

For information

LEGISLATIVE COUNCIL PANEL ON SECURITY

Supplementary information on Police's undercover operations against vice activities

Purpose

This note sets out the Administration's response to the issues raised in the submission from Professor Simon Young to Zi Teng dated 3 April 2006. It also provides the information related to massage establishments requested by Members at the meeting held on 4 April 2006.

Submission from Professor Simon Young

2. Four major issues were raised by Professor Simon Young in his submission. The Administration's response is set out in the following paragraphs.

Issue 1: Is it necessary for undercover agents to receive sexual services in order to gather sufficient evidence for prostitution-related offences under investigation?

3. Professor Young is of the view that it is unnecessary for undercover agents to receive sexual services in order to gather sufficient evidence for prosecuting certain prostitution-related offences¹.

4. The Administration does not share Professor Young's views. Given the nature of the illegal activities that anti-vice operations are targeting at, there could, in some cases, be a strong operational need for the Police officer posing as customer to receive some form of sexual service from a prostitute so as to maintain his cover to collect the necessary evidence to secure successful prosecution against the offenders. The circumstances in question could include the following -

- (a) Among others, one of the major purposes of undercover operations against vice activities is to ascertain whether

¹ As mentioned in paragraph 1 on the second page of Professor Young's submission to Zi Teng dated 3 April 2006. The offences include sections 4(1) and 13(1) of the Massage Establishments Ordinance (Cap. 266), as well as sections 137(1), 139(1), 143(1), 144(1), 145(1) and 147(1) of the Crimes Ordinance (Cap. 200).

and, if so, what offences are being committed inside the relevant premises (which could be vice establishments or massage establishments), as well as to collect the necessary evidence to prove the commission of the offences. In this regard, it should be noted that mere sex talk is not sufficient to prove the existence of vice activities. From a legal perspective, as often prostitutes would not testify for the prosecution against those who run the vice business, what the prostitutes say to the undercover Police officer (save for admission of their own guilt under caution) is not evidence of the truth of the content. So even if a prostitute tells the undercover Police officer that "A" is her boss, this information amounts to hearsay and cannot be used as evidence against "A". The conversation between the Police officer and the prostitute could only be used to prove the nature of the business that the prostitute is engaged in and the type of activities the premise is related to. Hence, it might sometimes be necessary for the undercover Police officer to go along to receive some form of services offered to him, be it massage (which often include massaging the intimate part of his body) or sexually-related, in order to stay undercover and to collect more concrete evidence to prove a criminal offence relating to vice or massage establishments.

- (b) In order to secure successful prosecution against the offenders (be it the keeper, manager, assistant manager or licensee, etc.) for such offences, the undercover Police officer would need to collect concrete evidence to prove the different roles played by all those who are involved in the vice activity/business. As the law stands, for all offences (save for section 147(1) of the Crimes Ordinance (Cap. 200)) mentioned by Professor Young in his submission (see footnote 1), it must be proved that the premises (i.e. a 'vice-establishment' as defined under section 117(3) of Cap. 200, or a 'massage establishment' as defined under section 2 of the Massage Establishment Ordinance (Cap. 266)) where the vice or massage activities are carried out are kept or used for such purposes, i.e. over a period of time or at least not for a single incident. So, there is a need to prove an element of continuity in the vice or massage business

(see for example *HKSAR v MA Pik-ki* HCMA 950 of 2003 per McMahon J on ‘kept or used’, *R v CHEUNG Yuet-pang* [1991] 1 HKC 569 per Sears J on ‘habitual prostitution’ regarding offence under section 137(1) of Cap. 200). Hence, it would be necessary for the undercover agents to act like normal customers and to receive some form of sexual services offered to them, or else they may not be able to maintain their cover long enough to collect sufficient evidence against the persons concerned.

- (c) In cases where the Police are targeting at the syndicates behind the illegal activities (i.e. those who are involved in the operational control or management – including those running, keeping, managing and/or owning the business), apart from proving that vice activities do take place inside the premises, it is also necessary to prove that the people concerned know that vice/illegal activities are taking place within their premises. However, the controllers of these syndicates do not show up as often as the staff (who are often used as foot soldiers or frontiers) or prostitutes. As a result, it becomes necessary for undercover Police officers to visit the premises more than once or even over a period of time in order to collect sufficient evidence to press charges against the “big bosses” behind these syndicates. In the process, the undercover Police officers would have to continue acting as normal customers and receive some form of sexual services in order to succeed in the operation.

5. It is also relevant to note that there are a number of vice-related offences, for example, those under Part XII of Cap. 200 (from sections 129 to 147B) and Cap. 266, apart from the ones referred to by Professor Young. Different offences require different elements to be proved. It is only reasonable to allow the Police to plan their operation with a reasonable degree of flexibility so that the necessary evidence could be gathered to allow subsequent prosecutions of any offences uncovered during such operations.

6. The Police remind their undercover officers before each and every operation the extent and form of the sexual service the latter could receive during operation shall be restricted to that as required by

operational needs. In particular, sexual intercourse and oral sex are strictly forbidden and this is clearly stated in the Police internal guidelines governing anti-vice operations. All officers engaging in these undercover operations are required to strictly comply with the guidelines.

Issues 2 and 3: Is the receipt of sexual services by undercover agents illegal? Can the practice of receiving sexual services ultimately jeopardize the criminal investigation?

7. Professor Young has pointed out in his submission that the receipt of consensual sexual services by undercover officers is not illegal if it does not involve a girl under the age of 16, or if the undercover officer does not intend to enjoy free service from the outset. Professor Young is also of the opinion that the receipt of sexual services during undercover operations might be regarded as Police entrapment, thus jeopardizing the criminal investigations.

8. It is important to distinguish between Police incitement which results in the commission of an offence and undercover Police investigation which is an essential tool in the investigation of certain types of crime, and which is necessary if the Police are to do their work properly (see *HKSAR v HEUNG Yu-nam* [1997] 3 HKC 632 at 639, CA). Case law has clearly established that if an offence is one which the offender would not have committed had he/she known that the person approaching him/her or drawing him/her in was a policeman, and that is the only reason he/she would have refrained from its commission, that is not an entrapment situation (see *R v LIU Chun-fai* [1987] HKLR 1032, CA). So, if what an undercover Police did was to infiltrate a criminal enterprise and thereafter played some role in it to investigate and gather evidence, such conduct would not in itself constitute entrapment (see *R v SIU Yuen-fong and another* [2002] 4 HKC 692, at 711, Stock J). We therefore do not consider that undercover Police operations against vice activities amount to entrapment.

Issue 4: By receiving sexual services, has the undercover agent breached any ethical standards (either according to those of the Hong Kong or other international standards)?

9. Professor Young has raised concerns on the ethical aspect of undercover operations against vice activities. As previously explained, undercover agents engaging in anti-vice operations are performing their professional duties in collecting evidence, which is an important step in crime investigation and detection. All such operations are closely

supervised to ensure that they are properly conducted in accordance with the law and established Police guidelines.

Information Related to Massage Establishments

10. In 2005, 1 085 and 88 persons were arrested in relation to the offences of “keeping a vice establishment” (section 139 of Cap. 200) and “operating an unlicensed massage establishment” (section 4(1) of Cap. 266) respectively. For the former offence, 903 persons were charged and 848 persons convicted; for the latter offence, 135 persons were charged and 127 persons convicted.² However, we do not maintain statistics on cases involving a complete course of masturbation, nor the type of persons prosecuted (and hence the details of the cases related thereto).

11. A Member asked for the statements of the cases discussed at the meeting held on 4 April 2006. However, as the statements concerned are related to Police undercover operations and contain operational tactics, it would not be appropriate to disclose them for public scrutiny. Moreover, as the statements were prepared solely for the purpose of the cases concerned, it would not be appropriate for the Administration to release them to parties other than those related to the cases in question.

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² Persons prosecuted / convicted in 2005 might not be arrested in the same year. Moreover, there might be changes to the offences in question when they were finally charged (as compared to the offences for which these persons were arrested). Hence, it might not be appropriate to make direct comparison between the number of arrested persons, and the number of persons prosecuted and convicted quoted above.