A FREE LICENCE: THE LACK OF EXTERNAL CHECKS ON POLICE UNDERCOVER OPERATIONS

M D EAST

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago – Te Whare Wananga o Otago.

October 2017

Acknowledgements

This dissertation owes much to the people acknowledged below. Any faults and omissions, however, remain mine alone.

To my supervisor, Professor Andrew Geddis, thank you for your guidance, your invaluable comments, and your support throughout this project. You have made this dissertation an enjoyable experience.

To the Faculty of Law, for four years of support, inspiration and encouragement.

To my Dunedin friends and flatmates, thank you for making my time at University so entertaining.

To Matthias, Sam and Tim, thank you for your meticulous proof-reading skills and your insightful comments.

To Victoria and Phoebe, thank you for your help throughout the year. Your intellect combined with your sense of humour has made for a memorable year. Lastly, I appreciate your patience.

Finally, to my parents, for whom I am eternally indebted. I cannot articulate how grateful I am for all of the support and encouragement I have received from you. Thank you for everything.

A FREE LICENCE: THE LACK OF EXTERNAL CHECKS ON POLICE UNDERCOVER OPERATIONS

INTRODUCTION

Police undercover operations are not a new concept.[1] They vary in form and the level of deception employed. Traditionally, these operations have been justified on a utilitarian calculus that, because they allow criminals to be caught, society as a whole permits the Police to engage in subterfuge. As noted by Lamer J in *R v Mack*:[2]

> One need not be referred to evidence to acknowledge the ubiquitous nature of criminal activity in our society. If the struggle against crime is to be won, the ingenuity of criminals must be matched by that of the police; as crimes become more sophisticated so too must be the methods employed to detect their commission.

This "ends justifies the means" approach begs the question: how far is too far? To what extent should we allow the Police to engage in deceptive and invasive behaviour? Is the public interest in apprehending criminals so strong that we turn a blind-eye to the rights of individual citizens?

These issues have recently arisen after the Police's use of the "Crime Scenario Undercover Technique" (or so-called "Mr Big operation"). In 1901, the Manitoba Court of King's Bench described this type of operation as "vile", "base" and "contemptible".[3] However, our highest court has recently approved of the use of the technique.[4]

This dissertation will assess the conduct of the Police during undercover operations, and the restraints (or lack thereof) that operate to control such operations. In Chapter One I will examine the current undercover tactics employed by the Police and the mechanisms currently in place to limit police conduct during those operations. Chapter Two will explore the concerns about the use of these tactics. Chapter Three will provide an examination of the effectiveness of the current constraints. Chapter Four will suggest options for reform in this area.

There are multiple competing interests underlying this dissertation:[5]

> …the private interests of victims and their families; the public interest in bringing offenders to justice; the private interest and right of suspects not

[1] See, for example, the early case of *R v O'Shannessy* (unreported, Wellington, 8 October 1973, 78/73).
[2] *R v Mack* [1988] 2 SCR 903 at [16].
[3] *The King v Todd* (1901) 4 CCC 514 (Man KB) at [3] and [8].
[4] *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.
[5] Rt Hon Dame Susan Glazebrook "Mr Big Operations: Innovative Investigative Technique of Threat to Justice?" (paper presented to the Judicial Colloquium 2015, Hong Kong, September 2015) at 28.

> to be coerced into confessions; and the public interest in guarding against wrongful convictions, upholding individual rights and enforcing proper standards of police behaviour.

Completely disregarding one of these interests for the sake of another is not justifiable. Rather, the desired outcome is a result that provides a balanced approach and seeks to give proper weight to the respective interests.

CHAPTER I: CURRENT POLICE UNDERCOVER TACTICS & THE WAY THEY ARE CONSTRAINED

A Undercover Tactics Employed by the Police

After perusing the case law in New Zealand relating to undercover operations, there seems to be five different types of undercover tactics employed by the Police:

I. "Normal" undercover operations in which officers masquerade within existing circumstances to monitor suspects and gather evidence;[6]

II. Entrapment cases;[7]

III. The situation in which a suspect has been placed in custody overnight and undercover officers, who pose as cellmates, are placed in the same cell with the aim of eliciting a confession from the suspect;[8]

IV. Situations where the Police use a private person to try and elicit a confession from the suspect;[9] and

V. "Crime Scenario Undercover Technique" (or so-called "Mr Big operation").[10]

Each of the tactics listed above has its own set of concerns. Tactic I is the least reprehensible. This type of tactic is institutionally accepted. As the House of Lords in *R v Looseley* stated, "…there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime".[11] This allows for the detection and prosecution of crimes that would otherwise be committed in private.[12] The propriety of this tactic depends on how the Police infiltrate the suspect's life and gain their trust. Where the Police act as mere passive observers to a crime, which would have taken place in any event, there are no principled objections to the use of this tactic.

---

[6] *R v Hart* 2014 SCC 52, [2014] SCR 544 at [216] adopted by Glazebrook J at [488] of Her Honour's judgment in *Wichman*, above n 4.
[7] The leading case in New Zealand in this area is *Stevenson v R* [2012] NZCA 189.
[8] See, for example: *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204; *R v Cummings* [2014] NZHC 1025*; R v Harrison* [2014] NZHC 2246.
[9] See, for example: *R v Barlow* (1995) 14 CRNZ 9 (CA); *K (CA106/2013) v R* [2013] NZCA 430*; R v M* CA64/96, 22 April 1996*; R v Ahamat* CA143/00 19 June 2000.
[10] See, for example: *R v Cameron* [2007] NZCA 564 (Pre-trial); *R v Cameron* [2009] NZCA 87 (Post-trial); *R v Wichman*, above n 4; *R v Reddy* [2016] NZHC 1294; *Lyttle v R* [2017] NZCA 245.
[11] *R v Looseley; Re Attorney General's Reference (No 3 of 2000)* [2001] 1 WLR 2060; [2001] 4 All ER 897; [2002] 1 Cr App R 29 (HL) at [4].
[12] *Looseley*, above n 11, at [2].

However, as the Police employ more invasive means to gain the suspect's trust, the tactic becomes increasingly intolerable. For example, there are documented cases of undercover officers developing sexual relationships with their targets in order to continue with the operation.[13] At least in one New Zealand case it has been alleged that the undercover officer developed an intimate relationship with the suspect.[14]

An illustrative example of this type of tactic going awry is in *Wilson v R*.[15] In *Wilson*, the Police deployed two undercover officers to infiltrate the Red Devils Motorcycle Club. As part of the operation, the undercover officers created and executed a false search warrant; brought false charges against an undercover officer in an attempt to burnish his credentials; and involved the Chief District Court Judge by seeking the Judge's permission for an undercover agent to appear in court under an assumed name.[16] The Supreme Court noted that the officers' conduct during the operation amounted to forgery and perjury.[17] The Crown, wisely, accepted that the operation amounted to serious misconduct.[18] As a result, this means of infiltration is unlikely to be used again – at least until Parliament authorises such actions.[19] However, the case highlights that principled objections *can* be raised to the use of this type of tactic depending on what the Police do during the operation.

Tactic II involves the Police themselves providing an opportunity for the suspect to offend. This is distinguishable from Tactic I as in this situation the Police are more than passive observers. If the Police induce a person to commit an unlawful act that the person would not have otherwise committed, the suspect will have been entrapped.[20] The Court of Appeal in *Stevenson v R* distinguished between Tactic I cases and entrapment cases as follows:[21]

> …[the] question is whether the police conduct preceding the commission of the offence is no more than might have been expected from others in

[13] See, for example, Jane Wheatley "Helen Steel and John Dines: The spy who loved me" (19 March 2016) Sydney Morning Herald <http://www.smh.com.au/good-weekend/helen-steel-and-john-dines-the-spy-who-loved-me-20160318-gnltdv.html> and Lauren Collins "The Spy Who Loved Me" (25 August 2014) The New Yorker <https://www.newyorker.com/magazine/2014/08/25/the-spy-who-loved-me-2>.
[14] See *R v Slater* (1994) 12 CRNZ 198.
[15] *Wilson v R* [2015] NZSC 189, [2016] 1 NZLR 705.
[16] *Wilson*, above n 15, at [11].
[17] at [31] and [34].
[18] *Wilson*, above n 15, at [3].
[19] *Wilson*, above n 15, at [38]. See also Andrew Geddis "Mr Wilson's adventures in legal wonderland" (15 December 2015) Pundit <https://www.pundit.co.nz/content/mr-wilsons-adventures-in-legal-wonderland>.
[20] S Smith, V Stinson and M Patry "Using The 'Mr. Big' Technique To Elicit Confessions: Successful Innovation Or Dangerous Development In The Canadian Legal System?" (2009) 15 Psychology, Public Policy, and Law 168 at 179.
[21] *Stevenson,* above n 7, at [39].

> the circumstances; if not, that conduct is not to be regarded as inciting or instigating crime or luring a person into committing a crime.

If the facts of a particular case indicate the Police have lured a person into committing a crime, the evidence will likely be excluded. Exclusion is justified on the basis that state created crime is an affront to public conscience and any subsequent prosecution of such conduct would be unfair.[22]

Tactic III is the deployment of undercover officers into a suspect's cell overnight, posing as criminals. As the undercover officers spend time in the cell, they use an arrest cover story and history of criminality in an attempt to develop rapport with the target.[23] The purpose of the interaction is to communicate with the target in an attempt to make the target feel comfortable about revealing their own criminal exploits.[24] In at least one case, the Police were given prior access to a profile on the target, which outlined his criminal history, interests, and social activities.[25] In this situation, there is a risk that the Police will undermine a suspect's right to counsel and right to silence. But, because the suspect has been detained, there is not the same level of concern as with the other tactics, as the New Zealand Bill of Rights Act 1990 affords protection to a suspect throughout custody.[26] The Supreme Court recently considered the use of this tactic in *R v Kumar*.[27] In assessing whether or not such rights had been undermined, the Court applied the "active elicitation" test.[28] This test examines "…both the nature of the exchange between the suspect and the undercover officer and the nature of the relationship between them".[29] The majority concluded that the undercover officer had actively elicited the suspect's confession, and thus his right to silence had been undermined.

Tactic IV involves the Police using a private person to obtain an inculpatory statement or a confession from a suspect. The conversation between the informer and the suspect is usually taped and provided to the Police as evidence.[30] The test for determining whether such a statement has been obtained unfairly is that set out in *K v R*.[31] It involves a two stage inquiry: first whether the evidence was obtained by an

---

[22] at [38].
[23] *Kumar*, above n 8, at [17].
[24] at [17].
[25] at [16].
[26] New Zealand Bill of Rights Act 1990, ss 23(1)(b) and 23(4).
[27] *Kumar*, above n 8.
[28] *Kumar*, above n 8, at [43(c)]. This was adopted from McLachlin J's judgment in *R v Hebert* [1990] 2 SCR 151 at 184.
[29] *Kumar*, above n 8, at [43(c)].
[30] This occurred in *K (CA106/2013) v R*; *R v M (CA64/1996)* and *R v Ahamat*, above n 9.
[31] *K (CA106/2013) v R*, above n 9. See also Iacobucci J's judgment in *R v Broyles* [1991] 3 SCR 595 at 611.

agent of the state; and second, whether the evidence was elicited from the accused.[32] Furthermore, if the Police deliberately delay charging the suspect and orchestrate an interrogation in contravention of the suspect's rights under the Practice Note on Police Questioning, the statement is likely to be deemed inadmissible as evidence.[33]

Tactic V employed by the Police is the so-called "Mr Big" technique, used against a target suspected of having committed a crime, but the Police have insufficient evidence to bring a charge. This involves a supposedly chance meeting between a target and an undercover officer.[34] The undercover officer adopts a fictitious criminal persona, posing as a member of an organised crime syndicate.[35] The suspect is introduced to other members of the syndicate (all of whom are undercover officers), and is lured into the world of this apparent crime syndicate.[36] During the course of the operation the suspect is involved in various scenarios consisting of staged criminal activities, which escalate throughout the operation.[37] These criminal activities include repossession of vehicles, collecting money from sex workers, destroying evidence held by police, obtaining false passports, large scale drug offending with an international dimension, and stealing and dealing in firearms.[38] As the criminal activities escalate, the suspect's responsibility within the criminal syndicate and level of monetary reward increase.[39] Throughout the whole operation, the suspect is reminded that the syndicate operates on the basis of loyalty, trust and honesty. The suspect is also told that the syndicate has the capacity (through an association with a corrupt police officer) to sort out problems the suspect may have with the Police.[40]

The operation culminates in a meeting between the suspect and the commanding boss of the fictional criminal syndicate, "Mr Big".[41] By the time of the interview, the suspect is aware that acceptance into the criminal group will reap great rewards in the form of money, lifestyle and friendship from other members of the group.[42] During the meeting with the crime boss, the suspect is encouraged to divulge details of any criminal history. Details of the suspect's involvement in any alleged crimes or criminal investigations are required to be aired in order to maintain the integrity of the

---

[32] at [21(b)]. This test was applied recently in *J (CA108/2017) v R* [2017] NZCA 310 at [7].
[33] *Ahamat* (obiter), above n 9, at [20]; followed in *K (CA106/2013)*, above n 9, at [21(d)] and *J (CA108/2017),* above n 32, at [9].
[34] For example, in *Wichman*, above n 4, the suspect won a 4WD and go-carting holiday to Rotorua. When he arrived in Rotorua, the other "winners" were all undercover officers.
[35] Kouri T Keenan and Joan Brockman *Mr Big: Exposing Undercover Investigations in Canada* (Fernwood, Halifax (Nova Scotia), 2010) at 19.
[36] *Lyttle*, above n 10, at [19].
[37] Kouri T Keenan and Joan Brockman, above n 35, at 20.
[38] *Lyttle*, above n 10, at [19].
[39] Kouri T Keenan and Joan Brockman, above n 35, at 20.
[40] *Wichman*, above n 4, at [1].
[41] Kouri T Keenan and Joan Brockman, above n 35, at 20.
[42] *Lyttle*, above n 10, at [20].

organisation, and allow the syndicate to avoid any unwanted police attention.[43] The crime boss reiterates the need for honesty and trust, and emphasises that the syndicate can fix any problems with the Police. Furthermore, the boss promises that anything said during the meeting will remain confidential.[44] The purpose of this conversation, of course, is to elicit inculpatory statements from the suspect about previous offending. This interview is recorded and tendered as evidence at the suspect's trial.[45]

In New Zealand, the Mr Big technique has been deployed on seven occasions.[46] The reported cases in which the technique has been deployed have all been homicides, and police investigation had ceased.[47] In all of these reported cases, except the case of *Lyttle v R*[48] where the trial has not been held yet, the suspect was convicted of either murder or manslaughter.

The Supreme Court assessed the use of the tactic in the case of *R v Wichman*.[49] In that case, the Police strongly suspected that Mr Wichman had killed his infant daughter, but there was insufficient evidence to justify prosecution. Due to the lack of evidence, the Police decided to deploy a Mr Big operation. During the course of the final interview, Mr Wichman admitted that he had assaulted his daughter twice.

Mr Wichman challenged the reliability of the confession made during the final interview, and also argued that the evidence had been improperly obtained. In a majority decision, with Elias CJ and Glazebrook J dissenting, the Court held that the confession was reliable and the evidence had not been improperly obtained. Whether or not a confession is reliable will depend on the pressure exerted on the suspect and if the suspect has any particular vulnerabilities. The Court held that on the facts of the case the confession was reliable. In assessing whether the evidence was improperly obtained, the Court had to examine the general unfairness resulting from the use of the tactic. The Court noted that the tactic had previously been approved of by the Court of Appeal in another case,[50] and in other similar jurisdictions. As such, the majority held that the use of the tactic was not unfair and thus authorised its general use.

From an assessment of the tactics above, it emerges that there is a gradation of deceptiveness and coerciveness implemented by the Police. Few would deny that the

---

[43] Kouri T Keenan and Joan Brockman, above n 35, at 20-21.
[44] *Wichman*, above n 4, at [11].
[45] Kouri T Keenan and Joan Brockman, above n 35, at 21.
[46] *Wichman*, above n 4, at [19].
[47] See *Reddy*, *Wichman*, *Cameron* (Pre and Post Conviction) and *Lyttle*, above n 10.
[48] *Lyttle*, above n 10.
[49] *Wichman*, above n 4.
[50] *Cameron* (Pre and Post Conviction), above n 10.

Police perform a special function in society.[51] For that reason it would be absurd to suggest that police should *never* be able to conduct undercover operations. As noted above, there are distinctly fewer objections to the use of undercover officers at the investigative stage if the Police use unexceptional methods to infiltrate the suspect's life.[52] As a result, I will not focus on "normal" undercover operations (Tactic I). Nor will I focus on cases where undercover officers are deployed into a suspect's cell overnight, as the suspect is afforded protection through the operation of the New Zealand Bill of Rights Act (Tactic III). Where the Police use private informers, the suspect will have the protection afforded by Rule 2 of the Practice Note if there has been a deliberate delay in charging the suspect. Also, in those operations the Police generally persuade a person close to the suspect to confront the suspect about the alleged offending and the subsequent conversation is recorded. The level of coercion and deception used in this tactic pales in comparison to a Mr Big operation. Therefore, the same concerns do not arise with the use of private informers. As a result, I will not discuss that tactic further (Tactic IV).

At first glance, it may seem hard to distinguish the Mr Big tactic from entrapment. Both tactics share the similar concern in that the Police construct an artificial reality into which the suspect is drawn. However, the Mr Big technique is implemented to elicit a confession regarding events that preceded the operation.[53] In contrast, entrapment occurs where a police officer induces the suspect to commit a criminal offence with which he is then charged.[54] Entrapment is therefore distinguishable on the basis that it is unacceptable for the State to be *creating* crime (Tactic II).

In order to narrow the scope of the enquiry, I will only deal with the tactic that uses the most coercion and deception, the Mr Big tactic (Tactic V). It is simultaneously the most invasive tactic and yet the least regulated. Furthermore, there are additional concerns given that the tactic is aimed at eliciting a confession, which numerous studies have shown can be false.[55]

---

[51] Jeremy Waldron *The Law* (Routledge, London, 1990) at 40.
[52] A similar point was made in Andrew Ashworth "Should the Police be Allowed to Use Deceptive Practices?" (1998) 118 LQR 108 at 138.
[53] S Smith, V Stinson and Marc W. Patry, above n 20, at 179.
[54] *Wichman v R* [2014] NZCA 339, [2015] 2 NZLR 137 at [75].
[55] Gilsi H Gudjonsson *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, Chichester, 2003) at 164–166.

B Current Constraints on Mr Big Operations in New Zealand

In New Zealand, the interrogation of suspects is controlled primarily in three ways:

I. New Zealand Bill of Rights Act 1990;[56]
II. the Evidence Act 2006;[57] and
III. the Chief Justice's Practice Note on Police Questioning.[58]

William Young J noted in *Wichman* that it is conceivable that in some circumstances abuse of process principles may also apply.[59] At first glance, it seems as though these constraints would provide more than sufficient protection to those subject to a Mr Big operation. However, upon further analysis, these constraints provide illusory protection.

A baseline level of protection is afforded to suspects in that, theoretically, the Police are constrained by the criminal law.[60] However, whilst this provides a theoretical constraint, it does not necessarily follow that it is a practical restriction. It is highly unlikely that the Police would prosecute themselves.[61] The case of *Wilson v R* highlights the criminal law providing a questionable constraint. In that case, even with the Police technically committing forgery and perjury, the Supreme Court would not have ordered a stay of proceedings based on an abuse of process.[62]

The right to silence and the privilege against self-incrimination are the rights most likely to be infringed during a Mr Big operation. However, under the New Zealand Bill of Rights Act, those provisions are only engaged when the suspect is in custody or charged with an offence.[63] Therefore, they do not apply in situations where undercover officers are role-playing outside of detainment. Thus, in Mr Big operations, the New Zealand Bill of Rights Act will provide no practical constraints.

---

[56] New Zealand Bill of Rights Act, s 23.
[57] Evidence Act 2006, ss 28, 29 and 30.
[58] *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.
[59] *Wichman*, above n 4, at [23], n 23.
[60] J Kleinig *The Ethics of Policing* (Cambridge University Press, Cambridge, 1996) at 225. An exception to this proposition can be found in s 34A Misuse of Drugs Act 1975, which allows Police Officers to use drugs for the purposes of an undercover operation.
[61] Elizabeth E. Joh "Breaking The Law to Enforce it: Undercover Police Participation in Crime" (2009) 62 Stan L Rev 155 at 158. See also Law Commission *Criminal Prosecution* (NZLC R66, 2000) at [128].
[62] *Wilson,* above n 15, at [93]. The only reason the appellant's conviction was quashed was due to the bizarre circumstances of the case and its litigation history.
[63] New Zealand Bill of Rights Act 1990, ss 23(4) and 25(d). It is arguable that the New Zealand Bill of Rights Act would apply in situations where the suspect had been arrested or detained in the course of an earlier investigation and subsequently released: see *R v Barlow*, above n 9, per Cooke P, Hardie Boys and Mckay JJ.

The Chief Justice's Practice Note on Police Questioning provides a guideline for the Police to follow when questioning suspects. A breach of the Practice Note by police may lead to the evidence being improperly obtained.[64] Ostensibly, this would seem to provide the objective constraint necessary to limit police conduct. However, the majority of the Court in *Wichman* held that the Practice Note does not directly apply to undercover officers.[65] The crux of the majority's reasoning was that because the Practice Note makes no reference to undercover officers, it does not apply to them.[66] The majority did qualify this by stating that deliberate circumvention of the Practice Note would be unfair, such as an interrogation of a suspect by an undercover officer when there is ample evidence to charge them formally.[67]

As a result, the only mechanism that provides a practical constraint on police action during Mr Big operations is the Evidence Act 2006.[68] However, the Evidence Act operates retrospectively. It only views and assesses conduct after such conduct has occurred. This is problematic, as an individual's rights may have already been breached. Furthermore, as highlighted by the Court in *Wichman*,[69] assessing particular police tactics on a case-by-case basis provides little guidance as to appropriateness of future investigatory techniques that are employed.

[64] Evidence Act 2006, s 30(6).
[65] *Wichman*, above n 4, at [106].
[66] *Wichman*, above n 4, at [106].
[67] at [114].
[68] In particular, ss 8, 28, 29 and 30 of the Act.
[69] *Wichman*, above n 4, at [127].

CHAPTER II: CONCERNS SURROUNDING THE USE OF MR BIG

A Absence of Rights Protection

As discussed previously, the New Zealand of Rights Act and the restrictions imposed by the Practice Note do not apply to undercover officers.[70] There are two main reasons for restricting the purview of rights protection. The first is that the Practice Note is a mechanism to protect a person from the Police and their ability to deploy the coercive powers of the State.[71] However, when an officer is acting undercover, the suspect does not know they are speaking to a Police Officer, and therefore will not have been induced to confess by the official status of the questioner.[72] The argument goes that both the Practice Note and the New Zealand Bill of Rights Act preserve the suspect from coercion and provide rights which may be exercised at the time of arrest, "…but the courts should not be so indulgent as to preserve the accused from himself and his own untrammelled tongue".[73] Secondly, if the Practice Note were to apply to undercover officers during a Mr Big operation, officers would be required to give the suspect a caution when there is sufficient evidence to charge the person.[74] This would potentially require the undercover officers to caution a suspect during the investigation, and thus break their cover. Naturally, this would jeopardise the whole operation, and potentially the undercover officers' safety.[75] As a result, subjecting undercover officers to the Practice Note would materially alter the way in which they interact with suspects, and on the majority's view in *Wichman*, would be inimical for the future use of the Mr Big technique.[76]

The first of those arguments rests on the premise that through the eyes of the suspect, the undercover officer is tantamount to an ordinary citizen. Therefore, if the suspect misplaces their trust in such a person, the suspect only has him or herself to blame. This point was expounded by the majority in *R v Hebert*, where the Court noted that in these circumstances,"[i]f the suspect speaks, it is by his or her own choice, and he or she must be taken to have accepted the risk that the recipient may inform the police."[77] The logical conclusion of this argument is that a Police Officer can avoid the Practice Note by removing his or her uniform and deploying an undercover operation. The rules contained in the Practice Note reflect fundamental values of our

---

[70] See above.
[71] *Wichman*, above n 4, at [106].
[72] Glazebrook, above n 5, at 21. This reasoning is analogous to the person in authority requirement for the purpose of the common law voluntariness rule: *Wichman*, above n 4, at [105].
[73] *R v Skinner* (1992) 17 C.R. (4th) 265 at 275 per Scollin J.
[74] Practice Note on Police Questioning, above n 58, Rule 2.
[75] Glazebrook, above n 5, at 21.
[76] *Wichman*, above n 4, at [101].
[77] *R v Hebert* [1990] 2 SCR 151 at 185.

criminal justice system, namely the privilege against self-incrimination and the presumption of innocence.[78] To allow Police Officers to disregard these important safeguards by deploying an undercover operation is unacceptable, and, as opined by Glazebrook J, would essentially reduce the Practice Note to a voluntary standard.[79] Although in the English context, Lord Taylor's comments in *Regina v Christou* are apposite:[80]

> It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it.

Another objection to the majority's reasoning in *Wichman* is that it relies on the specious argument that an undercover officer is not deploying the coercive powers of the State. Essentially, the test for whether the coercive power has been deployed is a subjective assessment through the eyes of the suspect. Because they see a person purporting to be an ordinary citizen, it is said that the coercive power of the State has not been brought down upon the suspect. Therefore, a caution is not required to restore the balance to an interrogation, as the perception of a power imbalance could not have existed at the time of the conversation.[81] But just because the coercive powers of the state are not visible to the suspect does not mean that they are not being deployed. As pointed out recently:[82]

> …[t]he state's 'superior resources and power' are not restricted to the interrogation room or a jail cell. The engineering of a new social world and the orchestration of the target's actions for months at a time may constitute, in psychological terms, quintessential 'control'. The state's agents are not rendered impotent simply because they are pretending not to be state agents.

To impose a requirement that the suspect must be aware that the person before them has the ability to deploy the coercive power of the state (as distinct from one able to

---

[78] *Wichman*, above n 4, at [475] per Glazebrook J.
[79] at [476].
[80] *Regina v Christou* [1992] 1 QB 979 (CA) at 991. A similar point was made by Helman J in *Swaffield v R* (1996) 88 A Crim R 98 at 118: "[t]o approve of, or to turn a blind eye to, their circumvention by a crude evasion would undermine the authority of the Rules, and thus an accused person's right to silence, to an unacceptable extent".
[81] *Swaffield v R* (1996) 88 A Crim R 98 at 118.
[82] TE Moore, P Copeland and RA Schuller "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2010) 55 Crim LQ 348 at 378.

pull the levers of authority) restricts the operation of the rule in an unnecessarily artificial way.[83]

The argument that if Rule 2 of the Practice Note were to apply to Mr Big operations it would unduly limit further operations[84] is overstated. As per the wording of Rule 2, a caution is only required where a person is being invited to make a statement or to answer questions.[85] Thus, where there is not a functional equivalent of an interrogation, there is no need to caution and any admission would not be unfairly obtained, at least on the grounds of breach of the Practice Note.[86] A caution will only be necessary in a Mr Big operation where there is sufficient evidence to charge the suspect, and the final interview is tantamount to an interrogation.[87] This would not preclude Mr Big operations from taking place generally, but rather would be a question of fact in each case.

B Substantial Risk of False Confessions

Confession evidence is one of the most influential and powerful types of evidence that can be adduced in a courtroom.[88] Mock jury research confirms that people are trusting of confessions and have an inability to disregard their importance, even when there are good reasons to do so.[89] Furthermore, these confessions are believed even when the jury knows they have been coerced from suspects.[90] Consequently, it has been argued that "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained."[91]

However, an abundance of literature confirms the phenomenon of false confessions.[92] For example, since 1989, post conviction DNA testing has exonerated 252 convicts, 42 of whom falsely confessed to rapes and murders.[93] During the Mr Big operations, there is a considerable degree of control exercised by the Police over the target. Given the invasiveness of this technique and its inherently coercive nature, there is a risk

---

[83] *Tofilau v The Queen* [2007] HCA 39, (2007) 231 CLR 396 at [177] per Kirby J (dissenting).
[84] *Wichman*, above n 4, at [101].
[85] *Wichman*, above n 4, at [488] per Glazebrook J.
[86] at [488].
[87] at [490].
[88] Kouri T Keenan and Joan Brockman, above n 35, at 33.
[89] S. Kassin and L. Wrightsman "Prior Confessions and Mock Juror Verdicts" (1980) 10 Journal of Applied Social Psychology 133.
[90] Moore, Copeland and Schuller, above n 82, at 385.
[91] C.T. McCormick *Handbook of the law of evidence* (2nd ed, West Publishing Company, Minnesota, 1972) at 316.
[92] See, for example, Gudjonsson, above n 55.
[93] See B. L. Garrett "The Substance of False Confessions" (2010) 62 Stan L Rev 1051 at 1052; B. L. Garrett "Judging Innocence" (2008) 108 Colum L Rev 55 at 57.

that its use will lead to false confessions.[94] Indeed, in Canada there are documented cases where the use of the technique has led to wrongful convictions.[95] There is no greater blight on our justice system than the conviction of an innocent person.[96] The problem of false confessions is compounded by the fact that confessions often inhibit further inquiry by the Police, as they disincentivise continuing the investigation and exploring other potential avenues of inquiry.[97] The corollary of this is that potentially exculpatory evidence is left undiscovered, and the true perpetrator remains unpunished.[98]

Without an appreciation for the coercive nature of the Mr Big tactic it is hard to understand how a suspect would falsely confess. As the argument goes, why would a suspect make such a damning admission if it were not true?[99] In cases where the Police have used violence, or threats of violence to elicit a confession, the risk of a false confession is obvious, as a person may be confessing to simply stop the infliction of pain. However, during a Mr Big operation, the influence is less obvious as police questioning now involves subtle and sophisticated psychological tricks that rely on manipulation for their efficacy.[100] As a result, it is hard to quantify the impact of these influences. However, it is arguable that there is an analogy between the use of violence and trickery insofar as both methods are coercing others, which deprives them of the power to choose an outcome for themselves.[101] Furthermore, the risk of false confessions is not mitigated merely because the Mr Big operations take place outside of custody. In fact, the opposite is possible, that the risk of a false confession arising from a non-custodial interrogation may be greater than custodial interrogation.[102] Such a risk arises because the suspect cannot perceive the adverse consequences of their admission.[103] Moreover, the coercive power of the State can be just as powerful and influential on an individual's mental liberty when the target is not in physical custody.[104] The superior resources of the state are not limited to custody, but rather can be wielded at any time.[105] Those with the identified dispositional risk factors are at an even greater likelihood of confessing. Such

[94] Moore, Copeland and Schuller, above n 82, at 350.
[95] See *R v Bates* 2009 ABQB 379 at [11]; *R v Unger* 2005 MBQB 238 at [48]; See also the case of Andrew Rose referred to by Gudjonsson, above n 54, at 573–582.
[96] As William Blackstone said, "the law holds that it is better that ten guilty persons escape, than that one innocent suffer": William Blackstone *Commentaries on the Laws of England* (1838) *358.
[97] S Kassin and others "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 Law & Hum Behav 3 at 23.
[98] Glazebrook, above n 5, at 23.
[99] Moore, Copeland and Schuller, above n 82, at 384.
[100] Richard Leo "From coercion to deception: the changing nature of police interrogation in America" (1992) 18 Crime, Law and Social Change 35 at 37.
[101] Ashworth, above n 52, at 111; Leo, above n 100, at 54.
[102] Gudjonsson, above n 55, at 581–582.
[103] Moore, Copeland and Schuller, above n 82, at 378.
[104] at 384.
[105] at 384.

dispositional risk factors include the suspect's age (i.e. juvenile status), mental impairment, antisocial personality traits and history of offending.[106] In the context of Mr Big operations, a false confession may arise in the final interview where the suspect becomes tired of the persistent questioning of the Boss, and confesses simply to appease the wishes of the Boss.

The majority in *Wichman* acknowledged the potential for psychological pressure to be coercive.[107] Nevertheless, the majority found that the irrelevance of s 29 of the Evidence Act in the case was "…of considerable contextual significance."[108] Section 29 prevents the Police using violence or threats of violence to elicit confessions.[109] Counsel for the suspect in *Wichman* did not argue that s 29 was engaged on the facts of the case.[110] Implicit in this is that even with the acknowledgement of the potential for psychological pressure, the Court still seemed to revert back to the lack of violence used in the operation. This was exacerbated by the fact that the Court found that the defendant had no special characteristics linked to risks of false confessions.[111] The majority opined that on the facts of *Wichman*, the risk of a false confession was low.

The majority also recorded the "…heavy focus on the need for honesty"[112] within the crime syndicate. The importance of telling the truth was stressed to the suspect throughout the final interview. This could be seen as further mitigating any risks of a false confession. However, in the context of a Mr Big operation, "the meaning of 'truth' has a shaky connection to its objective essence."[113] The suspect may confess as a means of compromising between agreeing to something they did not do, and fear of consequences if they do not confess.[114] It is then disingenuous to transport:[115]

> …this convoluted version of 'truth' into court as if it had the same legal tender usually associated with the term 'truth'. Although it is the same word, we should not assume it has the same meaning at the trial as it did in the gang's depraved and fictitious fantasy world.

Of course, the risk of a false confession materialising is not sufficient to preclude the use of the Mr Big technique. As noted by the majority in *Wichman*, the risk that

---

[106] S Kassin, above n 97, at 19–22.
[107] *Wichman*, above n 4, at [74].
[108] at [24] and [70].
[109] Evidence Act 2006, s 29.
[110] *Wichman*, above n 4, at [25].
[111] at [88]. Both Elias CJ and Glazebrook J refuted this point in their dissenting judgments.
[112] At [87].
[113] Moore, Copeland and Schuller, above n 82, at 388.
[114] Gudjonsson, above n 55, at 582.
[115] Moore, Copeland and Schuller, above n 82, at 388.

unreliable evidence may lead to the conviction of an innocent person is not confined to Mr Big cases.[116] That may be so, but in terms of undercover tactics deployed by the Police, it is by far the most invasive and coercive. Therefore, the risk is surely heightened in Mr Big cases. Its use should be viewed with trepidation. The tactic can:[117]

> …elicit 'true' confessions but by its very nature it also has the potential to induce individuals - because of avarice, fear or a wish to impress - to produce false confessions. A procedure that is capable of both exposing the guilty and trapping the innocent needs to be approached with extreme caution.

C Incentive to Lie

Although this concern could be seen as a subsidiary of false confessions, it is distinct from the type of confession referred to earlier. In this situation, the suspect makes a conscious decision to confess in order to receive some benefit. Therefore, whilst the outcome is the same, namely a false confession, the reason why the suspect confessed is different.

> How do you get sucked in? Well, out here [on a reserve] it's close to poverty. There's no jobs. All you have to do is pick something up here and take it there for $500 to $1000. Who's going to turn that down? Obviously, I didn't.[118]

From the above quote, the problem of the inducements used in Mr Big operations becomes obvious. The operation is designed to encourage the target to become a full member of the organisation. Full membership is promoted in various ways, such as providing tangible benefits, including money, travel, and meals in expensive restaurants.[119] The level of these benefits will only increase when full membership is attained.[120] There is also the use of intangible benefits, such as the companionship of the other members and flattering the target with attention and praise.[121] This may result in the target's self-esteem being consciously boosted, such as in *Wichman* where the target was praised for his weight loss and improved dress sense.[122] Furthermore, and importantly, the Boss of the organisation is held out as someone

---

[116] *Wichman*, above n 4, at [76].
[117] Moore, Copeland and Schuller, above n 82, at 400.
[118] Kouri T Keenan and Joan Brockman, above n 35, at 1.
[119] *Wichman*, above n 4, at [157] per Elias CJ.
[120] at [157].
[121] at [157].
[122] at [157].

"…who could fix any problem with the law",[123] and thus the target would be able to avoid the "spectre of prosecution".[124]

The target is propelled into an artificial world in which confessing to a crime is incentivised. The target wants to be accepted. As a result, they will say things that are not true.[125] The suspect is manipulated by his or her new friends, who are influential social agents.[126] Such behaviour is not a new phenomenon; it is trite that people will engage in conduct for which they are rewarded.[127] This is exacerbated by the fact that people have myopic inclinations, and would rather maximise their short-term gain without thought for the long-term consequences.[128] As a result, when opting to "confess" in a Mr Big case, suspects are far more likely to be focused on attaining the benefits that entry to the organisation provides, without considering any negatives of doing so. The suspect, like other people in society, is motivated by greed and profit, and they will lie to obtain benefits.[129]

The problem with these inducements is that there are no perceived downsides to confessing. As a result, the confession is said to be "costless".[130] This problem was heightened in the *Wichman* case, as the Boss had assured the suspect any admissions would remain confidential.[131] By the time of the interview, the State is exercising a significant degree of control over the suspect as a result of the previous scenarios.[132] There is a lot riding on this final interview: entry into the criminal syndicate, friendship, and monetary reward among other things. Accordingly, the suspect has more reasons to confess than to maintain their innocence and therefore is vulnerable to being manipulated into confessing.[133] The nature of these inducements is that the confession does not represent the guilt of the defendant, but rather their desire to continue to receive these benefits.[134]

---

[123] at [159].
[124] *Wichman* (CA), above n 54, at [66].
[125] David Milward "Opposing Mr. Big in Principle" (2013) 46 UBC Law Rev 81 at 94.
[126] Moore, Copeland and Schuller, above n 82, at 381.
[127] at 382.
[128] at 382.
[129] C Nowlin "Excluding the Post-Offence Undercover Operation from Evidence: 'Warts and All'" (2004) 8 Can Crim Law Rev 382 at 395.
[130] *Wichman*, above n 4, at [452] per Glazebrook J.
[131] at [11] per William Young, Arnold and O'Regan JJ, [302] per Elias CJ, [451] per Glazebrook J.
[132] Moore, Copeland and Schuller, above n 82, at 359.
[133] at 388.
[134] Gudjonsson, above n 55, at 204.

There is the counter argument that even so, an innocent person would still not confess.[135] This argument ignores the significant effect of the inducements offered by the undercover officers and is devoid of any appreciation for the manipulation the suspect is subjected to. It is important to remember that throughout the operation the organisation reinforces the possibility of having any charges, or police interest, disappear. There is a substantial amount of stress and angst that comes with police interest, even if the person is innocent. The suspect would surely fear being the subject of a wrongful conviction.[136] As a result, an innocent person may still confess during a Mr Big operation in order to have the police interest disappear, and be free from the stress and uncertainty.[137]

Given the powerful nature of these inducements, there is a need to make sure the material benefits promised are kept to a minimum. This point was relied on by the majority in *Wichman*, who noted that the target was given a limited amount of money for participating in the organisation.[138] However, merely limiting the financial rewards given to the suspect will not insulate against the risk of a false confession. Often the suspect will have endured a tumultuous time in their life if they were charged with an offence, or the subject of a police investigation. This is especially so if the victim of the offence was close to the suspect.[139] The presence of the Police in a person's life will often lead to "social stigma and ostracism from the community, as well as other social, psychological and economic harms."[140] As a result, the person becomes socially isolated and emotionally vulnerable. The subsequent Mr Big operation therefore gives the suspect a means of transforming their life. The undercover officers provide companionship and a sense of normality in the suspect's life, which may have been absent for a prolonged period. It is the presence of the intangible benefits that is the most concerning aspect of the Mr Big operation, as their effect is unable to be quantified. Unlike monetary rewards, where it is axiomatic that the more that is offered the more likely the suspect will be induced,[141] the same cannot be said for things such as friendship. The effect of human interaction and companionship on a person's psyche cannot be understated.[142] The suspect may do anything to maintain these friendships, including falsely confessing to a crime. Of

[135] The majority in *Wichman* noted that the target could have explained to the Boss that despite police suspicion, he had not killed the victim and at the same time sought the Boss's assistance with the prosecution which the target anticipated was imminent, above n 4, at [89].
[136] at [446] per Glazebrook J.
[137] at [446].
[138] at [71(d)]. The suspect in *Wichman* was paid a total of $2,600, above n 4, at [369] per Elias CJ.
[139] For example, in *Wichman*, above n 4, the victim was the suspect's infant daughter.
[140] *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at 212–213.
[141] See *R v Mentuck* 2000 MBQB 155 at [100] where MacInnes J noted: "…the police must be aware that as the level of inducement increases, the risk of receiving a confession to an offence which one did not commit increases, and the reliability of the confession diminishes correspondingly".
[142] See Robert S. Albert and Thomas R. Brigante "The Psychology of Friendship Relations: Social Factors" (1962) 56 The Journal of Social Psychology 33 at 34.

course, it is always a question of degree, but given the level of intrusion and manipulation involved in a Mr Big case, and the use of immeasurable benefits, extreme caution is required.[143]

D Coerced Self-incrimination

The rule against self-incrimination has its origins in the Latin maxim *nemo debet prodere se ipsum* – "no one can be required to be his own betrayer". This notion reflects the adversarial nature of our criminal justice system. The prosecution bears the onus of proof to prove the defendant's guilt beyond reasonable doubt. To compel the defendant to confess their guilt would undermine this very system and encroach on a fundamental principle of our criminal justice system.[144]

The purpose of a Mr Big operation is "…to induce confessions, and they are carefully calibrated to achieve that end."[145] The culmination of the operation is the final interview with the crime boss. Sometimes the final interview is conducted in a way that would be unacceptable if it were a formal police interview.[146] As noted above, by the time of the interview, the State has created an artificial world in which confessing is greatly incentivised. The whole operation is designed so as to remove the choice of whether or not to make a statement.[147] The fact the suspect in *Wichman* was told he was "free to go" at the start of the interview is unpersuasive, as the whole operation was predicated on "the importance of impressing the boss and the desirability of the [suspect] being admitted to membership of the organisation."[148] All of this means that the suspect is forced into a situation where the only feasible option is to confess, and thus self-incriminate. Of course, there are situations where Mr Big operations have not resulted in confessions.[149] But to use this as justification for the general use of the tactic is unconvincing. The standard should not be judged against those who happen to have the mental strength to continually plead their innocence in the face of enduring psychological pressure. Rather, each case should be assessed individually having regard to the particulars of the suspect.

---

[143] See the Kamal Reddy case, above n 10, where Reddy was eventually arrested and taken to the Police Station. The first person he asked to talk to was his friend, the undercover police officer: Kelly Dennett "Kamal Reddy Nearly Pulled Off the Perfect Crime" (22 June 2016) Stuff <http://www.stuff.co.nz/national/80133883/kamal-reddy-nearly-pulled-off-the-perfect-crime>.
[144] *Wichman*, above n 4, at [297] per Elias CJ. Indeed, the importance of this right has been recognised in s 25 of the New Zealand Bill of Rights Act.
[145] *Hart*, above n 6, at [68].
[146] See for example in *Tofilau v The Queen*, above n 83, at [396] where Callinan, Heydon and Crennan JJ noted that the trial Judge said that, in his discussion with the "boss", one of the suspects was "hectored and harangued to a significant degree, in a manner which would be unacceptable in a formal police interview".
[147] *Wichman*, above n 4, at [506] per Glazebrook J.
[148] at [305] per Elias CJ.
[149] see *Dix v Canada (Attorney-General)* 2002 ABQB 580, [2003] 1 WWR 436.

It is clear that the self-incrimination principle becomes meaningless if the Police can simply bypass its application by manufacturing a non-custodial interrogation. Therefore, it is arguable that the principle should apply in a non-custodial context. While there is a concern that this would render the Mr Big tactic redundant, the Police can tailor the level of pressure exerted during the operation so that it will not amount to a breach of this principle.[150]

E Police Abuse

Once the Police become immersed in the subterfuge of an undercover operation, it is easy to lose the objectivity required to assess the propriety of their conduct. As a result, the line between acceptable police conduct and conduct which a democratic society will not countenance becomes distorted and is not easily demarcated. Given that there is invariably a considerable power imbalance between the Police and the target of an operation, the potential for abuse is always present.[151]

A cogent example is that of the *Wilson* case referred to earlier in which the Police committed various crimes and admitted their operation amounted to serious misconduct. There are a number of cases from Canada in which the Police's conduct during Mr Big operations has been extreme. In the case of *R v Steadman,*[152] the undercover agents had told the suspect that they needed his assistance in collecting a debt owed to the crime syndicate. In preparation for the suspect's arrival, the Police splashed animal blood in a hotel bathroom and then dragged one of the agents through the blood, and placed a baseball bat in the room. Upon arrival, the suspect was told that one of the members of the crime syndicate had hit the man whom owed the debt in the head with the baseball bat. The purpose of this scenario was to instil a sense of fear into the target as to the violent nature of the crime syndicate.

In *R v Bonisteel,*[153] the target was shown a fake police report indicating that "Toni" (a female undercover agent) had lied to the criminal syndicate about what occurred during a drug deal. Later, another undercover agent and Toni went into a motel room, with the target waiting nearby. The agents made shouting and thumping noises to create the impression that Toni was being beaten. The next day, the target met with Toni, who was wearing make-up that made it appear as though she had been beaten. Again, the purpose of this scenario was to imbue the suspect with a sense of fear and trepidation.

---

[150] For a recent example, see *Lyttle*, above n 10, at [55]–[72].
[151] Lucia Zedner *Criminal Justice* (Oxford University Press, Oxford, 2004) at 130.
[152] *R v Steadman* 2007 BCSC 483 at [56].
[153] *R v Bonisteel* 2008 BCCA 344 at [15].

In fact, one of the reasons the majority of the Court found the Police's conduct to be acceptable in the *Wichman* case was that the operation was "vanilla in character" when compared to the Mr Big operations deployed in other jurisdictions.[154] But this reasoning is less persuasive given the lengths Canadian Police go to. Comparing our Police's conduct to an extreme example will necessarily always make it look "vanilla in character", but it does not make it less dubious when compared to our own nation's sense of fairness and social justice. Although the Police have been careful in their execution of the operations thus far, it is easy to see how they can get out of hand without any prospective constraints.

F Prejudicial Effect of the Confession

A further problem with the use of the Mr Big technique is the prejudicial effect the evidence has on the defendant at trial.[155] Section 8 of the Evidence Act requires evidence to be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding.[156] During a Mr Big operation, the defendant is portrayed as a person willing to become implicated in illegal acts, even if no unlawful acts are actually committed.[157] Evidence of this willingness may cause "moral prejudice" by marring the character of the suspect. Such moral prejudice creates a risk that the jury will assume from the suspect's proclivity to offend during the operation that he or she is guilty of the crime charged, or that he or she is deserving of punishment in any event.[158] The evidence also has the potential to create "reasoning prejudice" by distracting the jury's focus from the offence for which the suspect is charged to these instances of staged illegality.[159] The prejudicial effect may be increased where the suspect is encouraged to boast about their crimes, so that their confession becomes so detailed that it has a ring of authenticity.[160] But, this prejudicial evidence provides the context in which the confession was made. Therefore, it will be difficult for a defendant to challenge the reliability of a confession in a Mr Big operation without adducing this prejudicial evidence.[161]

---

[154] *Wichman*, above n 4, at [118].
[155] Prejudicial effect is assessed under s 8 Evidence Act 2006.
[156] Evidence Act 2006, s 8(1)(a).
[157] *Tofilau*, above n 83, at [148] per Kirby J.
[158] *Hart*, above n 6, at [74].
[159] at [74].
[160] Moore, Copeland and Schuller, above n 82, at 388. This was not an issue in *Wichman* as the Court noted that the suspect was not encouraged to idly boast about his crimes, above n 4, at [71(b)] per William Young, Arnold and O'Regan JJ and [451] per Glazebrook J.
[161] *Wichman*, above n 4, at [94].

As noted by the majority in *Wichman*, this argument rests on the premise that the jury would engage in "illegitimate reasoning".[162] In all of the New Zealand Mr Big cases, the defendant has been charged with some form of homicide.[163] As a result, a general criminal propensity displayed by the suspect in a Mr Big operation has little relevance to a charge of homicide.[164] Furthermore, any potential risk can be militated through the use of a jury direction.[165]

The problem with this approach is that it takes a sanguine view of the fact-finding process. There is empirical research to suggest that jurors may infer guilt from unrelated offences.[166] Furthermore, confessions, by their very nature, will always have probative value.[167] They are "probably the most probative and damaging evidence that can be admitted",[168] as if the trier of fact accepts the confession, it is sufficient to sustain a conviction. As a result, it is very unlikely that a confession obtained through a Mr Big operation will be excluded on the basis of its prejudicial effect.[169] Accordingly, the State has created a "…potent mix of a potentially unreliable confession accompanied by prejudicial character evidence".[170] Admitting such evidence into court heightens the risk of a wrongful conviction materialising.[171] Moreover, the effects of a jury direction are questionable, as research has shown that people do not discount confessions even where it is legally appropriate to do so.[172]

Therefore, a confession admitted as a result of a Mr Big operation will be inherently prejudicial, however given its probative value it will very rarely be excluded under s 8. Greater caution is required in situations where details of the crime have been made available during the investigation through leading questions, photographs or newspaper accounts. Divulging facts of the crime during the operation gives the suspect the chance to legitimise their confession. The admission may end up containing precise details of the crime or the state of the victim.[173] Hence the jury ends up hearing a richly nuanced and textured confession that can be corroborated

---

[162] *Wichman*, above n 4, at [97].
[163] In *Cameron*, *Lyttle*, and *Reddy*, above n 10, the defendant was charged with murder. In *Wichman*, above n 4, the defendant was charged with manslaughter.
[164] *Wichman*, above n 4, at [96].
[165] at [70] and [97].
[166] see Law Commission *Evidence Law: Character & Credibility* (NZLC PP27, 1997) at [37]–[51].
[167] *Wichman*, above n 4, at [96].
[168] *Bruton v United States* 391 US 123 (1968).
[169] This might occur where the admissions are partial or incomplete, see *Wichman*, above n 4, at [95]. However, given all of the New Zealand Mr Big cases have produced full admissions, it would seem that this is unlikely.
[170] *Hart*, above n 6, at [91].
[171] at [8].
[172] S Kassin and K Neumann "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21 Law & Hum Behav 469 at 471.
[173] Moore, Copeland and Schuller, above n 82, at 388.

with extraneous facts.[174] By this stage directions may be ineffective as a protection against potential misuse of the evidence, as they might not provide a sufficient counterweight to the prejudicial effect of the confession.[175]

G Level of Intrusion

The level of invasiveness and degree of intrusion that this type of operation has in a suspect's life is unprecedented. The importance of friendships and the significance they form in a person's life has already been discussed. But, there is also the impact on the suspect when they discover the artificial reality in which they have inhabited has been contrived at the hands of the State. The suspect learns ex post facto that his or her so-called "friends" are in fact agents of the Government, who have tricked him or her into trusting them, and then used this friendship as leverage. It is arguable that this is such a life altering experience that the target may never recover from such a revelation.[176] Given the dearth of information available on the effects of Mr Big operations, it is hard to state for certain what the effects are. However, the suspect is subjected to significant and careful psychological manipulation, the very purpose of which is to create a rapport with the officers and imbue a sense of loyalty towards the criminal organisation. It is inconceivable to suggest that the suspect would not be affected by such an experience. The potential for irreparable damage is enormous.

The degree of intrusion becomes more unjustifiable given that the Mr Big tactic is used in cases where the Police have limited evidence against the target. So far, the tactic has been deployed as a "last resort" in serious, unsolved cases.[177] This is seen to be a justification for the use of the tactic, as restricting its use limits the potential for damage. That may be true in an empirical sense, however it fails to capture the potential for damage in individual cases. If the tactic is only used as a "last resort," it necessarily follows that the investigation will have become stagnant and there is not enough evidence to charge the suspect.

It is of some note that *Wichman* is the only reported Mr Big case in which the Police intercepted the suspect's telephone conversations.[178] Under the Search and Surveillance Act 2012, a warrant to intercept private communications will be granted if the Police can satisfy two conditions. Firstly, that there are reasonable grounds to

---

[174] At 388.
[175] Law Commission, above n 166, at [54].
[176] Moore, Copeland and Schuller, above n 82, at 398.
[177] See above n 47.
[178] *Wichman*, above n 4, at [9] per William Young, Arnold and O'Regan JJ and [161] per Elias CJ. Although even in *Wichman* the suspect's telephone was only intercepted for the last month of the operation.

suspect that an offence has been committed.[179] Secondly, that there are reasonable grounds to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence.[180] The ability to intercept private communications is an important tool for the Police, as the communications are usually thought to be in confidence, and thus the suspect may provide key details that would otherwise remain undisclosed. One would expect that if the Police had the evidential basis to apply for an interception warrant they would do so. The only plausible explanation for not doing so is that the Police could not satisfy the criteria for granting an interception warrant under the Search and Surveillance Act. This reflects the dearth of evidence the Police have against a suspect who is made the subject of a Mr Big operation. It also begs the question, if the Police do not have sufficient evidence to apply for an interception warrant, why should they be allowed to circumvent this threshold and deploy a far more intrusive and unregulated tactic?

Therefore, the Police are deploying the tactic on the basis of a "hunch." Of course, this use of intuition may be based on experience or statistics.[181] But there is still the potential for the Police to be incorrect in their premonition. The Police do not possess clairvoyant crime detecting abilities. If the propriety of the tactic could be justified by the Police's own belief in guilt the tactic would invariably always be permissible.[182] It is concerning that such an invasive technique can be executed on the basis of such little evidence. The risk that a target of an operation may be innocent must surely increase where the tactic is launched on a weak evidential foundation.

H Undermining Police Legitimacy

The Police are charged with the task of enforcing the law and apprehending criminals. This is a fundamental role in society and forms a pillar of our criminal justice system. As a result, society has given the Police functions that normal citizens do not enjoy.[183] However, in order for our criminal justice system to be legitimate, the Police must also act within the bounds of the law and observe a high standard of fairness. If they do not, it would suggest "a normative paradox: the State permits the Police to act seemingly 'above the law' as they enforce it."[184] Trust and confidence in the Police is

[179] Search and Surveillance Act 2012, s 51(1)(a)(i).
[180] Search and Surveillance Act 2012, s 51(1)(a)(ii).
[181] In New Zealand almost three quarters of child homicides since 1992 have been committed by family members. This would have led the Police to believe that the suspect in *Wichman* was, out of everyone else, the most likely to have killed the victim.
[182] Ashworth, above n 52, at 116.
[183] Walrdon, above n 51, at 40.
[184] Elizabeth E. Joh, above n 61, at 183.

lowered when they engage in unlawful or reprehensible conduct.[185] Such conduct inhibits the Police from performing their regulatory role, and it leads to public disenchantment and polarisation.[186]

There is an argument that in order to maintain the integrity of the criminal justice system, officers of the law should be held to the same high standard of fairness as in court proceedings.[187] Such a standard, whilst principled, is probably too high and fails to acknowledge the critical function undercover operations serve in our criminal justice system. But, there is a tension, as police deception involves morally troubling social costs. Authorising police deception inevitably has the effect of sanctioning the manipulation and exploitation of human relationships, authoritatively encouraging the Police to lie, and undermining public confidence and social trust.[188] Undercover operations will be more legitimate if the Police respect both the law and the public.[189]

During Mr Big operations, public funds are used to allow undercover officers to stage criminal activities.[190] The Police's conduct in these operations is inextricably linked to criminal activity. It is arguable that allowing the Police to engage in operations of this sort has the potential to undermine public confidence in the criminal justice system.[191] It is a question of degree. There is a line beyond which the public will deem police deception intolerable.[192] The deceit employed by the Police during a Mr Big operation is unprecedented. It involves the creation of an elaborate false reality by the Police and extensive lying in order to engender a sense of trust in the suspect. The notion of the Police deceiving the public to this extent seems contrary to democratic ideals. As Traynor J in *People v Cahan* stated: "[i]t is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law".[193]

As argued earlier, not all undercover operations have this effect. It will depend on the level of deceit employed during each operation. The majority in *Wichman* noted that trying to distinguish between acceptable and unacceptable levels of deceit may be

---

[185] Jason Sunshine and Tom R. Tyler "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" (2003) 37 L & Soc'y Rev 513 at 515.
[186] at 515.
[187] Ashworth, above n 52, at 118.
[188] Leo, above n 100, at 54.
[189] Nicholas Wamsley "Big Brother Gone Awry: Undercover Policing Facing A Legitimacy Crisis" (2015) 52 Am Crim L Rev 177 at 187.
[190] Kouri T Keenan and Joan Brockman, above n 35, at 92.
[191] Jerome H. Skolnick and Richard A. Leo "The Ethics of Deceptive Interrogation" (1992) 11 Criminal Justice Ethics 3 at 9.
[192] Wamsley, above n 189, at 187.
[193] *People v Cahan* P. 2d 905 (1955) at 912.

otiose given its tendency to lead to interminable discussions.[194] However, this is only a problem in borderline cases. The Mr Big technique is clearly the most deceitful tactic employed by the Police, but it remains the least regulated. If this continues, public confidence in the administration of criminal justice may be undermined, and the legitimacy the Police require to carry out their function will be reduced.

[194] *Wichman*, above n 4, at [118].

CHAPTER III: AN EXAMINATION OF THE EFFECTIVENESS OF THE CURRENT CONSTRAINTS

A Official Information Act Request

As discussed earlier, the only current legal constraints that restrict the actions of the Police during Mr Big operations are the criminal law, as a theoretical constraint, and the retrospective protection offered by ss 28, 29 and 30 of the Evidence Act.

There are, however, further limits on the Police's actions during these operations. Those are the Police's *own* internal guidelines or policies governing the use of the tactic. Although those guidelines are not legally enforceable, they provide some sort of framework for the Police to appraise the propriety of an operation. Discovering the guidelines the Police set for themselves would provide an insight as to how uncontrolled the Police are during these investigations.

As a result, I filed an Official Information Act request seeking these guidelines.[195] However, the request was refused pursuant to section 6(c) of the Act, as "making the information available would be likely to prejudice the maintenance of the law including the prevention, investigation and detection of offences."[196]

In any event, it seems as though these guidelines can be gleaned from other sources. For the purposes of the appeal to the Supreme Court in *Wichman*, the Crown filed an affidavit from a Detective Senior Sergeant as to the protocols relating to the use of Mr Big.[197] Later in the judgment of Glazebrook J, Her Honour referred to the Police's limits on how the operations are conducted.[198] In a footnote to Her Honour's judgment, she refers to these guidelines.[199] One can presume that they are the protocols referred to in the Detective's affidavit. These guidelines include voluntary participation on behalf of the target; no actual offences being committed; interaction with the public kept to a minimum; and no violence or threats of violence are used.

These guidelines are extremely vague and unhelpful. They provide no insight as to whether there are guidelines regarding the inducements and psychological pressure used. Furthermore, whilst the guidelines prevent actual offences being committed,

---

[195] Mitchell East "Internal Policies Regarding Undercover Operations" (5 July 2017) FYI <https://fyi.org.nz/request/6136-internal-policies-regarding-undercover-operations>. The response to the request is attached as an appendix to this dissertation.
[196] Official Information Act 1982, s 6(c).
[197] *Wichman*, above n 4, at [19].
[198] at [509] per Glazebrook J.
[199] at [509], n 639.

there is no indication as to what staged crimes are acceptable. It is also uncertain what the first guideline is referring to – it cannot possibly mean "voluntary" in common parlance, as no rational suspect would agree to be subjected to an undercover operation. Nor could it mean voluntary in the sense that the suspect has not been forced to comply, as that would surely be covered by the rule precluding violence or threats of violence. The only possible meaning the guideline could carry is that the Police must emphasise to the suspect during the final interview that they are "free to go" at any time. Such an interpretation is consistent with the way in which the operation was conducted in *Wichman*.[200] But, as argued previously, this ignores the coercive nature of Mr Big operations and it is unpersuasive to suggest that the suspect's conduct is in fact voluntary.

Putting the guidelines to one side, there is a more fundamental problem with the Police's protocol. This is the Police's unwillingness to disclose their guidelines. There is a lack of transparency surrounding the limits of Mr Big operations. As a result, we are left having to trust the Police to constrain themselves. But trust is not a legally enforceable standard. Nor does it provide sufficient protection for the individual targets of operations. There is no objective framework for the Police to operate within; rather they are left to guide themselves based on their own moral compass. Leaving the Police to constrain themselves may have pernicious effects for suspects who are subjected to the tactic at the hands of overzealous officers. The rules that govern state conduct should be made known to the general public, not buried away in a police manual.[201] Disclosure of the Police protocol would allow for a proper appraisal of the legitimacy of the tactic and would lead to researchers subjecting the technique to greater study. Without such study, the risk of false confessions in this area will remain high.[202] Furthermore, an absence of transparency in police decision-making can be destructive in its potential to breed police abuse as well as to foment public distrust.[203] Cordoning off police decisions prevents public scrutiny, which is an important check on the interests of justice.[204]

B Evidence Act Interpretation

Suspects' statements and other evidence obtained during undercover operations currently are regulated through the Evidence Act 2006, ss 28, 29 and 30. The interpretation given to these sections affects the effectiveness of the constraint. In the context of Mr Big operations, section 28 deals with the reliability of a suspect's

[200] at [166] per Elias CJ.
[201] Waldron, above n 51, at 42.
[202] Moore, Copeland and Schuller, above n 82, at 400.
[203] Elizabeth E. Joh, above n 61, at 183.
[204] at 183.

confession; section 29 prevents the Police from eliciting the confession through oppressive means; and section 30 governs improperly obtained evidence. The way the Court has interpreted these sections has meant section 28 will be the most useful for challenging evidence obtained from a Mr Big operation. As a result, I will discuss section 28 last.

1 Section 29

Section 29 excludes statements "influenced by oppression" (defined as "oppressive, violent, inhuman, or degrading conduct" towards the defendant or another person or "a threat of conduct or treatment of that kind").[205] In the context of a Mr Big operation, a confession would be excluded if it were influenced by express or implied threats of violence.[206] Given the Police's own guideline debarring the use of violence during the operation, it is unlikely that this section will provide any extra protection. However, if the New Zealand Police were to incorporate scenarios involving staged violence, as their Canadian counterparts have done, this would likely amount to implicit threats of violence for the purposes of section 29.

2 Section 30

Section 30 governs the admissibility of improperly obtained evidence offered by the prosecution. Evidence is improperly obtained evidence if it is obtained: in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act applies;[207] in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution;[208] or unfairly.[209] If, on the balance of probabilities, the Judge finds that the evidence has been improperly obtained, the Judge must determine whether or not the exclusion of the evidence is proportionate to the impropriety. This involves a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.[210]

In the context of a Mr Big operation, it is unlikely that s 30(5)(a) will be engaged. This is due to the fact that the right to silence and right to counsel under the New Zealand Bill of Rights Act are not engaged outside of custody. Of course, if the Police

---

[205] Evidence Act 2006, s 29(5).
[206] *Wichman*, above n 4, at [24].
[207] Evidence Act 2006, s 30(5)(a).
[208] Evidence Act 2006, s 30(5)(b).
[209] Evidence Act 2006, s 30(5)(c).
[210] Evidence Act 2006, s 30(2).

breach any of the other rights this will constitute improperly obtained evidence under s 30(5)(a).[211]

Section 30(5)(b) focuses on the situation where a suspect's statement to the Police leads to the discovery of real evidence. If the statement itself is inadmissible, then the real evidence obtained in consequence of the statement will be improperly obtained. Given the fact that most Mr Big operations are aimed at eliciting confessions, and in every New Zealand case so far the confessions have been admissible, it is unlikely that this provision will be operative.

Under s 30(5)(c), evidence will be improperly obtained if it was obtained unfairly. This provision deals with unfairness such as police impropriety. It also includes breaches of the Practice Note.[212] As aforementioned, the Practice Note is not directly applicable to undercover officers. However, s 30(5)(c) will be engaged where the Police deliberately circumvent the operation of the Practice Note.[213] In the absence of a deliberate circumvention of the Practice Note, s 30(5)(c) will be limited to general impropriety by the Police during Mr Big operations. The question of police impropriety is one of degree, which will depend on the facts of the particular case.[214] The majority in *Wichman* concluded that the permissible limit of police impropriety is a matter on which reasonable minds disagree.[215] As a result, the majority held that the Police's conduct in that case was not improper, and thus deemed the evidence to be admissible. This, according to the majority, aligned with previous case law in New Zealand and other similar jurisdictions.[216]

The corollary of this is that as long as the Police stay within the realms of *Wichman*-type inducements and pressure, the evidence will not be unfairly obtained. This can be inferred from the recent Mr Big case of *Lyttle v R* in which no challenge was made to the confession elicited during the operation under s 30.[217] This was notwithstanding the Police had obtained a psychological profile of the suspect before they commenced the operation, and referred to the prospect of friendship, fast cars and money.[218] Indeed, at one point in the operation the undercover officers referred to entry into the organisation as tantamount to feeling as though you have won the lottery every day.[219]

---

[211] Furthermore, the provision is not limited to breaches of the New Zealand Bill of Rights Act. It also includes breaches of other statutes, for example the Crimes Act 1961, or the common law: see *Hamed v R* [2011] NZSC 101.
[212] Evidence Act 2006, s 30(6).
[213] *Wichman*, above n 4, at [70] and [114].
[214] at [118].
[215] at [130].
[216] at [130].
[217] *Lyttle*, above n 10.
[218] *Lyttle*, above n 10, at [60].
[219] at [55].

The suspect was also paid more money for his assistance in the organisation than in *Wichman*, and was promised the services of prostitutes.[220] However, these differences were not so substantial to distinguish the case from *Wichman*. Therefore, the unfairness limb of s 30(5) will likely only provide a constraint on police conduct when the impropriety is wholly distinguishable from that in *Wichman*. Moreover, a confession that is improperly obtained can still be admitted through the balancing test in s 30.[221] Given that the seriousness of the offence with which the suspect is charged is a factor to consider in the balancing exercise,[222] it seems unlikely that a court would exclude a confession to a murder.[223] Hence this provision provides a relatively weak form of protection.

3 Section 28

Section 28 addresses the risk of unreliable statements offered by the prosecution.[224] In the context of Mr Big operations, this will be the confession elicited from the suspect in the final interview. In assessing reliability, section 28(4) sets out a non-exhaustive list of factors the Judge must take into account.[225] Sections 28(4)(c) and (d) refer to questions or threats put to the defendant, which implies that the unreliability comes from an external source.[226] Conversely, sections 28(4)(a) and (b) deal with unreliability due to a cause that is purely internal to the defendant, such as psychological conditions or intellectual disabilities.[227] Once the issue of reliability has been raised,[228] the judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability.[229]

The majority in *Wichman* considered that the "circumstances in which the statement was made" includes the nature and content of the statement and the extent to which those circumstances affected the defendant.[230] The congruence between the objective facts and the statement, and the general plausibility of the statement are germane to a decision under s 28(2).[231] As Glazebrook J noted, the Court is looking for indicators

---

[220] at [21].
[221] Evidence Act 2006, S 30(2)(b).
[222] Evidence Act 2006, s 30(3)(d).
[223] See the comments of the majority in *Wichman*, above n 4, at [72].
[224] *Wichman*, above n 4, at [69].
[225] Richard Mahoney and others *Adams on Criminal Law: Evidence* (looseleaf ed, Brookers) at [EA 28.09].
[226] at [EA 28.07].
[227] at [EA 28.07].
[228] Raising the issue of reliability can occur under either s 28(1)(a) or (b).
[229] Evidence Act 2006, s 28(2).
[230] *Wichman*, above n 4, at [84].
[231] at [84].

of actual reliability (or unreliability) in the statement.[232] Such indicators may include consistencies or plausibilities when assessed in light of the other evidence.

The process of determining reliability is best set out by Glazebrook J in Her Honour's judgment. Implicitly this is a three-step test – first, examine the circumstances of the operation and assess the extent to which they call into question the reliability of the confession. These circumstances include those listed in s 28(4), but also the length of the operation; the number of interactions between the Police and the accused; and the nature of the relationship between the undercover officers and the accused.[233] Second, the Court should assess actual reliability. Actual reliability is discerned from comparing other evidence in the case to the statement itself.[234] The Court is looking consistencies (and inconsistencies) between the statement and any surrounding evidence. Internal indicators that point toward reliability (such as emotion, general plausibility, sensory details) can also be considered at this stage.[235] The last step weighs the circumstances pointing towards the confession being unreliable against the indicators of actual reliability. The stronger the circumstances pointing towards an unreliable confession, the stronger the indicators of actual reliability need to be.[236]

In the *Wichman* case, both the majority and Glazebrook J in Her Honour's dissent held that the confession should not be excluded under s 28.[237] The majority found that the suspect's immaturity and youth were not exploited.[238] Nor did they think that the suspect had no choice but to confess.[239] Furthermore, they noted that there were indicators of actual reliability in the statement, such as its correlation with other evidence.[240] Thus, the confession was reliable for the purposes of s 28. Glazebrook J noted that if just the circumstances were taken into account, the statement would fail the test under 28.[241] However, Her Honour went on to consider the indicators of actual reliability. The suspect's confession in the Mr Big operation accorded much more closely with the medical evidence than the suspect's earlier account given to the Police at the initial investigation.[242] This, in conjunction with other factors, indicated that the circumstances in which the statement was made did not in fact adversely

[232] at [432] per Glazebrook J.
[233] *Wichman*, above n 4, at [434] per Glazebrook J citing the majority in *R v* Hart, above n 6, at [102].
[234] *Wichman*, above n 4, at [452] per Glazebrook J.
[235] at [436].
[236] at [435].
[237] at [93] per William Young, Arnold and O'Regan JJ and [457] per Glazebrook J.
[238] at [89].
[239] at [89].
[240] at [92].
[241] at [451] per Glazebrook J.
[242] at [454].

affect its reliability.[243] Therefore, the suspect's statement was not excluded under s 28.[244]

On this approach, it seems that most confessions elicited in a Mr Big operation will be admissible for the purposes of s 28. As long as there are *some* indicators of actual reliability, it is likely to be enough to tip the balance in favour of admissibility. This will be the case unless the inducements offered by the Police are so great, or the suspect has particular psychological vulnerabilities, that outweigh the indicators of actual reliability. But, the inducements offered by the Police and the psychological vulnerabilities of a suspect can be determined *before* the start of an operation. Thus, the Police can reverse engineer the limits of a Mr Big operation to deliberately avoid the purview of s 28. Therefore, s 28 provides impotent protection in the context of Mr Big operations.

[243] at [456].
[244] at [457].

CHAPTER IV: REFORM

A The Need for Change

As Chapters II and III have made clear, there are a myriad of concerns with the use of the Mr Big tactic, but yet it remains the least regulated type of undercover operation. Furthermore, the practical constraints that are currently in place, provided by the Evidence Act, are insufficient for a number of reasons.

The first is that the Evidence Act assesses the Police's conduct ex post facto. A constraint that operates after the fact is problematic because at that stage a suspect may have already had their rights infringed. The operation of the Evidence Act deeming evidence to be inadmissible will be of little note to a person who has had the affairs of their private life unreasonably intruded upon.

One might argue that the *risk* of having the evidence excluded is a constraint in and of itself. If the evidence is deemed to be inadmissible, the undercover operation was all for nothing. In order to prevent this happening, and make sure the Police's hard work does not go to waste, they will be cautious during the operation so as to not overstep the mark. This risk will prevent the Police adopting an overzealous approach when attempting to elicit inculpatory evidence. The possibility of having the evidence excluded at trial may provide a constraint in general undercover operations. However, its persuasiveness is limited in the context of a Mr Big operation. In none of the Mr Big operations in New Zealand was there sufficient evidence to charge the suspect before deploying the tactic.[245] More importantly, all were "cold cases" in which all other investigative avenues had failed. Without the use of the Mr Big tactic, the Police would never have been able to apprehend the suspect. As a result, the inverse is true in Mr Big cases; the Police are incentivised to push the boundaries, as without a confession they will be highly unlikely to convict the suspect. Accordingly, this risk does not act as a constraint in the same way it would in other cases because the Police have nothing to lose.

Furthermore, there are countless examples from New Zealand and overseas that show there is possibility for these operations to go awry. As noted by William Young J for the majority in *Wichman*, human nature being what it is, the Police often become focused on securing a successful outcome without regard for countervailing considerations.[246] Without any constraints on the Police, there is a greater risk that the

[245] See above n 47.
[246] *Wichman*, above n 4, at [126].

operations will unreasonably impinge on a suspect's right to be presumed innocent and their right to be free from state intrusion.

Also, as argued above, the way in which the Evidence Act has been interpreted in relation to Mr Big cases means the provisions will not provide much of a constraint. The lack of controls and repeated judicial backing of the tactic will likely increase the technique's prevalence and foster a philosophy amongst the Police that the use of deception to elicit confessions is not only effective, but sanctioned.[247] An increase in the use of the Mr Big tactic is also likely given that the Court has recently circumscribed undercover techniques within a custodial setting.[248] Furthermore, with the *Wichman* judgment approving the use of the Mr Big operation, the Police will set about "reverse engineering" the operations so they do not fall foul of the Evidence Act. As discussed earlier, so long as the factors affecting reliability under section 28 are addressed, section 30 imposes less constraint, as a court will be unlikely to exclude a confession to murder. Thus, the Police can refine and develop the Mr Big technique to circumvent evidentiary rules by design.[249]

The risks identified in Chapter II are inherent in Mr Big operations; these risks have a greater chance of materialising where there are no external checks on the way in which the operations are conducted. In situations where the risks materialise, the suspect's fundamental human rights will have been infringed. The potential for the operation to cause irreparable harm is enormous. The operation pervasively intrudes into a person's private affairs, disregards their individual autonomy, and undermines the presumption of innocence. To leave the technique unregulated would be to compromise these important values for the sake of law enforcement expediency.[250]

In order to justify the use of the Mr Big technique, there needs to be prospective restrictions on the way in which it is deployed, thus giving greater weight to fundamental human rights. At this stage, our current criminal justice system is predicated on a utilitarian calculus. The Mr Big technique is undoubtedly successful in resolving major unsolved crimes.[251] Therefore, the technique has been deemed permissible because it serves the collective good of apprehending criminals.[252]

---

[247] Adriana Poloz "A Motive to Lie? A Critical Look at the Mr. Big Investigative Technique" (2015) 19 Can Crim L Rev 231 at 236–237.
[248] at 237. See *Kumar*, above n 8, where the Supreme Court restricted the use of undercover officers in a custodial setting.
[249] Adriana Poloz, above n 247, at 237. See Elias CJ's comment at [166] of *Wichman*, where Her Honour noted that a conversation "seems to have been scripted more with an eye to subsequent admissibility".
[250] Milward, above n 125, at 113.
[251] See *Wichman*, above n 4, at [17].
[252] Ashworth, above n 52, at 117.

B Arguments in Favour of the Status Quo

Some may argue that reducing the rights of criminals is justifiable, especially given some of the horrific crimes they have committed. However, that presupposes that a crime has been committed. The Mr Big tactic is deployed at the investigative stage, and thus the target is merely a suspect. Even if convicted criminals lose certain rights, suspects, like ordinary citizens, still retain the full panoply of rights.[253]

If criminals are able to engage in surreptitious behaviour, then it seems only fair that if the Police are to be effective, they should also be permitted to do so. Ashworth described this as the equality of arms, or "tit for tat" argument.[254] However, this argument has its limits. Whilst we permit the Police to use *some* deception, if we were to accept the argument generally it would surely permit torture in cases where the alleged offence is particularly horrific. The State cannot allow suspected or convicted criminals to set the standards for acceptable law enforcement methods.[255] The Police's legitimacy is derived from the public willingness to empower their actions.[256] Justifying the use of the Mr Big tactic on the basis that criminals are equally deceptive is self-contradictory and undermines the Police's legitimacy.

There is also the argument that the seriousness of the offence being investigated justifies the use of the Mr Big tactic. This is another utilitarian justification – that the social good in convicting *serious* criminals outweighs the need to respect individual rights. Again, this presupposes that the suspects who are targeted by the operation have committed a serious offence. However, the Police can never be sure that a target of an operation has in fact committed the alleged offence. Therefore, whilst the use of deceptive means by the Police seems to become more justifiable for serious offences, the importance of protecting individual rights in these cases becomes stronger.[257] The presumption of innocence is a fundamental safeguard against wrongful convictions in society.[258] It protects the liberty and human dignity of those accused by the State of criminal conduct.[259] The need for this protection increases where the alleged crime is serious, as the consequences of such a conviction are far greater. Undoubtedly the public interest in crime detection increases as more serious crimes come into question.[260] But the presumption of innocence also increases correspondingly. As

---

[253] at 116–117.
[254] Ashworth, above n 52, 116.
[255] at 116.
[256] Wamsley, above n 189, at 187.
[257] Ashworth, above n 52, at 122.
[258] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [197] per McGrath J.
[259] *R v Oakes*, above n 140, at 212.
[260] Ashworth, above n 52, at 122.

Ashworth notes, "…both sides of the equation may gain in weight, without altering the equilibrium, and the 'seriousness of the offence' argument leads nowhere."[261]

C Justifying Change

In order to justify a change to our current criminal justice system, there needs to be a conceptual shift from a utilitarian calculus to a more rights-centric approach. A utilitarian justification to crime detection allows fundamental human rights to be trampled upon by the State in order to apprehend criminals. Furthermore, even the most ardent supporter of consequentialism cannot deny the phenomenon of false confessions and wrongful convictions. An "ends justifies the means" approach is not permissible in crime detection when the end result may be the conviction of innocent people.

A person has the right to not have their life intruded upon and subjected to the coercive power of the State. However, to simply say that a person has "rights" in the abstract provides illusory protection. Human rights that are not afforded protection are not even rights at all; they are merely a pretence.[262] Rights only exist to the extent that they can be enforced.[263] There needs to be an acknowledgment of fundamental human rights and commensurate protection given to those rights.

The recognition of fundamental human rights and the risk of false confessions justify the conceptual shift to a rights-centric approach to crime detection. A rights-centric approach means increased protection needs to be given to suspects who are subjected to police undercover operations. In furtherance of a rights-centric approach, the propriety of an undercover operation needs to be assessed *before* its implementation, rather than ex post facto. Individually, people should be able to organise their private affairs as they see fit, without the overbearing influence of the State. Unfettered Mr Big operations have the potential to threaten this right, as opening a person's home-life to the coercive power of the State to such an extent undermines individual autonomy.

Committing ourselves to individual rights is committing ourselves to forego the use of certain means in pursuit of social goals, namely apprehending criminals.[264] There would be no point in the claim:[265]

---

[261] at 122.
[262] AJ Ashworth "Excluding Evidence as Protecting Rights" (1977) Crim L R 723 at 735.
[263] Geoffrey Robertson *Freedom, The Individual and The Law* (6th ed, Penguin, London, 1989) at 51.
[264] Waldron, above n 51, at 95.
[265] R Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at 193.

> …that we respect individual rights unless that involved some sacrifice, and the sacrifice is that we must give up whatever marginal benefit society would receive from overriding these rights when they prove inconvenient.

Therefore, the social cost of acknowledging the fundamental rights of suspects is to prevent the use of unfettered Mr Big operations.

If this conceptual shift is to be accepted, there needs to be reform in this area. Change needs to occur, and it needs to circumscribe police activity during Mr Big operations. However, no one could ever seriously suggest a Manichean position endorsing fundamental rights to exclusion of all other interests. Rights are not absolute. As explained above, undercover operations allow for the detection of crime that would otherwise take place in private.[266] In particular, Mr Big operations have resolved numerous unsolved crimes. This promotes the public interest in bringing offenders to justice, and provides closure for the victims and their families. Instead, there is a need to balance effective and efficient policing against democratic ideals, the rule of law and constitutional rights and values.[267] There seems to be the misconception that there is a trade-off between suspects' rights and the investigation and detection of crime, as if it is a zero-sum game. It is possible to decouple these competing interests.[268]

D Suggestions for Reform

In *Wichman*, Glazebrook J opined that explicit jury instructions should be given in Mr Big cases.[269] I agree, but more substantive change needs to occur. This is due to both the retrospectivity of directions and, more importantly, the empirical evidence that suggests jury instructions are ineffective.[270] Our adversarial system cannot be relied on to provide sufficient checks on police conduct.

Whilst the majority in *Wichman* found that the Practice Note on Police Questioning does not apply to undercover officers, legislative reform could expand the Practice Note to explicitly refer to undercover officers. However, this recommendation is unsatisfactory for two reasons. Firstly, it is too circumscribed. Rules 2 to 5 of the Practice Note only apply when the Police have "sufficient evidence to charge a

---

[266] See page 2.
[267] K Puddister and T Riddell "The RCMP's 'Mr. Big' sting operation: A case study in police independence, accountability and oversight" (2012) 55 Can Publ Adm 385 at 387.
[268] See Max Harris *The New Zealand Project* (Bridget Williams Books Ltd, Wellington, 2017) at 144 where the author made the same argument when talking about victims' rights and sentencing criminals.
[269] See *Wichman*, above n 4, at [533] per Glazebrook J and the appendix attached to the judgment.
[270] See Richard Leo and others "Promoting Accuracy in the Use of Confession Evidence" (2013) 85 Temp L Rev 759 at 823, n 429.

person."[271] The protection offered by Rules 2 to 5 would only crystallise at the point in the investigation where the evidence obtained reaches this threshold, but until then they would provide no constraint on police action. Thus, an extension of these rules would only offer *qualified* protection. Secondly, although Rule 1 could apply throughout the operation, the way the Court has interpreted the rule would mean it provides no restriction during a Mr Big operation. In *Rameka v R*, the Court of Appeal said that Rule 1 prevents the Police telling a suspect that the person has a legal obligation to answer questions.[272] However, during a Mr Big operation, the Police would never suggest to a suspect that they have a legal obligation to answer a question or else they would break their cover. Thus, on this interpretation, Rule 1 would not afford any protection to a suspect in a Mr Big operation.

It has been suggested that the right to silence should be extended to cover situations, such as Mr Big operations, where there is pre-detention deception.[273] Under the New Zealand Bill of Rights Act, a suspect only has the right to silence when arrested or detained under any enactment.[274] The right to silence, and the concomitant privilege against incrimination, provide immunity from being compelled to answer during police questioning.[275] Those arguing for an extension of this right point out that the right to silence becomes "meaningless if the police can simply switch to undercover operations to by-pass the right to remain silent and trick a suspect to talk to them."[276]

Such an extension is possible in New Zealand. Under the s 28 of the New Zealand Bill of Rights Act, existing rights or freedoms are not abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights Act. In *R v Allen*, Duffy J held that the common law right to silence recognised in the previous cases of *R v Sang*[277] and *R v Horsfall*[278] can co-exist with the New Zealand Bill of Rights Act.[279] Therefore, the common law right to silence could cover situations of pre-detention deception. The issue of a common law right to silence has not been directly addressed in the Mr Big context. The current test used to determine whether the right to silence in custody has been breached is the "active elicitation test" espoused by the Supreme Court in *Kumar*.[280] The Court of Appeal in *Wichman* adopted this test in assessing unfairness under s 30 of the Evidence Act.[281] The

[271] See Practice Note, above n 58, and *Wichman*, above n 4, at [498] per Glazebrook J.
[272] *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 at [29].
[273] Kouri T Keenan and Joan Brockman, above n 35, at 67.
[274] NZBORA 1990, s 23(4).
[275] *Smith v Director of the Serious Fraud Office* [1992] 3 All ER 456; [1992] 3 WLR 66.
[276] Kouri T Keenan and Joan Brockman, above n 35, at 67.
[277] *R v Sang* [1980] AC 402.
[278] *R v Horsfall* [1981] 1 NZLR 116.
[279] *R v Allen* HC Rotorua CRI-2007-087-1729, 10 February 2009 at [24].
[280] *Kumar*, above n 8, at [43(c)].
[281] *Wichman* (CA), above n 54, at [68]–[69].

majority in the Supreme Court did not explicitly state why the active elicitation test should not be used to assess unfairness. However, given the use of the test to determine a breach of the right to silence in custody, if such a common law right were to apply, this test is also likely to be used.

The problem with applying such a test in the context of Mr Big operations is that it would likely rule most confessions obtained inadmissible. Of course, it is always a question of degree. But as the Court of Appeal noted in *Wichman*, some of the reasons for finding that the confession was actively elicited addressed risks inherent in the scenario technique.[282] Given the way in which the final interviews are conducted in Mr Big operations,[283] it is likely that *most* interviews would amount to active elicitation. Therefore, extending the right to silence to cover pre-detention situations would be inimical for future Mr Big operations if the active elicitation test was adopted to assess a breach. Such a solution would ignore the success of Mr Big operations and their ability to solve cold cases.

E Deception Warrants

As noted earlier, it is paradoxical that other police investigation methods, which are far less intrusive than Mr Big operations, have more protection by requiring court sanction in the form of a warrant. It seems logical, therefore, that Mr Big operations should be regulated in the same way. A warrant mechanism would ensure apposite considerations are "properly weighed, where a proposed operation will be intrusive and may have damaging effects as far as the suspect is concerned."[284] Prior judicial authorisation would allow for an appraisal of the operation *before* it is implemented to ensure fundamental human rights and the risk of false confessions are adequately addressed. In order to address these concerns, the warrant system would provide prospective constraints on the operation to reflect the permissible limits of police conduct in a democratic society. Accordingly, it would allow undercover operations to be conducted within a legal framework and thus in an objectively fair manner. Prior judicial authorisation would strike an appropriate balance between the competing interests, as it "…would protect suspects (especially innocent ones) from unwarranted intrusions without depriving police of an effective crime detection technique."[285]

---

[282] *Wichman* (CA), above n 54, at [65].
[283] See *Wichman*, above n 4, at [163]–[189] per Elias CJ.
[284] *Wichman*, above n 4, at [127].
[285] Steven Penney "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era: Part II: Self-Incrimination in Police Investigations" (2004) 48 Criminal Law Quarterly 280 at 328.

A system allowing for court sanction of "deception warrants" should be implemented. This could be similar to the authorisation of surveillance device warrants under the Search and Surveillance Act 2012. The system would set out a rubric as to when these "deception warrants" can be issued, and thus it would provide a legislative safeguard for the use of the tactic.

The use of the technique should be restricted to investigate serious offences. Under the Search and Surveillance Act, a surveillance device warrant can only be issued in order to obtain evidential material in relation to an offence that is punishable by a term of imprisonment of 7 years or more.[286] The deception warrants should have a similar restriction. Whilst in practice the Police are only likely use the tactic to investigate alleged homicides,[287] such a restriction will afford protection to suspects if the Police decide to use the tactic to investigate other serious offences.

A deception warrant should be required in all undercover operations where the purpose of the operation is to elicit a confession in a "cold case". If the warrants were only required for the use of the Mr Big tactic, the Police would likely develop a substantially similar technique under the guise of a different name to get around the requirements of the warrant.

Other limitations as to the use of these warrants could include, but are not restricted to:

- A formal interview with the suspect must have already been tried, and all other legitimate avenues of investigation should be exhausted;[288]
- There should already be other independent evidence available that incriminates the suspect;[289]
- The current police guidelines should be adopted – no violence or threats of violence, interactions with the public should be kept to a minimum, and no actual offences should be committed; and
- Apart from the officer who conducts the final interview, the Police involved in the ruse should not know the details of the crime being investigated.[290] This will prevent the suspect learning of details of the crime, which they might not have known previously, that could be used to legitimise a false confession.

---

[286] Search and Surveillance Act 2012, s 45(1)(a).
[287] This would be consistent with the use of the Mr Big tactic thus far, see above n 47.
[288] *Wichman*, above n 4, at [528] per Glazebrook J.
[289] at [528].
[290] at [528].

An application for a deception warrant should include:

- The name of the intended target of the operation;
- The current evidence obtained in relation to the suspected offence(s);
- The current evidence obtained in relation to the suspect, both inculpatory and exculpatory;
- The reasons why the Police believe the suspect has committed the offence;
- The age, education level and economic condition of the suspect;
- A profile on the suspect that sets out any potential vulnerabilities such as known mental conditions, age, antisocial traits;
- Whether the suspect has any previous convictions;
- The level of tangible inducements to be offered (for example, money);
- The number of undercover officers to be used;
- The expected duration of the investigation;
- The expected number of scenarios to be deployed; and
- The nature of the scenarios proposed and details of what they will involve.

A High Court Judge should consider the application. The application should only be granted if the Judge is satisfied that the undercover operation will not unreasonably infringe the suspect's fundamental rights and the potential risk of a false confession materialising is minimal. If the Judge is not satisfied that these conditions have been met, the Judge can modify the terms of the operation accordingly. If the Judge considers the operation cannot be conducted in a way that does not unreasonably infringe the suspect's fundamental rights or the risk of a false confession materialising is more than minimal, the Judge should not grant the warrant.

Once the operation is implemented, there should be further judicial oversight every two months.[291] Regular oversight would ensure the Police are acting properly and within the prescribed limits as the operation continues. Furthermore, this oversight would act to militate any confirmation bias the Police develop as the operation progresses.[292] If the premise of the deception warrants is to protect a person's rights, the decision as to whether a warrant should be granted must be made on a fully informed basis. Therefore, there should be a legislative duty on the Police to fully and

[291] The average length of a Mr Big operation in New Zealand thus far is just over four months. Oversight every two months would provide an appraisal of the operation at the halfway point if it were of average length. If, like in the cases of *Reddy* and *Wichman*, the operation continues for six months (or longer), further judicial oversight would be required as the operation progresses. If the operation runs for less than two months continued judicial oversight would not be required, as the same concerns would not arise.

[292] See Raymond S. Nickerson "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2 Review of General Psychology 175.

frankly disclose to the court all material facts.[293] The duty should apply to both the initial warrant application and the judicial oversight as the operation continues. If the Police breach this duty the warrant should be held invalid. Such a duty will ensure the Police disclose all evidence that is relevant to a warrant application, even if it points against a warrant being granted. This means a Judge's decision as to whether to permit an infringement on a suspect's rights will always be made on a fully informed basis.[294]

Requiring prior judicial authorisation will not inhibit the undercover operations taking place expeditiously for the simple reason that this does not occur currently. Mr Big operations are used in cases where the investigation has become stagnant. There is no rush to deploy the operation, as the Police would not otherwise have sufficient evidence to convict the suspect.

The main criticism of having to obtain prior judicial authorisation is that once "a Mr Big operation has been legitimately launched, it can be expected to take on a dynamic of its own."[295] Therefore, the operation may transmogrify in such a way that the initial authorisation is no longer appropriate or relevant. However, there is nothing stopping the Police applying for further authorisation during the course of the operation. Of course, that does not account for the fact that some of the meetings are developed as a result of the suspect's reaction to scenarios previously played out.[296] Thus it may require the Police to improvise as the operation unfolds.[297] But, most of the factors set out in the application for a deception warrant are *general*, and thus will not change as the operation takes place.

Others may argue that the judiciary should not be so involved in police undercover operations. This point was made in *Wilson v R*, where the Supreme Court noted:[298]

> …[t]he independence of judges from the executive, both in appearance and in reality, is critical both to the proper operation of the rule of law and New Zealand's constitutional arrangements, and to the maintenance of public confidence in their operation.

---

[293] This is similar to the requirement under the High Court Rules 2016 for obtaining a freezing order. See High Court Rules 2016, r 32.2(3).
[294] This is essentially an ex parte (without notice) application, and a duty of this nature is common where such applications are made for state intervention, for example – freezing orders. A duty of disclosure restores the balance to a hearing that would otherwise be unopposed.
[295] *Wichman*, above n 4, at [115(b)].
[296] Kouri T Keenan and Joan Brockman, above n 35, at 100.
[297] at 100.
[298] *Wilson*, above n 15, at [35].

However, in that case the Judge was a participant *in* the operation, not merely assessing the propriety of an operation. The Supreme Court later qualified its statement by saying:[299]

> Judges should be involved in the investigation of criminal offending only to the extent that they have judicial obligations to perform, as when issuing warrants authorising the use of particular investigative techniques.

Thus, deception warrants would not contravene the separation of powers. Furthermore, courts readily engage in assessing the limits of police conduct under s 30 of the Evidence Act. It would be a strange result if the Court could sanction the Police's conduct retrospectively through the Evidence Act, but not prospectively through these deception warrants. More fundamentally, limiting executive power and protecting human rights is *upholding* the separation of powers, as this the very reason why the Judiciary is detached from the Executive. In the words of Lord Griffiths:[300]

> …the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

Implementing this warrant system is in the Police's interest. It will allow their operations to be undertaken in a way that accords with fundamental human rights and minimises the risk of false confessions. Conducting undercover operations in an objectively fair manner will lead to greater trust and confidence in the Police as an institution for social control.[301] Thus, the public will be more likely to comply with the Police's directives.[302]

---

[299] at [36].
[300] *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1 AC 42 (HL) at 62.
[301] Jason Sunshine and Tom R. Tyler, above n 185, at 517.
[302] at 515.

CONCLUSION

The current constraints surrounding undercover operations, especially the Mr Big tactic, are insufficient and give a wide, uncontrolled licence to the Police. We continue to justify the use of these tactics on the grounds that convicting criminals, especially serious ones, is important. This does not take into account that there is a significant risk that those targeted by undercover operations may be innocent. Nor does it acknowledge the fundamental rights of those targeted by such operations. We have already acknowledged that some police tactics are an affront to our democratic ideals - that is why we have banned torture. Unfettered Mr Big operations have the potential to create just as disastrous consequences. Legal regulation of the tactic, in the form of deception warrants, is required to protect the rights of suspects and mitigate the risk of false confessions. Adopting deception warrants would shift the conceptual nature of criminal investigation from a utilitarian justification to a heavier focus on suspects' rights. In a country committed to democratic ideals and the rule of law, such a change is both necessary and urgent.

BIBLIOGRAPHY

A Cases

1 New Zealand

Hamed v R [2011] NZSC 101, [2012] 2 NZLR 305.
Hansen v R [2007] NZSC 7, [2007] 3 NZLR 1.
J (CA108/2017) v R [2017] NZCA 310.
K (CA106/2013) v R [2013] NZCA 430.
Lyttle v R [2017] NZCA 245.
R v Ahamat CA143/00 19 June 2000.
R v Allen HC Rotorua CRI-2007-087-1729, 10 February 2009.
R v Barlow (1995) 14 CRNZ 9 (CA), (1995) 2 HRNZ 635.
R v Cameron [2007] NZCA 564 (Pre-trial).
R v Cameron [2009] NZCA 87 (Post-trial).
R v Cummings [2014] NZHC 1025.
R v Harrison [2014] NZHC 2246.
R v Horsfall [1981] 1 NZLR 116.
R v Kumar [2015] NZSC 124, [2016] 1 NZLR 204.
R v M CA64/96, 22 April 1996.
R v O'Shanessy (unreported, Wellington, 8 October 1973, 78/73).
R v Reddy [2016] NZHC 1294, [2016] 3 NZLR 666.
R v Slater (1994) 12 CRNZ 198.
R v Wichman [2015] NZSC 198, [2016] 1 NZLR 753.
Rameka v R [2011] NZCA 75, (2011) 26 CRNZ 1.
Stevenson v R [2012] NZCA 189, (2012) 25 CRNZ 755.
Wichman v R [2014] NZCA 339, [2015] 2 NZLR 137.
Wilson v R [2015] NZSC 189, [2016] 1 NZLR 705.

2 Australia

Swaffield v R (1996) 88 A Crim R 98.
Tofilau v The Queen [2007] HCA 39, (2007) 231 CLR 396.

3 Canada

Dix v Canada (Attorney-General) 2002 ABQB 580, [2003] 1 WWR 436.
R v Bates 2009 ABQB 379.

R v Bonisteel 2008 BCCA 344.
R v Broyles [1991] 3 SCR 595.
R v Hart 2014 SCC 52, [2014] SCR 544.
R v Hebert [1990] 2 SCR 151.
R v Mack [1988] 2 SCR 903.
R v Mentuck 2000 MBQB 155.
R v Oakes (1986) 26 DLR (4th) 200 (SCC).
R v Skinner (1992) 17 C.R. (4th) 265.
R v Steadman 2007 BCSC 483.
R v Unger 2005 MBQB 238.
The King v Todd (1901) 4 CCC 514 (Man KB).

4 England and Wales

R v Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 AC 42; [1993] 3 WLR 90; [1993] 3 All ER 138 (HL).
R v Looseley; Re Attorney General's Reference (No 3 of 2000) [2001] 1 WLR 2060; [2001] 4 All ER 897; [2002] 1 Cr App R 29 (HL).
R v Sang [1980] AC 402, [1979] 3 WLR 263, [1979] 2 All ER 1222.
Regina v Christou [1992] 1 QB 979 (CA).
Smith v Director of the Serious Fraud Office [1992] 3 All ER 456; [1992] 3 WLR 66.

5 United States of America

Bruton v United States 391 US 123 (1968).
People v Cahan P. 2d 905 (1955).

B Legislation

1 New Zealand

Crimes Act 1961.
Evidence Act 2006.
High Court Rules 2016.
Misuse of Drugs Act 1975.
New Zealand Bill of Rights Act 1990.
Official Information Act 1982.
Search and Surveillance Act 2012.

C Books and Chapters in Books

William Blackstone *Commentaries on the Laws of England* (1838).
R Dworkin *Taking Rights Seriously* (Duckworth, London, 1977).
Gilsi H Gudjonsson *The Psychology of Interrogations and Confessions: A Handbook* (Wiley, Chichester, 2003).
Max Harris *The New Zealand Project* (Bridget Williams Books Ltd, Wellington, 2017).
J Kleinig *The Ethics of Policing* (Cambridge University Press, Cambridge, 1996).
Kouri T Keenan and Joan Brockman *Mr Big: Exposing Undercover Investigations in Canada* (Fernwood, Halifax (Nova Scotia), 2010).
Richard Mahoney and others *Adams on Criminal Law: Evidence* (looseleaf ed, Brookers).
C.T. McCormick *Handbook of the law of evidence* (2nd ed, West Publishing Company, Minnesota, 1972).
Geoffrey Robertson *Freedom, The Individual and The Law* (6th ed, Penguin, London, 1989).
Jeremy Waldron *The Law* (Routledge, London, 1990).
Lucia Zedner *Criminal Justice* (Oxford University Press, Oxford, 2004).

D Journal Articles

Robert S. Albert and Thomas R. Brigante "The Psychology of Friendship Relations: Social Factors" (1962) 56 The Journal of Social Psychology 33.
AJ Ashworth "Excluding Evidence as Protecting Rights" (1977) Crim L R 723.
Andrew Ashworth "Should the Police be Allowed to Use Deceptive Practices?" (1998) 118 LQR 108.
B. L. Garrett "Judging Innocence" (2008) 108 Colum L Rev 55.
B. L. Garrett "The Substance of False Confessions" (2010) 62 Stan L Rev 1051.
Elizabeth E. Joh "Breaking The Law to Enforce it: Undercover Police Participation in Crime" (2009) 62 Stan L Rev 155.
S Kassin and K Neumann "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21 Law & Hum Behav 469.
S Kassin and others "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 Law & Hum Behav 3.
S. Kassin and L. Wrightsman, "Prior Confessions and Mock Juror Verdicts" (1980) 10 Journal of Applied Social Psychology 133.
Richard Leo "From coercion to deception: the changing nature of police interrogation in America" (1992) 18 Crime, Law and Social Change 35.

Richard Leo and others "Promoting Accuracy in the Use of Confession Evidence" (2013) 85 Temp L Rev 759.
David Milward "Opposing Mr. Big in Principle" (2013) 46 UBC Law Rev 81.
TE Moore, P Copeland and RA Schuller "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2010) 55 Crim LQ 348.
Raymond S. Nickerson "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) 2 Review of General Psychology 175.
C Nowlin "Excluding the Post-Offence Undercover Operation from Evidence: 'Warts and All'" (2004) 8 Can Crim Law Rev 382.
Steven Penney "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era: Part II: Self-Incrimination in Police Investigations" (2004) 48 Criminal Law Quarterly 280.
Adriana Poloz "A Motive to Lie? A Critical Look at the Mr. Big Investigative Technique" (2015) 19 Can Crim L Rev 231.
K Puddister and T Riddell "The RCMP's 'Mr. Big' sting operation: A case study in police independence, accountability and oversight" (2012) 55 Can Publ Adm 385.
Jerome H. Skolnick and Richard A. Leo "The Ethics of Deceptive Interrogation" (1992) 11 Criminal Justice Ethics 3.
S Smith, V Stinson and M Patry "Using The 'Mr. Big' Technique To Elicit Confessions: Successful Innovation Or Dangerous Development In The Canadian Legal System?" (2009) 15 Psychology, Public Policy, and Law 168.
Jason Sunshine and Tom R. Tyler "The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing" (2003) 37 L & Soc'y Rev 513.
Nicholas Wamsley "Big Brother Gone Awry: Undercover Policing Facing A Legitimacy Crisis" (2015) 52 Am Crim L Rev 177.

E Reports

Law Commission *Criminal Prosecution* (NZLC R66, 2000).
Law Commission *Evidence Law: Character & Credibility* (NZLC PP27, 1997).

F Internet Resources

Lauren Collins "The Spy Who Loved Me" (25 August 2014) The New Yorker <https://www.newyorker.com/magazine/2014/08/25/the-spy-who-loved-me-2>.
Kelly Dennett "Kamal Reddy Nearly Pulled Off the Perfect Crime" (22 June 2016) Stuff <http://www.stuff.co.nz/national/80133883/kamal-reddy-nearly-pulled-off-the-perfect-crime>.

Mitchell East “Internal Policies Regarding Undercover Operations” (5 July 2017) FYI <https://fyi.org.nz/request/6136-internal-policies-regarding-undercover-operations>.
Andrew Geddis “Mr Wilson’s adventures in legal wonderland” (15 December 2015) Pundit <https://www.pundit.co.nz/content/mr-wilsons-adventures-in-legal-wonderland>.
Jane Wheatley “Helen Steel and John Dines: The spy who loved me” (19 March 2016) Sydney Morning Herald <http://www.smh.com.au/good-weekend/helen-steel-and-john-dines-the-spy-who-loved-me-20160318-gnltdv.html>.

G Other Resources

Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297.
Rt Hon Dame Susan Glazebrook “Mr Big Operations: Innovative Investigative Technique of Threat to Justice?” (paper presented to the Judicial Colloquium 2015, Hong Kong, September 2015).

New Zealand POLICE
Nga Pirihimana O Aotearoa

Police National Headquarters
180 Molesworth Street, PO Box 3017, Wellington 6011
Phone +64 4 474 9499 Fax +64 4 8191295

Ref:17/8398

10 August 2017

Mitchell East
C/- fyi-request-6136-66889140@requests.fyi.org.nz

Dear Mr East

I refer to your Official Information Act request received 5 July 2017 received by email seeking the following information:

1. I am requesting any general internal guidelines or policies governing the use of undercover investigations by the New Zealand Police and in particular those that relate to the "Crime Scenario Undercover Technique" (or so-called "Mr. Big operation").
   I understand that there is a public interest in protecting police undercover operations. However, I do not seek information about how those guidelines or policies have been applied in any individual case. Rather, the guidelines and policies I am requesting are general constraints and therefore will not reveal anything about the specifics of an investigation.

Firstly our apologies for the delay in responding. It would appear that a clerical error held up the processing of your request.

In respect of your request, police will not make public information contained in the Undercover Procedures Manual as to do so would only serve to provide criminals with information on how the programme works. This would place our members at risk and would not be in the public interest. Therefore your request is refused pursuant to section 6(c) of the Official Information Act as the making available of the information would be likely to prejudice the maintenance of the law including the prevention, investigation and detection of offences.

You have the right to ask the Ombudsman to review my decision if you are not satisfied with the way I have responded to your request.

Yours sincerely

T Anderson
National Crime Manager