely underpinned police work in some law enforcement agencies, particularly in connection with drug law enforcement. Having noted the significant organizational and investigator/prosecutor reliance upon informers, this study identified systemic

¹ The seniority of his role as Assistant Director notwithstanding Standen remained an active operational investigator and was tipped to take over from Phillip Bradley as Commissioner (Jacobsen 2011a).

² At time of writing Kinch was awaiting extradition to Australia. The third conspirator, Bakhos Jalalaty pleaded guilty.

³ I am grateful to the NSW Supreme Court for releasing the relevant portion of the trial transcript to me for research purposes.

vulnerabilities in informer management arising from the absence of clear procedural policies and, where any policy guidance did exist, the inconsistency of the policy architecture and widespread careless indifference towards policy adherence. Other concerns identified by researchers include: the equally widespread lack of an auditable accountability trail documenting the detail and nature of informer/investigator contact; variable degrees of supervision; the absence or inadequacy of appropriate training; and the often coercive manner in which informers were recruited (Jones-Brown & Shane 2011). Each of these factors contributes to the emergence of an organizational operating environment that is insufficiently resistant to corruption and therefore corrosive of good policing.

Whilst high-profile cases might grab the headlines, the real story lies beneath the surface in the systemic vulnerabilities which need to be first identified, and then managed well for sake of organizational and individual integrity protection. The covert operating environment is a challenging one, where otherwise morally harmful behaviour by operatives (undercover police and informers) may be justifiable on the basis of stronger competing claims (Miller 2010:250, Miller & Blackler 2005:26); in which supervision whilst in the field might frustrate the purpose of the operation; and in which the temptation by operatives to participate in crime or otherwise manipulate the situation to private advantage is ever-present; robust resilience must be built if deployment of operatives is to remain a viable, legitimate and justifiable methodology. A clear understanding of risk and vulnerability is a prerequisite to constructing a resilience framework that can be used to achieve, sustain and manage institutional and individual integrity.

Understanding risk and vulnerability in infiltration and informing

Four general areas of risk can be identified in relation to the use of informers. First, those who provide information covertly are at risk of reprisal from those being informed against. Secondly, the organization or investigator intending to use the information provided covertly runs the risk that the information may be erroneous, false or deliberately misleading: misinformation insinuated to disrupt, divert or frustrate an investigation. A third area of risk to the organization or investigator arises if the informer manipulates the relationship with the authorities for reasons other than simply being rewarded for information provided. Alternatively, the organization is at risk (and potentially also the informer) if the investigator exploits the relationship with the informer for individual rather

than organizational ends. These latter two scenarios, if not already a consequence of corruption, potentially give rise to corruption.

Areas of vulnerability in managing informers, the information they provide, and information about the informer can be categorized according to organizational *purpose*, organizational *process*, organizational *product*, and/or *people* working for an organization: (see Table 1 below). Corruption in this context is understood to comprise the perversion or subversion of organizational purpose, organizational process, organizational product, and/or people working for an organization.⁴

In the arena of the competing knowledge systems of organized crime and policing (Dean et al, 2010:195-6), information is the key value-asset for all protagonists and becomes the currency of corruption in the informer-investigator relationship. The acquisition, security, use and dissemination of information from or about informers, and of information about police methods and the state of police knowledge create a market for corruption. Within this context, subversion of process by investigators for 'legitimate' ends (the furtherance of an investigation) also constitutes (noble cause) corruption if protections, prohibitions or other restrictions intended to ensure compliance and security have been compromised or evaded.

⁴ The concept of corruption can be seen to exist along a continuum of harm ranging from mere incompetence (at the least harmful end of the continuum) through misconduct to corruption for personal profit and/or power at the most harmful end (I am grateful to Professor John Kleinig for sharing his insights into incompetence and corruption with me in numerous conversations). Within this context, I use the term 'corruption' here in two senses. First, in the sense in which it is used by Transparency International, for example, to convey the dishonest or fraudulent "abuse of entrusted power for private gain" (which can in turn be categorized as Grand Corruption; Petty Corruption; and Political Corruption: see http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/). And secondly, in the sense of debasement: in the context of covert policing governance non-compliance with required protocols and procedures (either through ignorance, negligence or deliberate evasion, without necessarily seeking to acquire material private gain). If it is accepted that the establishment of policies and procedures to give effect to statutory obligations and good management practice can be seen as an expression of values to be upheld in the service of the public, then mere failure to uphold the required standards is a form of 'corruption' even if there is no "private gain" that would constitute 'Corruption'.

Table 1: Areas of corruption vulnerability concerning investigating agencies, investigators and informers

	Purpose of organization (including contributory purposes of organizational sub-units)	Processes contributing to organizational purpose	Product (= information within organizational context of investigating/regulating authority)	People (as contributors to organizational purpose)
Areas of vulnerability	<p><i>[For example: a law enforcement agency within the criminal justice system]</i></p> <p>1 - Obtain reliable information to support investigations leading to prosecutions</p> <p>2 - Without compromising the organization</p> <p><i>NB - post-investigation asset recovery (which can be post conviction or pre-conviction) acts as a secondary organizational purpose for certain investigating agencies</i></p>	<p>1 - Identifying/recruiting informer</p> <p>2 - Identifying/recruiting handler (including self-selection)</p> <p>3 - Meeting informer in remote location (so as to not to risk exposing informer links to investigating agency; or expose informer identity within investigating agency)</p> <p>4 - Briefing informer</p> <p>5 - Debriefing informer</p> <p>6 - Analysing information provided</p> <p>7 - Disseminating intelligence derived from such information</p>	<p>1 - Informer identity</p> <p>2 - Handler identity</p> <p>3 - Reliability of information provided by informer</p> <p>4 - Access to raw information supplied by informer</p> <p>5 - Access to analysed intelligence (knowledge) derived from informer information</p> <p>4 - Use made of that knowledge product</p>	<p>1 - Informer</p> <p>2 - Handler</p> <p>3 - Source management</p> <p>4 - Departmental command</p> <p>5 - Law enforcement staff outside the source-handling environment but with access to knowledge product</p> <p>6 - Law enforcement staff outside source-handling environment doing it for themselves</p> <p><i>[NB - these different areas can be extended to include associate vulnerability - family/friends/colleagues of the informer or the handler]</i></p>

Theoretical explanations for corruption

The analytical architecture used to identify vulnerabilities and potential problems can be supplemented for the purpose of strategic planning with Larmour's diagnosis-cure theoretical framework that explains corruption variously from the perspective of the individual (behavioural theory), the organization (structural theory) and/or relationships (political theory) (2011). The diagnosis-cure paradigm identifies three possible strategic approaches to corruption minimisation. Of these three approaches relevant for consideration here are behavioural theory and structural theory. Again it is useful to apply these paradigms to informer corruption vulnerability in tabular analysis (Tables 2 and 3 below). The purpose of doing so is to identify possible avenues of intervention and reduction.

Behavioural theory can itself be broken down into constituent elements: expectancy, equity and acceptance. These are defined in the shaded rows in Table 2 below. The unshaded rows present what this means within the informer-management context - the manifestation of corruption symptoms - with italicised text highlighting problematic issues arising.

Table 2: Informer management corruption vulnerability mapped across a behavioural theory framework

Paradigm/ Model	Diagnosis	Cure
Behavioural theory: Expectancy	Corruption is a calculated choice Actors will calculate chances of succeeding and benefitting from corrupt conduct	Raise perceived chances of detection; reduce perceived costs of compliance; appeal to alternative altruistic motives
	Lone investigator operating with an informer - if the motivation for corrupt conduct exists then this exclusive relationship offers significant opportunities to be corrupt. (E.g. In Standen's case motivation arose from gambling addiction and severe debt.)	Increased supervision of investigators who report using or who are believed to be using informers. <i>Issues of feasibility arise: how far does supervision go to demonstrate a non-corrupt relationship (i.e. prove a negative?)</i> <i>Both investigator & informer may have strong, if different motivations for engaging in corruption thus demanding bespoke counter-measures.</i>
Equity	Corruption justified as a means to redress perceived unfairness at work	Reduce, conceal - or better justify - perceived inequalities
	Staff wishing to secure career progression as investigators or increased access to overtime opportunities (perceived to be unfairly distributed) may resort to corrupt use of informers to enhance their own reputation or create investigations that then generate overtime opportunities.	Ensure transparency in investigator selection and overtime allocation. <i>Equity issues seem less likely to be motivation for corrupt exploitation of an informer relationship.</i>
Acceptance	Corruption is the way things are done	Improve induction, role modelling, staff turnover
	New investigators, being schooled in 'investigation practice' by longer serving officers where squad/unit socialization is likely to produce an environment of strong peer pressure, may succumb to/adapt established working practices even if such practices are corrupt.	Training for informer handling to be conducted independently at remote location; mentoring from supervisors rather than 'old hands'. <i>Issues of operating culture arise: difficult for off-site training and supervisory mentoring to overcome day-to-day peer pressures, especially on investigators trying to prove themselves to colleagues.</i>

Standen's motivation for engaging in criminal enterprise with his informer can be explained in terms of expectancy (Table 2): addicted to gambling,⁵ his "debts were huge and his spending lavish" (Australian Broadcasting Corporation 2011) and he calculated the benefit (cash) from the precursor importation and subsequent manufacture and distribution of drugs was greater than the risk of detection.⁶ But the 'cure' for this diagnosis (increased detection opportunities; reduced costs of compliance; appeal to altruism) all failed in Standen's case. Supervision by colleagues, provision of a Dictaphone with voice-recognition software enabling dictation-to-screen word-processing (thus easing the 'burden' of report-writing), and coercive appeals to professionalism by withholding of salary, were insufficient to secure procedural compliance and improved record-keeping (Jacobsen 2011a, 2011b).

In this account the cure is vulnerable to high resistance on the part of the deviant investigator and/or inadequate management of that investigator. In Standen's case both these circumstances prevailed. In the case of John Donald, also explicable in terms of expectancy, robust deviance and skilled evasion prevailed. Thus it is necessary to consider whether an alternative theoretical approach would offer a solution less susceptible to resistance (Table 3).

Table 3 below illustrates that **structural theory** analysis (also comprising three elements: structure, organization and process) offers more intervention opportunities in the informer-investigator operating environment than does individual behaviour analysis.

⁵ An addiction of which the NSWCC was reportedly aware but is not reported as having attempted to address, (McKenna and O'Brien 2011).

⁶ Standen's career was punctuated with allegations of corruption both at the Narcotics Bureau and then subsequently at the Australian Federal Police. The NSWCC claims not to have been told anything adverse about his career history when recruiting Standen from the AFP (Jacobsen 2011 (b)).

Table 3: Informer management corruption vulnerability mapped across a structural theory framework

Paradigm/Model	Diagnosis	Cure
Structural theory: Organization structure	Corruption = <i>monopoly + discretion - accountability</i> Risks in outsourcing	Reduce discretion. Limit outsourcing
	Formula accurately describes the potential for corruption when an investigator is working alone with an informer (or perhaps with a co-handler in circumstances of minimal supervision). In this circumstance 'outsourcing' can be said to equate to individual investigators engaging in free-range, unsupervised relationships with informers.	A dedicated source-handling unit [DSU] operating independently of individual investigations in accordance with defined tasking criteria is a means of enhancing accountability whilst reducing monopoly thus rebalancing the equation. Such units remove the outsourcing risks (individual investigators doing it for themselves) but of course present their own vulnerabilities if appropriate checks and accountability frameworks are not imposed.
Internal organization	Confusion and overlap create opportunities for corruption, particularly amongst long-serving role occupants	Reduce conflicts of interest; separate monitoring from approval and payment; rotate staff; require leave to be taken.
	Wood Royal Commission (NSW) vol 2, para. 7.41: investigators perceived no need to report informer contact if informer was registered to a colleague. Ibid,; para 7.42: some informers registered to more than one investigator	Central registration and use of DSU removes risk of duplicated registration and the risk that investigators see no need to report contact with informers who are not registered to them (individual investigators under this system will have no contact with informers). Enhances concept of informer as organizational resource to be managed at organizational level, not the personal resource of individual investigators. Can be reinforced by independent Dedicated Source Unit (DSU) tasking mechanism.
Work process	Opportunities for corruption occur at different points in the work process	Sector-by-sector analysis to identify choke points; provide alternative paths
	The asset being corrupted when informers and investigators engage in a corrupt relationship is <i>information and the use to which it is put</i> : thus corruption prevention in these circumstances can be viewed (from a process perspective) as a knowledge management issue.	Use of a DSU, in conjunction with a tasking and co-ordination process for intelligence resource management that is independent of investigations, ensures that no source handler and no investigator has end-to-end control of all points in the process.

Discussion

The key difference between the behavioural theory approach and the structural theory approach lies in separation of the informer from the investigator both in the organizational structure and the organizational process; adherence to this approach was absent both in the individual cases of Standen and Donald and in the systemic vulnerabilities identified in New Jersey. In keeping with traditional law enforcement practice, Standen and Donald operated alone with their informers. An alternative to investigators “doing it for themselves” lies in the use of dedicated informer-handling units, organizationally set apart from investigation teams and ideally operating from locations physically removed from investigation teams. This structural innovation is supplemented through organizational process innovation. Through an independent resource management process investigators present defined intelligence gaps that may be amenable to (partial) resolution through informer utilization. Such a process ensures that those interacting directly with the informers have no vested interest (indeed no wider knowledge beyond the specific intelligence gap request) in the investigation. This arrangement has been promulgated as good practice for law enforcement and regulatory organizations in England and Wales since the introduction of the modern iteration of intelligence-led policing in 2000. The informer-handling units have been termed Dedicated Source Units [DSU] and the process by which competing demands for intelligence and surveillance resources are managed is the UK’s National intelligence Model, which all UK police organizations are expected to adopt and in the use of which partner agencies are encouraged to participate (ACPO/NCPE 2005; ACPO and NPIA 2007).

A detective’s professional reputation amongst peers is often established because of results arising from the investigator’s access to informers who provide actionable information. The prohibition on detectives recruiting their own informers is not universally welcomed, and has occasionally encountered strong organizational cultural resistance. Changing the structural environment within which employees work can provide a strategic framework that makes it easier to manage and influence the behaviour of groups and individuals, and modify the organizational culture so as to render it more corruption-resistant.

The issues and proposed solution can be illustrated in process flow-diagrams.

Figure 1 illustrates how in the traditional operating model an investigator managing his or her own informer effectively controls all points of the process and thus operates in an opaque environment

in which corruption can emerge and flourish unexposed and undetected. This is the scenario in which Standen and Donald operated and which may be inferred from the New Jersey study as being common in that jurisdiction also.

[** INSERT FIGURE 1 HERE **]

Figure 2 illustrates the separation of roles and tactical operating and decision-making arena intrinsic to the DSU model in which the investigation, the management of the DSU team and the encounters with individual informers operate in parallel dimensions enabling a variety of control mechanisms to be applied to prevent/inhibit/reduce corruption. This model could not, in and of itself, prevent an investigator cultivating private informers outside the DSU regime - but in such circumstances the investigator is denied organizational resources to reward the informer and thus a key incentive for the informer to co-operate is removed.

[** INSERT FIGURE 2 HERE **]

The creation of a specialist unit is not however necessarily a guarantee against corruption. Specialist units can develop deviant sub-cultures of their own. And in the case of DSUs ideal manifestation of the operating model necessarily involves separation from normal investigating agency premises with informer-handler meetings often taking place in locations remote from the immediate area of the investigation, the prime consideration being protecting the identities (organizational key knowledge assets) of informers and handlers. Off-site meetings are counter-intuitive to anti-corruption methods based on exposure and amenability to scrutiny. To counter-balance this weakness the DSU model offers alternative management intervention opportunities. External scrutiny by independent oversight agencies (such as the Ombudsman) as a mechanism of accountability becomes more feasible, for example. And in terms of control, there is increased potential for intrusive supervision when interaction with informers is confined to a small team rather than extended to every investigator in the organization. Likewise the professionalism of informer-management staff can be promoted through bespoke selection procedures and through specialist training, each a process that can enhance anti-corruption as the over-arching professional work ethic.⁷

⁷ In the UK DSU staff in different organizations are trained to nationally accredited standards to promote consistency of management approach between different organizations empowered to utilise informers.

This is not to say that within the design philosophy for anti-corruption in the field of informer management structural theory approaches should be used to the exclusion of behavioural theory – it is not a zero-sum game. There exists potential for the two theoretical approaches to complement and reinforce each other. Understanding behavioural explanations for corruption helps identify concern-triggers that can be tested in handler selection, and monitored in training and daily operational management.⁸ Likewise behavioural theory can help identify corruption-triggers amongst individuals being considered for recruitment as informers bearing in mind, of course, that it is usually the criminal activities and associations of an individual that render them attractive for recruitment as an informer. Thus in the field of informer management, behavioural theory approaches to understanding individual corruption can inform the design of structural theory responses minimising the organizational corruption environment. It is responses based on structural theory that control environmental factors conducive to, or inhibitive, of corruption, thus limiting the scope of behavioural factors to generate corrupt conduct.

This is envisaged in Table 4 below which revisits the areas of corruption vulnerability concerning investigating agencies, investigators and informers identified above, this time incorporating suggested solutions within the analytical framework. It is a solution model that can be applied irrespective of agency but which does have resource implications.

⁸ A staff member's gambling addiction, for instance, would be one such concern-trigger.

Table 4 - Areas of corruption vulnerability concerning investigating agencies, investigators and informers, incorporating suggested solutions

	Purpose of organization (including contributory purposes of organizational sub-units)	Processes contributing to organization purpose	Product (within organizational context)	People (as contributors to organizational purpose)
Areas of vulnerability	<p><i>Law enforcement agency within criminal justice system</i></p> <p>1 - Obtain reliable intelligence</p> <p>2 - Without compromising organization</p> <p>3 - influence of asset recovery strategy?</p>	<p>1 - Identifying/recruiting informer</p> <p>2 - Identifying/recruiting handler (including self-selection)</p> <p>3 - Meeting informer in remote location (so as to not to risk exposing informer links to investigating agency)</p> <p>4 - Briefing informer</p> <p>5 - Debriefing informer</p> <p>6 - Analysing information</p> <p>7 - Disseminating intelligence</p>	<p>1 - Informer identity</p> <p>2 - Handler identity</p> <p>3 - Information provided by informer (reliability)</p> <p>4 - Access to raw information</p> <p>5 - Access to analysed intelligence</p> <p>4 - Use made of that knowledge product</p>	<p>1 - Informer</p> <p>2 - Handler</p> <p>3 - Source management</p> <p>4 - Departmental command</p> <p>5 - Law enforcement staff outside the source-handling environment but with access to knowledge product</p> <p>6 - Law enforcement staff outside source-handling environment "doing it for themselves"</p> <p><i>[associate vulnerability - family/friends/colleagues of handler]</i></p>
Response to vulnerability	<p>Organizational structure: minimise staff exposure to informers by having specialist units rather than general access</p> <p>Recruitment and training strategy for handlers</p> <p>Recruitment and risk management strategies for informers</p> <p>Accountable processes for tasking, deployment and dissemination to ensure alignment with organizational purpose and to ensure informer serves organizational purpose and not vice versa</p> <p>Articulated principles in relation to use of informers and derived product to foster professionalism</p> <p>Independent oversight</p>	<p>Appropriate identification of intelligence need</p> <p>Tasking according to intelligence gap</p> <p>Authorization of deployment</p> <p>Record of decision-making and rationale</p> <p>Two handlers at every meet: electronic corroboration if feasible</p> <p>Proper record of meeting</p> <p>Accountable rewards</p> <p>Proper pre-dissemination analysis and sanitisation</p> <p>Appropriate dissemination flows</p>	<p>Protected identities (informers and handlers)</p> <p>Corroboration of product</p> <p>Geographic location security</p> <p>Building/office physical security</p> <p>IT security</p> <p>Review of potential evidential use of product</p> <p>No dissemination of/acting on product likely to expose source</p>	<p>Continuous risk assessment of informer (including through covert surveillance if necessary)</p> <p>No dissemination of/acting on product likely to expose source</p> <p>Use of specialist source-handling staff, remotely located, subject to rigorous selection processes</p> <p>Regular vetting & training of handlers - including corruption vulnerability training</p> <p>Regular vetting & training of handler managers - including corruption vulnerability training</p> <p>Continuous risk assessment of source management</p> <p>Corruption vulnerability training for senior investigators (explaining prohibition on direct contact with informers)</p> <p>Risk-assessed dissemination</p>

Diagnosis- cure paradigm	Structural theory	Behavioural theory
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Conclusion

The discussion above is founded upon the following premises, namely that:

- minimising corruption within public authorities is essential in achieving and sustaining democracy and the institutions of democracy, which include the criminal justice system, its agencies and actors (see Sawyer et al, 2009: chapter 9);⁹
- information, particularly information about individuals, has illicit as well as legitimate economic currency in the modern information age;
- public authorities whose specialist and core functions include the collation of individual information in turn generate through the accumulation of such raw data new knowledge on the basis of that which can be deduced or inferred from the aggregated information (such knowledge and aggregated information thus becoming an asset likely to be targeted by hostile elements seeking to infiltrate the organization or compromise its operation);
- political and economic pressure to achieve more results from fewer resources will continue to encourage relevant public authorities to utilise informers whenever feasible;
- organizations which utilise informers owe informers (as well as their handlers) a duty of care (Billingsley 2005);
- the public have a significant interest in public authorities operating to high levels of integrity and effectiveness, particularly in relation to information acquisition, collation, management and dissemination (particularly when the latter enables power relationships that facilitate enforcement or other forms of lawful coercion);
- the duty of care and legitimate public interest both individually and in combination warrant organizational investment in information integrity (in terms of process, product and people); and
- informers are an organizational asset to be nurtured, managed and appropriately protected pursuant to organizational purpose and that the potential inherent in the use of informers will not be maximised if informers are regarded and treated as single-use and disposable.¹⁰

If these premises are correct and accepted, then it becomes essential to put in place in relation to informers an administrative architecture that addresses the co-existing and interrelated

⁹ Of equal importance, although beyond the scope of this paper, is a corruption-free private enterprise in underpinning a free and open market economy as complementary to a liberal democratic society.

vulnerabilities that potentially compromise the system's *purpose, process, product and people*. Informer management remains an organizational operating environment vulnerable to corruption regardless of whether the agency utilising such covertly provided information is a police service, an intelligence agency, a regulatory body or some other central or local government authority. This risk of corruption can be managed but not eradicated. Structuring organizational use of informers around a specialist unit and tasking processes that separate investigator and informer offers the opportunity to manage this risk through minimising opportunity for corruption to take hold. As such it is an improvement on circumstances in which investigators cultivate and recruit their own informers largely out of sight from supervision. The structural responses identified in Table 4 above increase the transparency of different elements within the overall process whilst at the same time minimising risk of compromise through unauthorized disclosure of information.

The *purpose-process-product-people* (P4) analytical framework proposed here offers a functional basis for immediate problem-identification as an initial step in problem-solving. Larmour's theoretical framework of *causation* identifies possible strategies that can then be employed in a targeted manner to achieve longer-term resolution. Potential benefits are both direct and indirect: the governance structure considered above offers a mechanism for reducing corruption vulnerability. It also fosters a culture of professionalism within the organization; it reinforces personal safety of both informer and handler; it contributes to the overall administrative well-being of the public authority; and so serves the wider community interest in promoting and sustaining integrity in key public service agencies.

¹⁰ That such an attitude towards informers exists in some jurisdictions can be inferred from the studies undertaken by the Centre for Wrongful Convictions (2005) and by Jones-Brown and Shane (2011).

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Figure 1: Investigator acting alone in handling informer

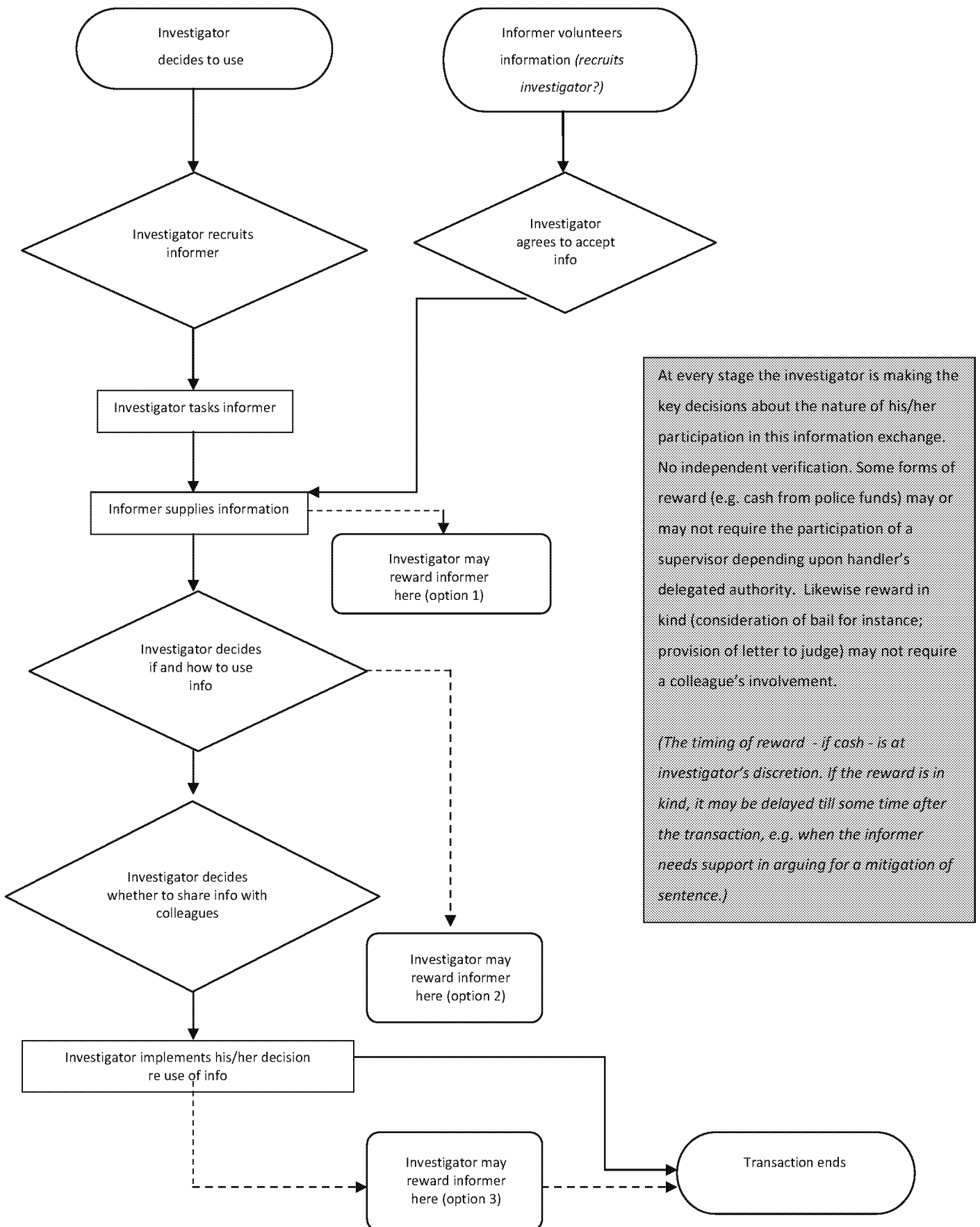
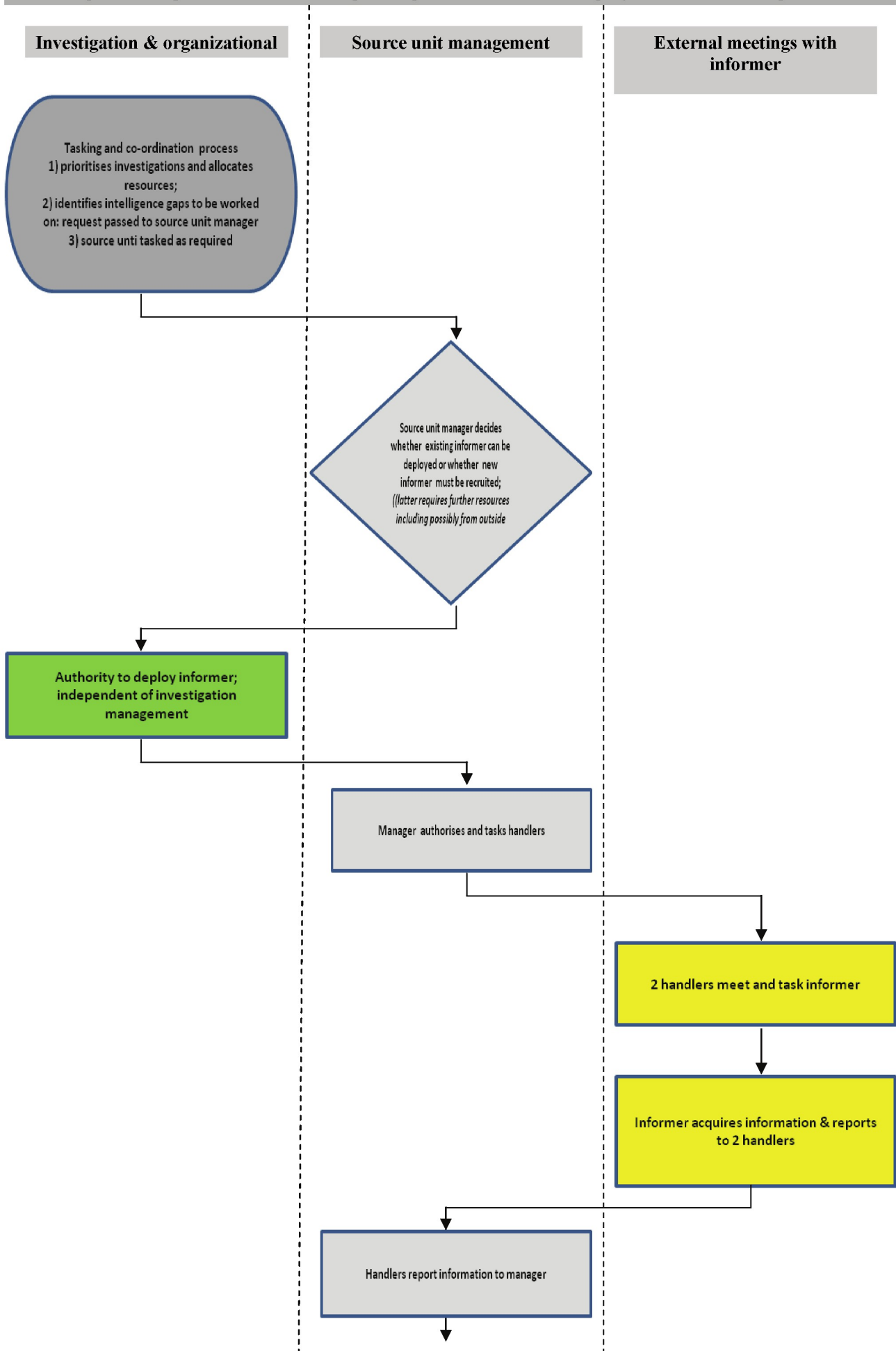
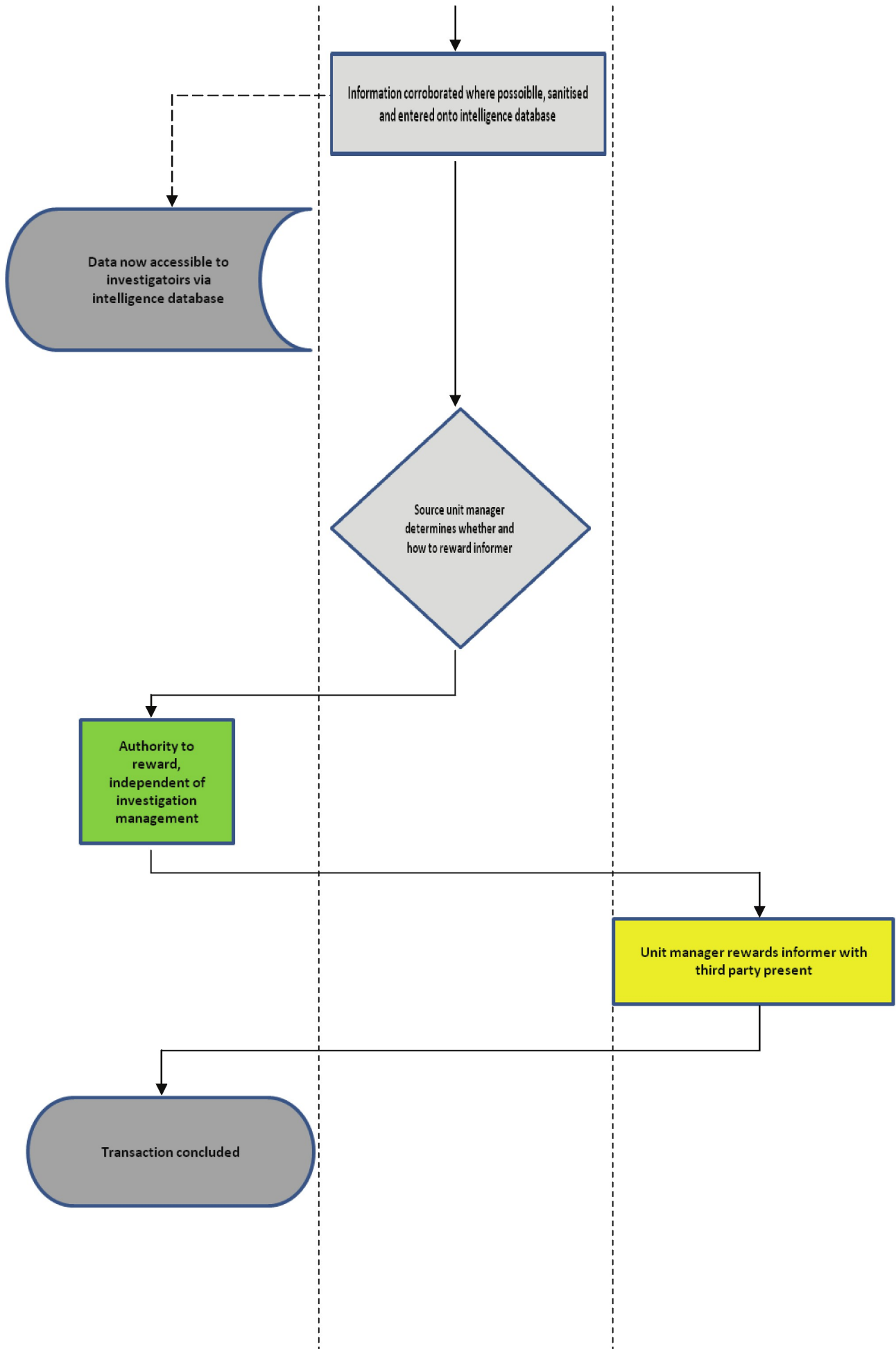


Figure 2 - Separation of roles and operating arena to enhance integrity of informer management



(continued)

(continued)



SUBMISSION TO THE CONSULTATION PROCESS ON AUTHORISED PROFESSIONAL PRACTICE FOR UNDERCOVER POLICING

Conducted by the College of Policing, 29 June to 10 August 2016

Clive Harfield, MSc, LL.M, MA, MPhil, PhD
5th August 2016

Introduction

1. The DRAFT *Authorised Professional Practice on Undercover Policing* [hereafter APPUP] is a welcome addition to the corpus of professional doctrine available to the police service.
2. The remarks that follow are founded upon personal operational experience in this arena of professional practice, and upon subsequent research into and writing on aspects of the governance, regulation and ethics of covert investigation.¹
3. This submission comments on two aspects of the APPUP as currently drafted.
 - A. The accreditation of specialist undercover units
 - B. The requirement for undercover units and operatives to adhere to the Police Code of Ethics

A - Accreditation of specialist undercover units

4. The suggested framework for accreditation is presented in a succinct fashion. Some questions spring to mind regarding the robustness of the proposed framework and aspects of the accreditation process not addressed in the current drafting.
5. *Should formal, external validation and accreditation take place before a force/unit is allowed to self-assess?* Independent assessment at the outset would ensure an impartial bench-mark as a foundation for future self-assessment. One recalls to mind an instance of an undercover unit remotely located that tried to deny the attempts of the senior officer with responsibility for undercover policing to undertake basic management of the assets, even to the extent of refusing to reveal the remote location from which they operated, on the basis that the senior officer had no need to know: an argument that did not succeed in this instance but which illustrates some ingrained and unco-operative attitudes towards oversight.
6. *Is self-assessment to be done by individual units; or by the host agency for which such units work?* The later approach would provide a mechanism for promoting consistent standards across a single host agency at least. It also provides a mechanism to inhibit such units becoming so independent of their parent agency that supervision is successfully evaded.

¹ See, for example, Clive Harfield & Karen Harfield, *Covert Investigation*, 4th edition, Oxford University Press, 2016; Clive Harfield, 'Law, morality, and the authorisation of covert police surveillance' *Australian Journal of Human Rights* 20(2), (2014), 133-164; Clive Harfield, 'Police informers and professional ethics' *Criminal Justice Ethics* 31(2), (2012), 73-95; Clive Harfield, 'Governance of covert investigation' *Melbourne University Law Review* 34(3), (2010), 773-804.

7. The proposal for self-assessment, as a mechanism within the overall accreditation framework, needs to be considered in the context of the findings of the recent Home Affairs Committee report on the first three years of the College of Policing.²
8. The findings of this report regarding the failure of forces to implement the common national ethical standards set out in the Code of Ethics (see paragraphs 14 and 18 of the report in particular) have worrying implications for the viability of a process model that comprises initial self-assessment and subsequent validation by the College of Policing, as a mechanism for the achievement and implementation of consistent national standards across undercover policing.
9. If implementation of the national Code of Ethics is being resisted at force level, the public can have little confidence that consistent standards in undercover policing will be achieved, or that self-assessment is the most effective means of calibrating standards.

B - The requirement for undercover units and operatives to adhere to the Police Code of Ethics

10. The APPUP is part of a wider response to revelations concerning the conduct of certain officers deployed in the former Special Demonstrations Squad, Metropolitan Police. The APPUP as drafted requires undercover operatives to adhere to the Police Code of Ethics. As things currently stand, that is more problematic than might at first appear.
11. It is necessary to take the time to set out the line of argument in full.
12. Whether any given instance of undercover policing is *lawful* or not is determined by statute; whether any given instance of undercover policing, or conduct contributing thereto, is *legitimate* or not depends on whether use of the tactic or the specific conduct in question is proportionate and necessary in the circumstances; notwithstanding their status as legal threshold tests defined in the *Regulation of Investigatory Powers Act* [RIPA], these are moral judgements made by investigators and their managers.
13. So whilst statute law provides a legal basis for policing, it is the management of moral issues that determines whether that which is lawful is also legitimate, and perceived to be so within the community. The events that have so undermined the perceived legitimacy of undercover policing in the UK need not be rehearsed here; merely referenced.³ In relation to undercover policing and the restoration of its perceived legitimacy, the APPUP presents a

² House of Commons Home Affairs Committee, *The College of Policing Three Years On*, Fourth Report of Session 2016-17, HC 23, 9th July 2016

³ The literature encompasses case law, official inquiries, journalism, and personal reflections. See, for example: *R v Barkshire and others* [2011] EWCA Crim 1885 (the 'Mark Kennedy' case); Home Affairs Committee, *Undercover Policing: Interim Report: Thirteenth report of session 2012-13*, HC837, House of Commons, 2013; HMIC, *A Review of National Police Units Which Provide Intelligence on Criminality Associated with Protest*, HMIC 2012; HMIC, *An Inspection of Undercover Policing in England and Wales*, HMIC 2014; Mick Creedon, *Operation Herne Report 1: Use of Covert Identities*, 2013; Mick Creedon, *Operation Herne Report 2: Allegations of Peter Francis*, 2014; Mick Creedon, *Operation Herne: Special Demonstration Squad Reporting – Mentions of Sensitive Campaigns*, 2014; Rob Evans and Paul Lewis, *Undercover: The True Story of Britain's Secret Police*, Faber & Faber, 2013; Robert Lambert, 'Researching Counterterrorism: a personal perspective from a former undercover police officer' *Critical Studies on Terrorism* 7(1), (2014), 165-181.

valuable opportunity to elaborate and promote wider understanding of investigative ethics within the police service, particularly as these relate to the use of undercover tactics, in order to achieve morally-sound decision-making.

14. Restoring the legitimacy of undercover policing requires a rather more sophisticated dialogue regarding the ethics of undercover policing than is currently being presented. There exists a significant contradiction in doctrine, either as published or as drafted, which needs to be reconciled if a sensible and sound position on the ethics of undercover policing is to be established for the benefit of operatives and the wider community alike.
15. At para. 3.5.1., the APPUP requires heads of unit to ensure that the [Police] *Code of Ethics* is adhered to.
16. The only other APPUP reference to ethics comes in para 4.3, which obliges operatives to report any ethical concerns that they have; which proposed requirement is premised on all staff involved in undercover work being fully conversant with the ethics of undercover work. (How is this premise to be tested?)
17. Para. 2 of the *National Code of Conduct for Undercover Operatives* requires operatives to “keep in mind at all times the principles and standards set out in the Code of Ethics for the Policing profession.”
18. A problem arises because the use of dishonesty – a fundamental moral harm that is intrinsically unethical - is integral to successful undercover policing. Undercover work involves lying about identity and the manipulation of personal relationships. A relationship is being used by one party (A) for a purpose of which the other party (B) is not aware, and which may be detrimental to B. Such conduct undermines the integrity of that relationship by abusing the trust inherent (to whatever degree) in any relationship.
19. Both recourse to dishonesty and the undermining of integrity are contrary to the Police Code of Ethics as it is currently drafted in rather ‘catch-all’ terms: “I will be honest and act with integrity at all times” (Section 1). In other words, undercover operatives cannot execute their undercover duties and simultaneously comply with the Code of Ethics as currently published. If operatives adhere to the Code of Ethics, then they cannot work effectively undercover.
20. If the Police Code of Ethics is to have any influence at all, such inconsistencies must be addressed.
21. This contradiction in the doctrine can, and must, be resolved. But it is also important for the restoration of perceived legitimacy in undercover policing that the contradiction is resolved in the right way and for the right reasons, in order to withstand scrutiny.

Undercover policing is not ethical – but that does not mean it cannot be used ethically

22. The APPUP commences with the assertion that undercover policing is an “ethical tactic” (p.2). Manifestly, it is not.⁴
23. Undercover operatives are deliberately dishonest with those they interact with on deployment either by telling lies or through omission (not revealing who and what they are and what they are really doing). This is so both in legend-building and when actively engaged on intelligence- or evidence-gathering.
24. Any individual (C) determines how they are going to interact with another person (D) on the basis of what that individual (C) knows and trusts about the other person (D). This is a normal part of functioning as an autonomous individual. (It is assumed that individuals will usually default to acting in order to further their own best interest, which may or may not be in conflict with another person’s best interest.)
25. Because they are denied full access to all the facts about an operative’s true identity and purpose, those with whom the operative interacts (whether they are the investigation subject or a third party) cannot make an informed judgement about what to do in their own best interest in managing their relationship with the operative.
26. The use of dishonesty in order to deny, constrain or manipulate the investigation subject’s or a third party’s use of autonomy is, in the circumstances, a significant moral harm and one which, for the subject of the investigation, ultimately could lead to significant material harms such as imprisonment (which generates further consequential harms for the convicted person and any dependents they might support).
27. The public understands in general terms that such dishonesty and manipulation is morally harmful and therefore unethical. It serves no purpose to pretend or assert otherwise. (Indeed, it tends rather to discredit the proponents of such assertions and further undermines the legitimacy of the tactic and the agency.)
28. Equally harmful in moral terms is the constraint on autonomy and the inhibiting of the exercise of free will that arises from the denial of liberty (arrest) and from the denial of peaceful possession of premises and property (search). Yet these are staple conducts within the policing repertoire because, on occasions, countervailing and weightier moral claims provide a justification for such conduct.
29. Likewise, on occasions, and even though dishonesty and manipulation are *prima facie* moral harms, there may exist weightier moral claims that could justify the use of undercover tactics in certain circumstances. Genuine moral justification and its role in sound decision-making is what the dialogue should comprise; not bald assertions that cannot withstand scrutiny.

⁴ Indeed, the assertion that the undercover tactic is “ethical” is a dishonest statement and therefore itself a breach of the Police Code of Ethics.

What will *not* justify the use of undercover tactics

30. Rationalization is not justification.
31. There exist a number of seductive but fallacious 'justifications' that must be avoided.
32. **Non-disclosure** of operative true identity and purpose is fundamental to the success of the undercover tactic: but that does not, in and of itself, justify recourse to dishonesty and manipulation. Investigators cannot be dishonest simply to ensure the success of the operation (an 'ends justify the means' argument). The undercover tactic is not self-justifying.
33. Nor does a claim to be **defending the rights of victims** provide any meaningful justification, not least because such a claim is itself a breach of the *Code of Ethics* (p.1) in that such conduct fails to satisfy the duty of impartiality. The criminal justice system, its agents and its actors (such as the police) must act, and be seen to act, impartially. Defending the rights of, or acting on behalf of, victims is to align with one side of a disputed or contentious circumstance; it is essentially taking a side; it is acting partially, not impartially.
34. 'The public' has a collective interest in the criminal justice system operating fairly and impartially. Such characteristics run to the integrity of the criminal justice system and of those agencies such as the police that operate to further the system's purpose. It is to this end – maintaining a fair and impartial criminal justice system – that police should work.
35. To the extent that the use of undercover tactics is provided for in law, undercover policing is human rights compliant. It serves no purpose – indeed it is counter-productive - for investigators then to try and balance that which cannot be balanced; two competing, conflicting and irreconcilable sets of rights - those of victims and those of suspects. However, both victims and suspects share a common interest (together with all other members of the community) in the criminal justice system operating fairly and impartially. Thus an appeal to the rights of victims will not found a justification for the use of undercover tactics.
36. The **greater good** argument, likewise, is an unsafe foundation because it over-simplifies the issues and can be used to rationalize the will of a majority even where that will has no moral foundation, and the minority in question as a weightier countervailing moral claim.

Serving the public interest in an effective criminal justice system – the moral foundation of undercover work

37. In rather simplistic terms, deployment of undercover tactics *might* be justifiable in circumstances where:
- i. the deployment is necessary to deliver the desired outcome of the criminal justice system (the making of a rational and logical decision on the basis of proven and reliable evidence);
- AND
- ii. there is no less morally-harmful means of acquiring the information needed by the fact-finders and decision-makers participating in the later stages of criminal justice system process.
38. Nothing done in the planning, execution or furtherance of the deployment should undermine the integrity of the criminal justice system.
39. The intended audience of the APPUP would derive benefit from inclusion in the APPUP of proper elaboration of the above brief outline in order to provide further guidance in making the morally-significant decisions that must be made when considering, planning and authorizing such deployment as a basic tactic.
40. Below this level of morally-significant decision-making regarding the tactic itself, there exists another level of morally-significant decision-making involving operative conduct whilst on deployment.
41. Two tests present themselves:
- a) - *Does the intended conduct of the operative at any given moment serve the primary end of obtaining information that will be used by CJS decision-makers? I.e., is the particular conduct in which the operative is engaged in any given instance directly obtaining information?*
 - b) - *Does the intended conduct of the operative at any given moment serve the secondary end of facilitating the operation? I.e., is the particular conduct in which the operative is engaged in any given instance facilitating or creating an opportunity that will lead to the obtaining of information?*
42. These are discrete ethical issues requiring separate justifications. The particular vulnerability present is that a morally-sound argument providing ethical justification for test 1, might improperly be used to rationalise circumstances that fall within the compass of test 2.
43. This is another area in which the intended audience of the APPUP would benefit from elaborated guidance, beyond that which is currently available.

A separate Code of Ethics?

44. As currently drafted, the Police Code of Ethics, in respect of covert policing in general, offers overly-simplistic guidance that logically is self-contradictory. Consequently it is not fit for purpose in this particular regard.⁵
45. The desire to have a single Code of Ethics that is readily comprehensible and unambiguous is understood, but covert policing – and undercover work in particular – is so morally complicated that a simplistic Code of Ethics will not suffice and creates more harm than good.
46. The four paragraphs currently devoted to covert policing in the Code of Ethics need to be re-written. Logically the current construction creates the effect of making all covert policing a *prima facie* breach of the Code of Ethics. Which presumably is not the intended purpose.
47. Given the very specialist nature of undercover policing, and the particular moral harms to which this tactic (in all its iterations) gives rise, in order to assist managers and operatives to employ this *prima facie* unethical tactic in ways that can be morally justifiable, and so ethical and legitimate, it would be useful to elaborate the current Code of Conduct for undercover operatives into a specialist Code of Ethics for all Authorizing Officers, managers and operatives in the undercover policing arena.
48. The ethical deployment of informers has been considered in the public domain and the model there proposed has received favourable comment from ethicists and practitioners alike.⁶ It could serve as a basis from which to develop a framework for achieving ethical deployment of the undercover tactic. The relevant paper is attached to this submission as an appendix.

Conclusion

49. The DRAFT APPUP provides a good foundation for necessary doctrinal guidance. There are two aspects of the APPUP that should be clarified and elaborated in order to enhance the guidance being directed to those working in the undercover arena.
50. Inconsistent implementation of the Police Code of Ethics highlights vulnerabilities in self-assessment as a mechanism for achieving consistent national standards in undercover policing. Independent accreditation should be achieved before self-assessment is relied upon, and exactly who undertakes the self-assessment will characterize the efficacy of the method.
51. Challenging though the work will be, the issue of undercover ethics cannot be avoided and cannot sufficiently be addressed simply by reference to a foundation document that is inadequately written and inconsistently applied. Revelations over the past few years demonstrate the need for robust, logical and elaborated guidance on how a tactic that is intrinsically morally harmful, can on occasions be morally justified and so used ethically.

⁵ See, for example, Clive Harfield & Karen Harfield, *Covert Investigation*, 4th edition, Oxford University Press, 2016, pp.31-32.

⁶ See Clive Harfield, 'Police informers and professional ethics' *Criminal Justice Ethics* 31(2), (2012), pp.76-78.