

What will it take to stop the snitches?

Government should implement Law Commission proposal on prison informants

Kathy Spencer

In 1990, three prison informants helped convict David Tamihere of murdering Swedish tourists Heidi Paakkonen and Urban Höglín. Thirty-five years later, Tamihere is waiting to hear whether the Supreme Court will quash the convictions.

There have been many developments over those thirty-five years, including: the discovery of Höglín's body some 70 kms from where the Crown alleged the murders took place; Tamihere's release from prison in 2010 after serving 20 years; and a successful private prosecution for perjury of "jailhouse snitch", Robert Conchie Harris, in 2017.

Last year, the Court of Appeal decided that the false testimony of Robert Conchie Harris "may have affected the jury's verdicts and accordingly amounted to a miscarriage of justice".

However, the Court considered that there was sufficient other evidence to establish Tamihere's guilt beyond reasonable doubt, so it declined to quash the convictions. That decision has been challenged by Tamihere and his appeal lawyers, who argued their case in the Supreme Court in August.

Jailhouse snitch testimony comes from prisoners who claim to have heard a fellow inmate confess to a crime. Calling on prison informants is a long-standing practice that is still very much in use, as reported by Mike White in June last year.

Because of concerns about the reliability of this type of evidence, a register of such witnesses was established in 2021. In the following three years, 35 inmates had put their hands up to testify, with 21 of them being called to give evidence.

Not only is this testimony allowed, it is common for the Police and Crown prosecutors to provide rewards to snitches in exchange for their testimony.

Rewards might take the form of reduced charges, a reduced sentence, improved prison conditions, earlier parole, the promise of some advantage in the future, or monetary payments.

Under current law, juries are left to decide on the credibility of prison informant testimony after cross-examination by defence counsel, and any warnings from the judge.

Many people would probably think, as I did, that juries would see the self-interest behind this kind of testimony and disregard it. But there is strong evidence that incentivised jailhouse testimony is often believed by juries, and that it is one of the leading causes of wrongful convictions.

There are a number of reasons why juries are inclined to believe prison informants. One is that jurors tend to think informants are putting themselves at risk by coming forward and therefore must have noble intentions in doing so. Another is that the jury may not be aware of any benefits or incentives that have been offered by the Police or prosecutors.

Jury members also tend to assume that Crown prosecutors would only present reliable witnesses. This was reinforced in Tamihere's case when the prosecutor told the jurors that they could be confident the prison informants were not lying.

Fortunately, there's a solution on the table. Last year the Law Commission recommended a law change that would make prison informant testimony inadmissible unless a judge could be convinced of its reliability "on the balance of probabilities".

So, for example, had any of the Tamihere informants been able to give the Police information leading to the discovery of the Swedes' bodies, their evidence may well have been considered reliable and therefore admissible in court. In reality, they provided no such information.

The Law Commission is a government body established in 1986 to systematically review our laws and recommend changes to the government. Past commissioners include legal luminaries Sir Geoffrey Palmer, Dame Sian Elias, Sir Owen Woodhouse, Sir Edie Durie, and Sir Kenneth Keith to name a few.

Most of those who made submissions to the Commission were in support of reform, with the Criminal Cases Review Commission noting that incentivised witness evidence was in the top tier of systemic issues that lead to miscarriages of justice.

However, submissions from those who rely on prison informants – the Police, Crown Law, and the Office of the Wellington Crown Solicitor – were opposed to change, saying that the current approach is working well.

To me, that is very concerning. Equally concerning is the fact that the Police and Crown Law don't prosecute jailhouse snitches for perjury when it becomes clear they have lied in court.

Tamihere informant, Robert Conchie Harris, was prosecuted for perjury but it was a private prosecution taken by "jailhouse lawyer" Arthur Taylor. It resulted in Harris being convicted of 8 counts of perjury and sentenced to 8 years 7 months for these crimes.

The Law Commission's report, which covers several aspects of evidence law, has been kicked into touch. The Government says that more policy work is needed to assess the "potential operational impacts" and that this work will have to compete with its other priorities. In other words, don't hold your breath.

In my view, this doesn't stack up: the Law Commission experts have done the work, developed options, consulted, and proposed a law change that is simple, straightforward to implement, and would largely remove one of the most common causes of wrongful convictions.

Is it going to take a (former) jailhouse lawyer to stop the use of jailhouse snitches, or will the Government listen to its own experts and act with urgency to end this shameful practice?

Kathy Spencer worked in public policy for over 30 years, including as a Deputy Director-General in the Ministry of Health, a General Manager in ACC, and a Manager in the Treasury.