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Abstract

It is not a dispute that undercover police officers have a proper role to play in contemporary law enforcement. However, there is no clear legislation in Hong Kong on the issue of whether the undercover agent is, at law, an offender of crime(s). This paper would examine the limitations of the prevailing undercover policing laws in Hong Kong and suggest possible recommendations. In particular, a comparative study of the United Kingdom and South Australia would be made to investigate whether Hong Kong should enact a legislation regulating undercover operations and criminal investigations.

1 LL.B. (City University of Hong Kong)
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REGULATING UNDERCOVER AGENTS’ OPERATIONS AND CRIMINAL INVESTIGATIONS IN HONG KONG: WHAT LESSONS CAN BE LEARNT FROM THE UNITED KINGDOM AND SOUTH AUSTRALIA?

I. BACKGROUND

It is not a dispute that undercover police officers have a proper role to play in contemporary law enforcement. However, the present Hong Kong laws are unclear on the issue of whether the undercover agent is, at law, an offender of crimes. Further, the grant of immunity from prosecution to undercover agents remains silent in the Hong Kong legal framework. To tackle the issues, this paper examines whether an undercover policing ordinance should be enacted to lay out requirements for the authorisation of undercover operations and to provide prospective immunity to undercover officers.

From the social perspective, undercover agents play a vital role in combating crime and preserving social harmony. It is well believed that many successful police anti-triad operations were the result of proactive undercover infiltration actions.2 Peter Yam Tat Wing, former Assistant Commissioner (Crime) of the Hong Kong Police Force Headquarters, expressed that there have been successful deployments of undercover police officers in schools, resulting in the arrest of triad elements that intimidate and recruit students to join triad societies.3

However, there are complaints raised occasionally where undercover agents had acted beyond their powers, for example, undercover police were accused of having free sexual service from prostitutes before the arrest.4 Zi Teng, a sex workers’ concern organisation, announced that the number of complaints it had received about officers getting free services before arresting a prostitute had more than quadrupled in 2010 from a year before.5 Regarding this, a police spokesman said undercover policeman worked to a strict set of

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3 Yam (n.2) at 33
4 Adrian Wan, ‘Police getting free sex, prostitute survey claims’ South China Morning Post (Hong Kong, 14 August 2011) EDT7
5 Canace Wong, ‘Police having more free sex, workers claim’ South China Morning Post (Hong Kong, 18 December 2010) EDT2
guidelines which they have to work under the direction of deputy regional commanders or senior superintendents. These disputes highlighted the need to regulate undercover operations in a more transparent way.

From the legal perspective, vulnerable victims of triad-related crimes are often reluctant to report to the police and testify in court due to the fear of revenge. Under such circumstance, the deployment of police officers to infiltrate triad groups to gather intelligence and to collect evidence for prosecution purposes has proved an effective tactic. The position of undercover agents is often precarious. In the fight against triads and organised crimes, undercover police infiltrate into the triads in order to collate intelligence and to take proactive action against organised crimes.

There is no legislation in Hong Kong to provide prospective immunity and/or exemptions for undercover agents who may commit illegal acts during operations. This may possibly give rise to controversies in offence-facilitation of undercover agents.

Considering covert policing in Hong Kong, the recent enacted ICSO established a legal basis allowing the law enforcement agencies to conduct interception and surveillance operations for legitimate purposes. This paper will argue whether an undercover ordinance should be enacted in addition to ICSO, in order to regulate undercover operations in general.

At international level, in the wake of the 9/11 attacks, undercover policing has became an increasingly important law enforcement tool in the United States and in Europe. More frequent deployment of covert tactics has confronted democratic government with difficult questions of how these extraordinary operations should be controlled and conceptualised.

In public’s eyes, Hong Kong might not be in high risk of being attacked by terrorists. However, Hong Kong was found to be on the list of potential terrorist targets during the Olympic Games in Beijing in 2008 according to WikiLeaks which revealed a cable sent from the United States Embassy in Beijing. Therefore, the Hong Kong Police Force should

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6 Ibid
7 Yam (n.2)
8 Yam (n.2) at 33
10 Ibid
11 Phyllis Tsang, ‘HK police launch anti-terror task force’ South China Morning Post (Hong Kong, 25 March 2011) EDT1
always maintain a high degree of vigilance and state of operational readiness commensurate with the prevailing threat level of terrorism. Concerning this public security matter, the need of detecting and preventing terrorism by intelligence gathering becomes unavoidable. In this regard, it is question whether undercover tactics should be strictly regulated which may possibly affect the intelligence gathering for detection and investigation.

After analysing the background of undercover policing in Hong Kong, it is important to note that there are potential urges of changing our present undercover policing laws.

This paper aims to highlight the limitations of the prevailing undercover policing laws in Hong Kong and suggest possible solutions by referring to covert policing laws in the United Kingdom and South Australia. This paper consists of six parts. In this part, the writer overviewed the background of undercover policing from the social, legal and international contexts. Part II critically analyses limitations of the present legal framework in relation to undercover policing. In Part III, the author investigates whether Hong Kong should enact a legislation regulating undercover agents’ operations and criminal investigations. A comparative study of the United Kingdom and South Australia will be made with regard. Part IV points out the need to enact an undercover policing legislation and recommendations are made in Part V. Finally, Part VI concludes the paper with the writer’s prediction to the future legal development of undercover policing in Hong Kong.
II. LIMITATIONS OF THE PRESENT REGULATORY FRAMEWORK
IN HONG KONG

This section analyses the Hong Kong current regulatory framework in relation to undercover policing and identify its shortcomings.

A. Interception of Communications and Surveillance Ordinance (Cap. 589)

Article 30 of the Basic Law expressly provides that relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences.

Prior to the enactment of ICSO, covert surveillance in HK was regulated by the Telecommunications Ordinance (Cap. 106) (TO) and internal guidelines. Section 33 of the TO provides that the Chief Executive or a public officer authorised by him may order the interception of telecommunications and that it be disclosed to the Government or any public officer as specified in the order.

In August 2006, the Interception of Communications and Surveillance Ordinance (Cap.589) (ICSO) was enacted, aiming to regulate the conduct of interception of communication and the use of surveillance devices by or on behalf of public officers and to provide for related matters. It is committed to introducing legislation that will provide a fair balance between the right to privacy and the need to investigate crime and to safeguard public security.

Part 1 of the ICSO deals with preliminary matters, which includes: definitions and conditions for issues, renewal and continuance of prescribed authorisation. It allows specified government departments and their officers under prescribed authorisations to infringe upon the freedom and privacy of communications of HK residents for the purpose of public security or investigation into criminal offences.

Part 2 provides two provisions prohibiting public officers from, directly or indirectly to

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12 Interception of Communications and Surveillance Ordinance (Cap. 589), Long title
14 Supra (n. 12) Section 2 and Schedule 1
15 Supra (n.12) Section 4 and 5
carry out any interception of communications or covert surveillance unless it is carried out in pursuant to prescribed authorisation or under other Ordinances.

Part 3 deals with matters relating to prescribed authorisations including the appointment of panel judges and authorising officers in the specified departments and the application procedure for different types of prescribed authorisations.

Part 4 includes provisions establishing an office of Commissioner on Interception of Communications and Surveillance to oversee the compliance by the specified departments and their officers with the requirements and to deal with related complaints of residents. The current Commissioner on Interception of Communications and Surveillance is Mr. Justice Woo Kwok-hing.

Part 5 provides for further safeguards such as monitor arrangements, regular reviews and reports on the conduct of interception of communications and surveillance and safeguards for keeping and using of the products. Non-admissibility of the products in evidence and prohibition of the use of information subject to legal professional privilege and covered respectively under Section 61 and 62 of ICSO.

Legal professional privilege is one basis upon which party is exempted from production of a document to the other party. According to R v. Derby Magistrates’ Court Ex p. B,\textsuperscript{16} the scope of protection is that it protects all confidential communications, whether written or verbal, between a client and his legal adviser in his professional capacity for the purpose of receiving or giving legal advice. Communication must be confidential.\textsuperscript{17}

Part 6 contains miscellaneous provisions including immunity of liability of any person arising from conduct(s) carried out pursuant to a prescribed authorisation.

The writer argues that the ICSO is insufficient as being a regulatory framework in Hong Kong. This is because undercover work is both covert and deceptive. Unlike unobtrusive covert surveillance, undercover activities ‘directly intervene to shape the suspect’s environment, perceptions or behaviour’.\textsuperscript{18} It is achieved by the use of agents posing in other

\textsuperscript{16} [1996] 1 AC 487
\textsuperscript{17} Three Rivers District Council v. Governor and Company of the Bank of England (No.6) [2005] 4 All ER 948 (Lord Scott)
\textsuperscript{18} The Law Reform Commission of Hong Kong, ‘Report on Privacy: Regulating the Interception of
roles, such as fellow criminals. Undercover activities resemble covert or deceptive tactics in that they provide a means of discovering otherwise unavailable information.

In terms of immunity, Section 65 the ICSO protects authorised agents from civil and criminal liability. However, ICSO has not specifically tackled the issue of intelligence gathering but simply places emphasis narrowly on intrusiveness on persons who are subject to or may be affected by the interception or surveillance operation. Lacking legal basis to overall undercover work, potential risks could be impose to undercover officers, as well as the justice system.

As the ICSO inadequately regulate undercover operations in Hong Kong, it is worth to discuss whether an undercover policing ordinance should be enacted to provide prospective immunity to undercover agents who may possibly commit illegal acts during operations.

Lacking a statutory immunity provide to agents in performing undercover activities, there have been incident in Hong Kong – The Queen v. Yip Chiu-Cheung, 19 where foreign undercover agents acted as a co-conspirator in drug trafficking.

B. The ‘Ambiguous’ Immunity: Insights from The Queen v. Yip Chiu-Cheung20

In The Queen v. Yip Chiu-Cheung,21 the Privy Council held that an accused may be convicted of conspiracy even where the other person was an undercover agent. The accused was convicted in Hong Kong of conspiracy to traffic in heroin. He had agreed with another man, Needham, to take five kilograms of heroin from Hong Kong to Australia.

Needham was in fact an American undercover drug enforcement agent. The plan was that he would fly to Hong Kong, pick up the heroin and fly to Australia. He had kept the authorities in Hong Kong and Australia informed of the plans and they agreed that he would not be prevented from carrying the heroin to Australia with the aim of identifying both the supplies and distributors of the drug. In fact, Needham’s original flight to Hong Kong was delayed and he missed the rescheduled flight. The accused was then arrested at Hong Kong airport and admitted to meet Needham.

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19 [1994] 2 HKCLR 35
20 Ibid
21 Ibid
The accused argued on appeal that he should not have been convicted of conspiracy as Needham was not a co-conspirator because he lacked the element of fault for the crime. Lord Griffiths in delivering the judgment of the court held that Needham had in fact the intention to commit the criminal offence of trafficking and therefore could be regarded as a co-conspirator. Lord Griffiths stated:

Naturally, Needham never expected to be prosecuted if he carried out the plan as intended. But the fact that in such circumstances the authorities would not prosecute the undercover agent does not mean that he did not commit the crime albeit as part of the wider scheme to combat drug dealing.\(^22\)

The case of *Yip Chiu-Cheung*\(^23\) has highlighted the limitations of Hong Kong laws that there is lack of statutory footing in securing undercover police from not being prosecuted. It cited a High Court of Australia case of *A v. Hayden (No.2)*,\(^24\) which declared that:

It is fundamental to our legal system that the executives has no power to authorise a breach of the law and that it is no excuse for an offender to say that he acted under the orders of a superior officer.\(^25\)

This could in fact create potential risks among the prosecution and undercover agents, as the undercover agents might have never expected to be prosecuted if he or she merely carried out the intended plans from their handler. It was contended that no moral guilt would be attached to the undercover officer who was at all times acting courageously and with the best of motives in attempting to infiltrate and bring justice a gang of criminal drug dealers.\(^26\) It is important to note that in such circumstances the authorities would not prosecute the undercover officer does not mean that he did not commit the crime. There could still be a possibility that the undercover officer would be prosecuted and even be convicted in the future.

\(^{22}\) *Supra* (n.19) at 40
\(^{23}\) *Supra* (n.19)
\(^{24}\) (1984) 156 CLR 532
\(^{25}\) Ibid at 540 (Gibbs, C.J)
\(^{26}\) *Supra* (n.19) at 39 (Lord Griffiths)
C. Legal Response to Offence-Facilitation: the Problem of Entrapment Law

One of the problems that undercover agents may encounter is that they can over-step the mark and actually commit a crime. As a result, an undercover agent may feel under pressure to produce results and evidence.27

The law of entrapment is one of the principal issues that undercover operations confront. As given the expense of undercover operations, it is only if the evidence they obtain will be legally admissible and legally acceptable, that such operations will be mounted.28

It is well established that entrapment is no defence, according to R v. Sang.29 A person charged with a crime is not entitled to an acquittal by reason only of the fact that the crime has been instigated by another, whether he is a person holding an official position or not or by reason of the fact that the conduct of the police or their agents contributed to the commission of the crime.30 However, this does not mean that undercover officers could act unlawfully.

In Secretary of Justice v. Musa,31 the court held that the fact of entrapment could be taken into account in mitigation of sentence. It was therefore considered by the court that the sentencing discretion would already provide adequate protection for a defendant who was entrapped by the undercover police officer.

However, there is English authority that it would be unfair and an abuse of process if a person had been incited or pressurised by an undercover police officer into committing a crime which he or she would not otherwise have committed, but it would not be objectionable if the officer, behaving as an ordinary member of the public would gave a person an unexceptional opportunity to commit a crime, and that person freely took advantage of the opportunity.32

It may be lawful for a person to take part in an offence which has already been planned and is going to be committed if the participation is for the purpose of trapping the offender33 and it

27 Roger Billingsley, Covert Human Intelligence Sources: The ‘Unlovely’ Face of Police Work (Waterside Press 2009)
29 [1980] AC 402
31 [2001] 1 HKC 14
32 R v. Looseley [2001] 1 WLR 2060
makes no difference that police participation in these circumstances may have affected the time for the commission of the offence.\(^34\) A dishonest police officer who instigated another to commit a crime is himself or herself liable for that crime as well as the offender\(^35\). However, the fact that an undercover police officer is a party to a conspiracy to commit a crime does not render the crime impossible to commit or the other members of the conspiracy not guilty.\(^36\)

Besides taking part in criminal offences, the questioning suspects from undercover officers during criminal investigations might lead to human rights violations, such as the right of silence. The case of *Secretary for Justice v. Lam Tat Ming*\(^37\) and *R v. Looseley*\(^38\) demonstrated the difficulties for undercover agents to produce admissible evidence in the lack of a clear regulatory framework for undercover operations.

1. **Exclusion for Human Rights Violation: Secretary for Justice v. Lam Tat Ming\(^39\)**

The Rules and Directions for the Questioning of Suspects and the Taking of Statements do not specifically encounter undercover law enforcement, there will be issues regarding the voluntary of their confession to an undercover agent where the accused was not cautioned.

The Court of Final Appeal in *Secretary for Justice v. Lam Tat Ming*\(^40\) distinguished two different situations. If undercover agents are passive, there would be no basis for exclusion. On the other hand, where the agent played an active role in procuring the confession from questioning the suspect, there is a residual discretion to exclude depending whether this amounted to an interrogation without a caution. The court will discourage any attempt by law enforcement agents to deliberately evade the formal constraints which apply to interrogations, such as advising suspects of their right to silence and right to legal advice. In such case, the court would take into account such matters as the seriousness of the crime and availability of other non-surreptitious investigative strategies.\(^41\)

Importantly, the former Chief Justice Li who emphasised the ‘overriding duty’ to ensure fair

\(^{34}\) *R v. McEorlly* (1973) 60 Cr App Rep 150

\(^{35}\) *R v. Sang* [1980] AC 402

\(^{36}\) *R v. Yip Chiu-cheung* [1994] 2 HKCLR 35

\(^{37}\) [2000] 2 HKLRD 431

\(^{38}\) [2001] 1 WLR 2060

\(^{39}\) Supra (n.37)

\(^{40}\) Supra (n.37)

\(^{41}\) Mike McConville and Dmitri M A Hubbard, *Hong Kong Law of Evidence*, (1st edn, Blue Dragon 2009) at 137
The Judge has the overriding duty to ensure a fair trial for the accused according to law. For this purpose, he has what should be regarded as a single discretion to exclude admissible evidence, including a voluntary confession, whenever he considers it necessary to secure a fair trial for the accused. The essential question is not whether the law enforcement agency has acted unfairly in a general sense. It is no part of the court's function to exercise disciplinary powers over the law enforcement agencies or the prosecution as regards the way in which evidence they seek to adduce at trial was obtained by them. The court's function is to consider whether it would be unfair to the accused to use the confession though voluntary against him at his trial. …

The requirement of a fair trial for the accused involves the observance of principles including the following which are relevant in this appeal: (1) No man is to be compelled to incriminate himself; his right of silence should be safeguarded. (2) No one can be convicted except upon the probative effect of admissible evidence. To ensure a fair trial for the accused, the court will exclude admissible evidence the reception of which will compromise these principles.42

In Lam Tat Ming, the Court of Final Appeal declared that the discretion to exclude prosecution evidence, where its prejudicial effect outweighs its probative value, was an element of the discretion to exclude prosecution evidence which would otherwise make the trial unfair to the accused.

From a practical point of view, the rationale of the use of undercover operations is to obtain evidence through a disguised identity of law enforcement agent. According to Lam Tat Ming, the undercover agent would have to caution the suspect before asking them questions. If so, the use of undercover operations in combating crimes would be seriously hindered.

Therefore, in order to secure the admissibility of evidence obtained by undercover agents, the law of undercover policing should be strengthened.

42 Supra (n.37) at 440-1

The principle in R v. Looseley was applied to a range of Hong Kong cases and it related to the question of whether the entrapment can give rise to an abuse of process that requires the court to stay the proceedings.

Looseley remains the authority for assessing whether a particular operation is likely to offend the law of entrapment. According to Lord Nicholls in Looseley, ‘it is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so’. This highlighted the critical aspect of running a successful undercover operation is the ability to demonstrate a proper methodology and ensure the guidance given by the courts has been properly applied.

It recognised that there are cases where some degree of participation of criminality is permissible. In Looseley, test purchasing was an example. However, it is important to note that the more persistent the undercover officer, the more problematic it will be to demonstrate the undercover operations have stayed within permissible limits.

An important test to be applied for entrapment is to consider whether the undercover police presented the Defendant with an unexceptional opportunity to commit the crime. The emphasis needs to be on the word ‘unexceptional’. It is important to consider whether the undercover officer’s conduct must fall within what is consistent ‘with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity’.

In other words, the undercover officers must act in good faith and not against an individual or group of individuals. Having reasonable grounds for suspicion is one way of demonstrating good faith.

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43 Supra (n.38)
44 Supra (n.38)
46 Simon NM Young, Hong Kong Evidence Case Book (Hong Kong: Sweet & Maxwell 2004) at 591
47 Simon McKay, Cover Policing: Law and Practice, (Oxford University Press 2011) at 236
48 Supra (n.32) at 2063-4
49 McKay (n.47) at 236
50 McKay (n.47) at 237
However, in certain cases, some degree of persistence may be required in order to achieve the objectives of the undercover operations. Lord Hoffmann in *Looseley* stated that

> Undercover officers who infiltrate conspiracies to murder, rob or commit terrorist offences could hardly remain concealed unless they showed some enthusiasm for the enterprise... a good deal of active behaviour in the course of an authorised operation may therefore be acceptable without crossing the boundary between causing the offence to be committed and providing an opportunity for the defendant to commit it.\(^{51}\)

There are a number of questions that can help to identify whether the undercover officers has gone too far to entrap the Defendant. First, whether the case is a type where normal investigatory techniques are unlikely to yield the result,\(^{52}\) for example, whether the nature of the offence is particularly secret, consensual or difficult to detect. Second, the likelihood of participation in criminality and whether it is possible to determined the limits of this at early stage and establish a procedure to ensure that the permissible limits are not crossed.\(^{53}\)

As undercover policing operations a methodology of approach will need to be demonstrable, this will involve checking whether the operation has been properly authorise. Therefore, a statutory regulation could secure the requirement to authorise the use and conduct of undercover agents, helping to determine the level of intrusion and whether the principle of proportionality has been observed.

In order to avoid the argument of being entrapped and enhance proactive covert policing and risk management, the most direct solution is to secure undercover operations being properly authorised. A clear requirement to authorise the use and conduct of undercover officers is therefore necessary. In this regard, it would be helpful to consider having a regulatory framework laying out the requirement of authorisation and the level of intrusion.

To examine the value and usefulness of enacting a statutory instrument, the following section analyses and evaluates foreign approaches – the United Kingdom and South Australia, in regulating undercover agents.

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\(^{51}\) *Supra* (n.38) at 2080

\(^{52}\) McKay (n.47) at 238

\(^{53}\) McKay (n.47) at 238
III. RESOLVING THE PROBLEMS: A COMPARATIVE STUDY OF RESEARCH IN THE UNITED KINGDOM AND SOUTH AUSTRALIA

In Hong Kong, criminal charges are never laid against undercover police as part of an authorised undercover operation. To facilitate undercover operations, immunities from prosecution are routinely granted to undercover agents. In other words, undercover operations in HK are so-called legal as there is no statutory footing suggesting they are illegal.

This section will critically analyse and evaluate the statutes of foreign jurisdictions – the United Kingdom and South Australia, in dealing with undercover operations.

The United Kingdom and South Australia stand out as good choices in this study. Both are common law jurisdictions with strong judiciaries and low level of government corruption. Particularly, Hong Kong was a former colony of the United Kingdom. In England, the origin of Common Law, the Regulations of Investigatory Powers Act 2000 was enacted to regulate intelligence gathering. In South Australia, immunities to undercover officers have been explicitly placed on a statutory footing, relieving authorised law enforcement agents of their legal liability for offences committed in the course of operations.


1. Legal Framework in Defining Undercover Agents

The Regulation of Investigatory Powers Act (‘RIPA’) came into force in 2000, intended to regulate the use of investigatory powers exercised by various bodies including local authorities and ensure that they are used in accordance with human rights. This is achieved by requiring certain investigations to be authorised by an appropriate Authorised Officer before they are carried out.

The background to RIPA 2000 is the Human Rights Act 1998 (HRA) which imposes a legal duty on public authorities to act compatibly with the European Convention on Human Rights.

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55 Regulation of Investigatory Powers Act 2000 Policy and Guidance, South Derbyshire District Council at para.2.1
(ECHR),\textsuperscript{56} an instrument of international law. Article 8(1) of the ECHR gives a right to respect for private and family life, the home and correspondence. However, this is qualified by Article 8(2) which provides that there shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

This paper will focus on Part II of the RIPA 2000 which relates to the regulation of surveillance activities and the use and conduct of covert human intelligence sources.

Section 26(8) of the RIPA 2000 defines Covert Human Intelligence Sources (CHIS) as where:

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);
(b) he covertly uses such a relationship to obtain information or to provide access to any information to another person; or
(c) he covertly discloses information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship.

Section 26(8) of RIPA 2000 stressed that the use and deployment of CHIS requires authorisation.\textsuperscript{57} The manner in which they should be managed is also prescribed and specified individuals have statutory obligations in respect of source management.

In South Australia, an ‘undercover operation’ is an operation that may include illegal conduct and that is intended to provide a person engaging in serious behaviour an opportunity to manifest or provide evidence of that behaviour.\textsuperscript{58} Pursuant to Section 3(1) of the Criminal Investigation (Covert Operations) Act 2009, an undercover operation involving conduct that is not illegal may not require approval under the Act.

According to the long title of the Criminal Investigation (Covert Operations) Act 2009, it aims to authorise the use of undercover operations and assumed identities for the purposes of criminal investigation and the gathering of criminal intelligence within and outside the State;

\textsuperscript{56} Regulation of Investigatory Powers Act 2000 – a Working Policy, Lancaster City Council at para.5
\textsuperscript{57} Section 29 of the Regulation of Investigatory Powers Act 2000
\textsuperscript{58} Halsbury’s Laws of Australia of Australia (Sydney: Butterworths 2012) vol.9 at para.130-10515
to establish a certification scheme for the protection of the identity of certain witness; to provide for cross border recognition of undercover operations, assumed identities and the certification scheme; to repeal the Criminal Law (Undercover Operations) Act 1995 and for other purposes.

Authorised participants in approved undercover operations are defined under Section 3 of the Criminal Investigation (Covert Operations) Act 2009 which clearly identified as (a) a person authorised under the terms of the approval to take part in the operations; or (b) in the case of operations that began before the commencement of Part 2 but after the commencement of the repealed Act – a person authorised under the terms of an approval under the repealed Act to take part in the operations; or (c) in the case of operations that began before the commencement of the repealed Act – a person authorised by a law enforcement authority to take part in the operations.

2. Authority Regime

In the United Kingdom, pursuant to Section 29(2) and (3) of the RIPA 2000, before authorising the deployment of CHIS, the authorising officer must believe that: First, it is necessary to deploy what for one of the following reasons: in the interests of national security; for the purpose of preventing or detecting any crime or preventing disorder; in the interests of the economic well-being of the UK; in the interests of public safety; for the purpose of protecting public health; for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution, or charge payable to a government department; or for other purposes which may be specified by order of the Secretary of State. Second, the authorised conduct is proportionate to what is sought to be achieved by the conduct or use. Third, that arrangement is in place for the management of the CHIS that meet the criteria prescribed in Section 29(5) of RIPA 2000.

The majority of organisations empowered under the RIPA 2000 are only able to deploy CHISs for the purpose of preventing or detecting any crime or preventing disorder.\(^{59}\)

Under the South Australian Criminal Investigation (Covert Operations) Act 2009, the definition of undercover operations are vividly determined under Section 3 of the Act, which

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\(^{59}\) Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2003 (SI 2003/3171)
stated as ‘operations (which may include conduct that is apart from this Act illegal) of which the intended purpose is to provide persons engaging or about to engage in serious criminal behaviour an opportunity to – (a) manifest that behaviour; or (b) provide other evidence of that behaviour.

A senior police officer\(^60\) may approve an undercover operation for the purpose of gathering evidence of serious criminal behaviour where the officer is satisfied as to the prescribed statutory provisions relating to the nature of the serious criminal behaviour being investigated and the proposed nature of the undercover operation.\(^61\)

Supported by Section 4(1) and (2) of the Criminal Investigation (Covert Operations) Act 2009, the officer approving the operation must:

(1) suspect on reasonable grounds that persons (whose identity may, but need not, be known to the officer) have engaged, are engaging or are about to engage in serious criminal behaviour of the kind to which the proposed undercover operations relate;

(2) be satisfied on reasonable grounds that the ambit of the proposed undercover operations is not more extensive than could reasonably be justified in view of the nature and extent of the suspected serious criminal behaviour;

(3) be satisfied on reasonable grounds that the means are proportionate to the end; that is, that the proposed undercover operations are justified by the social harm of the serious criminal behaviour against which they are directed; and

(4) be satisfied on reasonable grounds that undercover operations are properly designed to provide persons who have engaged or are engaging or about to engage, in serious criminal behaviour an opportunity (a) to manifest that behaviour; or (b) to provide other evidence of that behaviour, without undue risk that persons without a predisposition to serious criminal behaviour will be encouraged into serious criminal behaviour that they would otherwise have avoided.

Before giving approval, the senior officer must consider whether approval for similar operations has previously been sought, and, if sought and refused, the reasons for that refusal, according to Section 4(3) of the Criminal Investigation (Covert Operations) Act 2009.

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\(^{60}\) ‘Senior police officer’ means a member of the police force of the rank of Superintendent or above: Section 4(7) of the Criminal Investigation (Covert Operations) Act 2009

\(^{61}\) Halsbury’s Laws of Australia (n.58)
3. **Immunity Regime**

RIPA 2000 is silent in terms of granting immunity to CHISs, leaving much room for interpretation in this particular aspect. As a consequence, it causes difficulties and uncertainties in defining how far the infiltration should go for an undercover agent under the Act in a ‘lawful’ manner.

Pursuant to Section 27(1) of RIPA 2000, if the authorisation requirements are met, conduct in accordance with the authorisation will be ‘lawful for all purposes’. This suggested that a CHIS acting in accordance with an authorisation is not susceptible to either civil or criminal liability as a result of that conduct.

Section 27(1) of RIPA 2000 countenances criminal liability is implied not merely by the use of the term ‘for all purposes’ but also from the specific reference – Section 27(2)(a) of RIPA 2000 which states: to immunity from civil liability in respect of conduct which ‘is incidental to any conduct that is lawful by virtue of subsection (1)’.62

Whitaker suggested that Section 27(1) of RIPA 2000 is intended to provide a lawful basis for activity previously lacking statutory regulation, rather than to confer immunity from otherwise illegal criminal activity by making such activity lawful.63

The issue of immunity is rather put differently in paragraph 2.10 of the Covert Human Intelligence Sources Code of Practice, which reads: in a very limited range of circumstances an authorisation under Part II may, by virtue of Section 26(7) and 27 of the 2000 Act, render lawful conduct which would otherwise be criminal. While it is acknowledged in the Code of Practice that there are limits recognised by the law within which a CHIS must operate, the scope of those limits is obscured by Section 27 of RIPA 2000 and its suggestion that compliance with a valid authorisation insulates the CHIS from criminal liability.64

Another interpretation holds that, since RIPA 2000 does not specifically permit infiltration and participation, no CHIS may be authorised to engage in such conduct.65 If this was accepted, it might severely inhibit the use of CHISs, particularly when investigating serious

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62 Billingsley (n.27) at 60
64 Billingsley (n.27) at 61
organised crime. Further, immunity has been suggested not being granted under RIPA 2000. Bob Ainsworth MP in Hansard Fifth Standing Committee of Delegated Legislation stated:

It was always the intention that the Act [RIPA 2000] would not provide immunity from prosecution. The intention was that it would provide ECHR cover for the use of a CHIS. However, we have since reconsidered, taken further advice and concluded that, in a very limited range of circumstances, it may be possible that participation in a criminal offence might be rendered lawful by virtue of a correctly authorised CHIS authorisation. Ultimately, it still remains a matter for the prosecution authorities and the courts to decide whether an authorisation would render conduct that would usually be considered unlawful as lawful.  

It has been argued that the existence of immunity and its scope are contestable under the RIPA 2000. This lack of certainty in the granting of immunity is of an opaque nature.

Under the RIPA 2000, the existence of the immunity and its scope are contestable. Lacking certainty is compounded by the relationship between RIPA 2000 and the English criminal law. Section 27 of RIPA 2000 clearly not intended to entirely subvert the criminal law on the issue of whether a CHIS, at law, commits the offence in question but the reference to ‘lawfulness’ under Section 27 of RIPA 2000 and its ambivalent status – simultaneously meaning not only ‘properly regulated’ but also ‘not contrary to law’ is argued to be problematic.

Potential risks might also incur in its practical operations. Important to note, as there is no clear provision in explicitly ensuring immunity, it might incur a sense of insecure to the undercover agents and uncertainties to prosecution.

In South Australia, legal immunity of undercover officers was granted explicitly under the Criminal Investigation (Covert Operations) Act 2009 in Section 5(1), which stated: despite any other law, an authorised participant in approved undercover operations incurs no criminal liability by taking in undercover operations in accordance with the terms of the approval.

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67 Billingsley (n.27) at 66
68 Billingsley (n.27) at 66
69 Billingsley (n.27) at 66
According to Section 5(2) of the Criminal Investigation (Covert Operations) Act 2009, it operates both prospectively and retrospectively. As to the terms and conditions of the approval in Section 4(4) of the Act which requires, among other things, a description of the nature of the activities and the identity of all persons authorised to participate.

The 2009 Act has placed legal immunity on a statutory footing, relieving authorised law enforcement officials and/or civilian agents of their liability for offences committed in the course of authorised operations.

B. **Comparison between the approaches of British law and South Australian law: their Values to Undercover Policing in Hong Kong**

In comparing the two approaches and weighing their values to tackle the limitations of undercover policing in Hong Kong, it is crucial to look in-depth their nature and historical background.

1. **Immunity: the Wide British Approach versus the Narrow South Australian Approach**

In relation to the issue of immunity, the rationale of RIPA 2000 was not intended to provide immunity to undercover agents. It remains for the prosecution authorities and the courts to decide whether an authorisation would render conduct that would usually be considered unlawful as lawful. 70

In the absence of statutory immunity at RIPA 2000, intentional acts of offence-facilitation could possibly expose undercover officers to be liable as inciters or co-conspirators. Although it is unlikely that undercover officer who facilitates crime during officially authorised operations would be prosecuted in Hong Kong, the defence may seek exclusion of the evidence on the grounds of illegality.

The RIPA 2000 has adopted a wide approach in authorising the deployment of CHIS and has not tackled the issue of immunity clearly in its provisions. The question of legal immunity to undercover agents remains uncertain in the UK. Unlike the British approach, the South Australian Criminal Investigation (Covert Operations) Act 2009 has adopted a narrower

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70 Ainsworth (n.66)
approach in explicitly providing legal immunity to authorised participants in approved undercover operations.

Regarding the limitations of undercover policing laws in Hong Kong – ambiguous immunity to undercover agents, the South Australian Criminal Investigation (Covert Operations) Act 2009 seems to be more helpful in resolving the problem of safeguarding undercover officers from prosecution in the course of operations.


There have been legal challenges mounted based on the central question of whether covert policing resources in the UK were justified at all having regard to the circumstances of the case as well as scrutinising the human rights issues increasingly assiduously.\(^{71}\)

The large extent unintended counter-balance to the proliferation of the use of covert policing techniques and resources has been the HRA.\(^{72}\) Contrary to popular parlance, HRA does not incorporate but gives ‘further effect’ to those Articles of the ECHR contained in Schedule 1 – Convention for the Protection of Human Rights and Fundamental Freedoms. This includes Article 8 of the ECHR - the right to respect for private and family life, and Article 6 of ECHR - the right to a fair trial. RIPA 2000 was enacted in anticipation of the commencement of HRA and was brought into force simultaneously with it.\(^{73}\)

The law of privacy on the basis of HRA and ECHR are considered in the RIPA 2000. Distinguished from the UK legal historical background, neither ECHR nor HRA apply to Hong Kong. In this regard, it will pose difficulties for Hong Kong to strictly follow the British approach in regulating undercover operations.

Looking into the context of human rights in Hong Kong, it is axiomatic that any legislation or legal reform in Hong Kong must be compatible with the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) and the International Covenant on Civil and Political Rights (ICCPR). ICCPR is firmly rooted in Hong Kong’s legal system and members of the community are able to challenge laws and procedures that they consider to be inconsistent

\(^{71}\) McKay (n.47) at 25
\(^{72}\) McKay (n.47) at 26
\(^{73}\) McKay (n.47) at 26
with the ICCPR. Since the return of sovereignty to China in 1997, the ICCPR has been given a special status in Hong Kong by virtue of Article 39 of the Basic Law, which reads:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

In Australia, ICCPR was ratified in 1980. Although it has not been formally incorporated into Australia’s domestic law, the ICCPR is attached as a schedule (Schedule 2) to the Human Rights and Equal Opportunity Commission Act 1986. Similar to Hong Kong’s human rights context, neither ECHR nor HRA are applicable in Australia.

The enactment of an undercover policing involves taking a more sophisticated approach to undercover operational planning and it is crucial for the undercover agents in understanding intimately the core values of human rights that their activities put in jeopardy. The core value includes – privacy, under RIPA 2000. However, unlike the United Kingdom, Hong Kong is not bind by ECHR or HRA. This might cause potential difficulties in entirely adopting the RIPA 2000 in defining where police misconduct is found to have taken place in Hong Kong.

However, the counter argument for this is that similar human rights concepts could be found in the ICCPR and the Basic Law.

To illustrate this in detail, the deployment of CHIS may engage the right to fair trial under Article 6 of the ECHR, the concept of right to fair trial could be found at Article 87 of the Basic Law, which states: anyone who is lawfully arrested shall have the right to a fair trial

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76 McKay (n.47) at 65
by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

For Article 8 of the ECHR guarantees a right to respect privacy, Article 17 of ICCPR gives a similar concept by stating: no one shall be subjected to arbitrary or unlawful inference with his privacy, family, home or correspondence, nor to lawful attacks on his honour and reputation.
IV. SHOULD HONG KONG ENACT A LEGISLATION REGULATING UNDERCOVER AGENTS’ OPERATIONS AND CRIMINAL INVESTIGATIONS?

After analysing and evaluating the British and South Australian approach in regulating undercover operations, we should consider whether enacting an undercover policing legislation could effectively resolve the problems presently faced in Hong Kong.

A. Hong Kong Legal Culture: Law-making Driven by Crisis

In Hong Kong, law-making is often driven by crisis. To illustrate this, the Personal Data (Privacy) Ordinance (Cap. 486) was passed quickly after the EU Directive on data privacy was issued in 1995, prohibiting the transfer of personal data of EU members to countries or jurisdictions without privacy law. As a result, the Personal Data (Privacy) Ordinance came into force in December 1996 – only few months before the return of sovereignty to China. Ten years later, in 2006, a Member of the Legislative Council, Mr. Leung Kwok Hung, applied for judicial review demanding the abolition of laws and executive orders which authorised law enforcement agencies to conduct covert surveillance.

In Leung Kwok Hung v. HKSAR, the High Court held that covert surveillance must be authorised by law and executive orders were not law. Although the relevant consultation was conducted in 1996, the Interception of Communications and Surveillance Ordinance (Cap. 589) was drafted by the government and passed by the Legislative Council at the end of a record-setting 57.5 hours legislative session. The Octopus saga in mid-2010 again led to a report being promptly published by the government in October 2010 which was apparently based on a 2009 consultation, further review was then carried out on the laws on the collection and use of personal data for direct marketing purposes.

Laws that are generally made hastily in response to a crisis are certainly undesirable for the law-making and law reform process.

While it is important for detecting and preventing crimes and threats to the safety that people are entitled to enjoy in a free and well-ordered society, undercover operations must be

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77 [2006] HKCU 230
79 Ibid
controlled to sufficient protect agents by providing shields from legal liability. Also, it is questionable whether the Hong Kong current legislative and regulatory framework governing undercover agents are lawful and appropriately managed. It is not desirable for Hong Kong to wait for a ‘crisis’ to realise the need of a legislative framework for undercover activities.

There is a real risk for Hong Kong in lagging behind the other peer jurisdictions if law-making relied heavily on crisis. In regarding to legislating undercover policing, it is time to act promptly and not wait till serious crisis, such as undercover agents involving in crimes being prosecuted, occurred.

**B. Safety of Undercover Agents: the Ground of Public Interest Immunity**

The safety of undercover officers is an important issue to be taken care of in considering the enactment of legislation. In relation to the disclosure of materials, there might be opposing views arguing that the arrangement of restrictive disclosure is justifiable on the ground of public interest immunity to protect the safety of undercover police officers and to maintain the intelligence gathering techniques and capabilities for cases involving serious crimes such as terrorism. With reference to paragraph 20.10 of the Statement of Prosecution Policy and Practice – Code for Prosecution: in deciding whether to provide copies of audio and video surveillance to the defence the prosecution are entitled to take into consideration the protection of the safety of an undercover police officer, with reference to *R v. Crown Prosecution Service and Anoter, Ex parte J and Another*.80

The concept of public interest immunity recognises not that the prosecution have a privilege to withhold information, but that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.81

However, the writer holds the view that the argument of safety is unlikely to be upheld. According to Lord Bingham in *R v. H & C*:82

The golden rule is that full disclosure of such material should be made. ...

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80 [2000] 1 WLR 121
81 Department of Justice, ‘The Statement of Prosecution Policy and Practice – Code for Prosecution’ (2009) at para. 20.6
82 [2004] 2 AC 134
may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. ... In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.  

The principle has been applied by the Court of Appeal in *HKSAR v. Chan Kau Tai.* Important to note, the proper procedure and safeguard for non-disclosure on the ground of public interest immunity are in the existing practice of criminal trials. Therefore, having an undercover policing legislation would not expect to interfere with the proper and fair administration of justice which demands transparency and the disclosure of all relevant evidence.

**C. The Preferred South Australian Approach**

The judicial control of undercover policing methods in Hong Kong through the rules of evidence, procedure and internal guidelines encounter many uncertainties. For this reason, regulating covert policing comprehensively through legislation is clearly preferable.

Considering the two approaches – British and South Australia, it would be desirable if Hong Kong could adopt the South Australian Criminal Investigation (Covert Operations) Act 2009 in tackling the above-mentioned policy considerations. The reason is two-fold: first, the South Australian legislation provides a clearer statutory footing in regulating the use of undercover operations and providing immunity; second, the different human rights context between the UK and Hong Kong.

In relation to the issue of immunity, the South Australian Criminal Investigation (Covert Operations) Act 2009 provides a clear statutory footing in granting legal immunity to persons (undercover participants) taking part in approved undercover operations. This has directly tackled the limitations that Hong Kong is facing – lack of immunity provided to undercover agents. Unlike the British approach, immunity was ‘impliedly’ located in Section 27 of the RIPA 2000 which causes uncertainties and confusions.

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83 Ibid at 147
84 [2006] 1 HKLRD 400
Further looking at the historical background of the British approaches, it is arguable that prior to 2 October 2000, when the HRA 1998 came into force fully in the UK, the ECHR had its most profound effect on English law in the area of covert policing. Hence, the evolution of covert policing law in the UK was heavily based on human rights context. However, it is important to note that neither HRA nor ECHR bind Hong Kong.

It is believed that enacting an undercover operations ordinance would help to maintain law and order. In particular, law enforcement officers will be better able to carry out undercover operations when investigating certain criminal activities in accordance with more transparent and consistent procedures. In this regard, the South Australian approach seems to be more desirable due to its clear nature in providing prospective and retrospective immunity to authorised undercover agents.
V. RECOMMENDATION

As there is evidence supporting there is a need for change in the regulative framework of undercover policing in Hong Kong. This section summarises the above analysis and presents the following recommendations.

A. Recommendation 1: Providing a Legislative Framework of Undercover Policing in Hong Kong

The previous sections have identified the limitations of Hong Kong present laws in tackling undercover policing. It has been suggested that the existence of the immunity and its scope are contestable. This lack of certainty creates potential risks to our criminal justice system.

The writer recommends formulating an undercover policing legislation including rules specific to the situation of the participation of undercover agents in Hong Kong. Having clear rules and immunity provided under the legislative framework would be compelling and helps to maintain law and order in society. More importantly, it assesses the legitimacy of relevant policing strategy and operations.

This would believe to have the advantage of providing the law enforcement community with a resource setting out their powers and duties in respect of undercover agents in a more transparent manner than is possible under the current regulatory system in Hong Kong.

B. Recommendation 2: Drafting of Provision in relation to Immunity

In relation to the drafting of provisions to provide immunity, examples could be taken locally from Section 65 of the ICSO which reads as follow:

(1) Subject to subsection (2), a person shall not incur any civil or criminal liability by reason only of—

(a) any conduct carried out pursuant to a prescribed authorisation or device retrieval warrant (including any conduct incidental to such conduct);
(b) his performance or purported performance in good faith of any function under this Ordinance; or

85 Billingsley (n.27) at 67
(c) his compliance with a requirement made or purportedly made under this Ordinance.

(2) Nothing in subsection (1) affects any liability that is or may be incurred by any person by reason only of—

(a) any entry onto any premises without permission; or

(b) any interference with any property without permission.

The writer recommends that the wordings of the immunity provision could be adopted from ICSO, which contains immunity protecting authorised person of undercover operations from incurring civil or criminal liability. This would help to lay out a clear statutory footing and protection to undercover officers in Hong Kong from being prosecuted.

Importantly, the ICSO is a Hong Kong statute, unlike adopting the wordings from foreign legislations, cultural impacts are not a concerned here. Further, Section 65 of the ICSO provides a more detailed elaboration comparing with Section 5 of the South Australian Criminal Investigation (Covert Operations) Act 2009; and a clearer illustration comparing with the British RIPA 2000.

C. Recommendation 3: Creating Precedent regarding Undercover Operations

Alternatively, court rulings might help to create the effect of providing guidance in: whether there are sufficient reasons to conduct the undercover operations; whether the undercover officer has acted in good faith; whether there is evidence of improper targeting of individuals or groups of individuals and so forth.

To illustrate this, in a British case of *Birtles*, 86 the Court of Appeal suggested that there was a real likelihood that the appellant had been encouraged by an informer and perhaps also by the informer’s handler (an undercover officer) to commit a criminal offence of robbery at a post office, which otherwise the accused would not have committed. Although this was merely an appeal against sentence, Lord Parker CJ made some general remarks concerning the use of informers (a category of CHIS) which supports the concept of immunity from criminal liability:

The Court recognises that, disagreeable as it may seem to some people, the police

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86 [1969] 1 WLR 1047
must be able in certain cases to make use of informers, and further – and this is really a corollary – that within certain limits such informers should be protected.87

The advantage of having clear remarks from case law is that it provides flexibility, at the same time, serving similar purpose of eliminating the limitations of the current laws in HK. Further, the courts’ ruling can lay down important tests to testify whether an undercover officer had exceeded the permissible limits.

However, the counter argument is that unless the case reaches to the Court of Final Appeal which makes it to be ‘leading’, there might be problems of confusion and uncertainties. This is because different judges might have different opinions and options in relation to the level of intrusion during undercover operations.

Therefore, the writer recommends that alternative to create a legislation regulating undercover agents, case law – as a primary source of laws, would also be helpful to tackle the limitations presently faced in Hong Kong.

87 Ibid at 1049
VI. CONCLUSION AND PREDICTION OF FUTURE LEGAL DEVELOPMENT IN UNDERCOVER POLICING

It was well recognised that undercover operations were a valuable resource in the fight against crime. However, there is no legislative framework in Hong Kong to regulate undercover activities in a whole. The lack of statutory immunity to undercover agents has imposed a certain degree of legal uncertainties in our criminal justice system. Therefore, this paper has sought to illustrate the need for a wider discourse on the role of undercover investigation and appropriate forms of regulation.

To resolve the limitations of current Hong Kong laws in undercover policing, a direct and effective solution is to enact a legislation to lay out clear guidelines to the deployment of undercover operations and the grant of immunity.

This research compares and contrasts the British and South Australian approach in regulating undercover agents. In the aspect of immunity to authorised undercover agents, the South Australian law of Criminal Investigation (Undercover Operations) Act 2009 seems to be a more preferred approach for Hong Kong to adopt.

The difficulty of enacting an undercover policing legislation in Hong Kong is to balance the transparency and the safety of undercover agents. While there might be opposing views to the legislation that a legal framework to regulate undercover agents would disclose their identity or other relevant information, as a result, affecting the effectiveness of intelligence gathering techniques. The writer believes that such argument is unlikely to be upheld. This is because there are well established procedures under public interest immunity that can be applied when seeking to protect the identity of an undercover agent from disclosure.

Traditionally, Hong Kong lawmaking is driven by crisis. Under such legal tradition, Hong Kong could possibly lag behind to our peer jurisdictions, as the law will not change unless undesirable crisis has occurred. It is indeed time to change such attitude and be pro-active in creating a new undercover policing legislation. The new legislation should be specifically address the issue of authorising undercover agents and immunity in tackling the limitations Hong Kong presently faced.

Finally, this study reveals that regulating undercover policing comprehensively through
legislation is clearly preferable. The writer believes that such proposal would offer a satisfactory solution to the shortcomings of the current undercover policing laws in Hong Kong and undercover agents would be given a better protection from legal liability. Also, the legislative framework would also act as a deterrence effect to agents from stepping over the line and performing beyond their authorisation.
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