**DATE: 17 FEBRUARY 2009**

~ THE LAW SOCIETY OF SINGAPORE ~

# REPORT OF THE COUNCIL OF THE LAW SOCIETY ON THE DRAFT CRIMINAL PROCEDURE CODE BILL 2009

THE LAW SOCIETY
OF SINGAPORE

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1

# 1. INTRODUCTION

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## A. BACKGROUND

1.1 The Permanent Secretary, Ministry of Law, Ms Chan Lai Fung, invited the Law Society on 9 December 2008 to give feedback on the draft Criminal Procedure Code Bill proposed by The Ministry of Law, together with the Attorney-General's Chambers and the Ministry of Home Affairs, to repeal and replace the current Criminal Procedure Code (Cap 68) ("CPC").

1.2 We thank the Ministry of Law for this opportunity to give our views on the draft Criminal Procedure Code Bill ("DCPCB").

1.3 In December 2008, the Council of the Law Society ("the Council") directed the Law Society's Criminal Practice Committee ("the Committee") to review and comment on the proposed draft Bill. A list of the Committee members is set out at Annex A.

1.4 In view of the extensive proposed amendments to the Criminal Procedure Code that was last substantially revised in 1985, the Law Society requested the Ministry of Law for more time to study the proposed draft bill and provide considered comments. The Ministry of Law agreed to grant the Law Society an extension of time to 28 February 2009 to provide our views.

1.5 The Committee's written views on the matter were submitted to the Council for consideration on 17 February 2009. A list of the members of Council 2009 is set out at Annex B.

1.6 This Report now sets out Council's views and recommendations.

## B. OUTLINE OF REPORT

1.7 The following areas of practice at the Criminal Bar have been of grave concern to the Law Society for several years:-

(i) The Right to Counsel;
(ii) The Recording and Admissibility of Statements;
(iii) Discovery in Criminal Trials;
(iv) Alternative Sentencing Options; and
(v) Legal Professional Privilege.

1.8 The Law Society has in the past made representations to the relevant ministries on several of the aforesaid issues. The President of the Law Society has also expressed concerns in respect of the recording and admissibility of statements and the lack of discovery in criminal trials, in his inaugural address at the opening of the legal year in 2008 and more recently on sentencing issues.

1.9 These representations will address the provisions of the DCPCB in the light of the concerns of the Law Society and will be dealt with under the following sections:-

(A) The Right to be Informed of the Right to Counsel
(B) Recording and Admissibility of Statements
(C) Discovery in Criminal Trials

(D) Sentencing
(E) Legal Professional Privilege: Search & Seizure
(F) Miscellaneous

## C. CONSULTATION PROCESS

1.10 We are grateful that the Ministry of Law has consulted both the public and the Law Society in particular on the proposed amendments to a key criminal law statute in Singapore.

1.11 We hope that our report will prove useful to the Ministry of Law and represent a positive contribution to public consideration of, and interest in, this important area of law.

## D. EXECUTIVE SUMMARY OF COUNCIL'S VIEWS

### (A) THE RIGHT TO BE INFORMED OF THE RIGHT TO COUNSEL

1.12 Our response on the area of the right to be informed of right to counsel is found at Chapter 2 of this Report.

*Summary Recommendations:-*

1.13 The right to counsel is entrenched in Article 9(3) of the Singapore Constitution.

1.14 No other legislation in Singapore deals with the issue of the right to counsel of arrested persons and the interpretation of Article 9(3) has been left to the courts. There is no issue as to arrested persons being allowed to consult and be defended by a lawyer of their own choice. The right is granted. The issue arises as to whether arrested persons have the right to be informed of their right of access to counsel and as to the timing of when arrested persons are allowed access to and consultation with counsel.

1.15 The Law Society proposes that the right to counsel be incorporated as an integral part of the Criminal Procedure Code and detailed provisions marking the extent of those rights (which stem from Article 9(3)) be set out in the CPC.

1.16 Of particular importance is the right to be informed of the right to counsel.

1.17 As such, the Law Society recommends that

(i) The accused should be informed of his right to consult a lawyer upon arrest. Arresting officers should verbally inform the accused and/or show the accused this information in writing, so that the accused can then decide whether to exercise or waive this right.

(ii) Measures must be taken to ensure that the accused understands the right to counsel, especially if he subsequently decides to waive it.

(iii) Once an accused person has indicated his desire to exercise the constitutional right to counsel, he should be given up to 2 hours to contact a lawyer by telephone during office hours or, if it is after office hours up till 10.00 am the next day to contact counsel (i.e. 2 hours after regular office hours begin).

(iv) The accused should be afforded the opportunity of consulting with counsel over the telephone or in person before the investigative authorities start their interview with the accused.

(v) The right to counsel be extended to persons who voluntarily assist in police investigations, i.e. they should be informed of their right to counsel and be allowed to consult a legal practitioner prior to the recording of statements from them, should they choose to avail themselves of such consultation.

## (B) RECORDING AND ADMISSIBILITY OF STATEMENTS

1.18 Our response on the area of recording and admissibility of statements is found at Chapter 3 of this Report.

*Summary Recommendations:-*

1.19 Given the reliance placed by our Criminal Justice System on statements recorded from an accused/witness during the course of investigations, the manner, protocol and circumstances for the recording of such statements is critical in the administration of justice in Singapore.

1.20 The procedure for recording of statements by the police is set out in clause 26 (witness statements) and clause 27 (accused's statements) of the DCPCB. Admissibility of the said statements is set out in clause 216 (accused's statement) and under clause 217 (admissibility of witness statement). Other consequential sections touching on admissibility which have been considered are clauses 216, 217, 220, 224 and 239.

1.21 The Law Society recommends that:

(i) a witness being examined by the police be informed under clause 26(2) of his vested right that he need not say anything that might expose him to a criminal charge, penalty or forfeiture;

(ii) only a police officer of at least the rank of a sergeant be allowed to record a cautioned/notice statement under clause 27;

(iii) that provisions be put in place to regulate the manner of recording statements from witnesses (clause 26) and accused persons (clause 27) covering for e.g. the following areas:-

(a) The detention, treatment (including medical treatment) and questioning of above persons by police officers and that of maintenance of custody records (i.e. lock up diary and station diary);

(b) The length and conditions of detention, conditions of the cell, access to toilets, rest and meals.

(c) Interviews with vulnerable persons e.g. juveniles, mentally disordered, mentally handicapped persons must be regulated by a protocol to cater for the special needs and vulnerability of the persons interviewed.

(d) Interviews with suspects to be tape recorded and provisions put in place regulating such interviews.

(iv) the definition of "investigation officer" be set and made clear;

(v) only police officers who are at least the rank of sergeant be empowered to record Cautioned Statements under clause 27;

(vi) the caution administered under clause 27 should also include the right to silence and adopt more neutral words;

(vii) audio or video recording be made compulsory for the taking of cautioned statements relating to more serious offences;

(viii) only Magistrates be empowered to take statements in capital offence cases (this was the position in Singapore prior to the abolition of the Judges' Rules in 1976 to provide a higher safeguard) as there is only one judge now sitting to try capital cases instead of two previously or a jury prior to that;

(ix) a provision be enacted (as it is absent in the DCPCB) for a statement to be made by an accused containing material implicating a co-accused to be given to the co-accused and vice-versa to enable the said person to respond to the allegations contained against him contemporaneously as a co-accused, in a joint trial can be convicted on such evidence when introduced under section 30 of the Evidence Act, and vice-versa if such a statement is made by a co-accused against an accused;

(x) all statements made by the accused whether amounting 'to a confession or not' are subject to the voluntariness test, as provided for under section 122(5) of the CPC and the Proviso thereto;

(xi) all statements made by co-accused which implicate the accused be subject to the voluntariness test and that proof of involuntariness goes to admissibility and not just weight;

(xii) the Explanatory Note at clause 216 (admissibility of accused's statements) be excluded from the proposed section as it encourages or increases the risk of investigation interviews producing unreliable evidence;

(xiii) the voluntariness test applied to witness statements by the court in its judicial discretion, for the sake of certainty and fairness, be given statutory force;

(xiv) clause 220 to make clear what errors may not be consequential to the admissibility of the statement and what errors will invariably or automatically render a statement inadmissible. This is the only way in which the conditions set out in clauses 26 and 27 are not proved superfluous;

(xv) the right to object to a conditioned statement should not be removed by clause 224, and that clause 224 incorporates a time for service (for example, 7 clear days before the hearing) of conditioned statements and for objections to be made before the hearing;

(xvi) clause 230 be made subject to "all rules of law governing the admissibility and/or inadmissibility of confessions including but not limited to the rules relating to voluntariness"; and

(xvii) clause 239 illustration (d) be removed from the DCPCB and that if an accused denies he made the statement there should be a *voir dire*.

## (C) DISCOVERY IN CRIMINAL TRIALS

1.22 Our response on the area of discovery in criminal trials is found at Chapter 4 of this Report.

*Summary Recommendations:-*

1.23 Disclosure is one of the most important issues in the criminal justice system and the availability of proper and fair disclosure is a vital component of a fair criminal system. Fairness requires that full disclosure should be made of all materials held by the Prosecution that weakens its case or strengthens that of the Defence.

1.24 The Law Society advocates that that the current procedural deficiencies for criminal discovery have a substantial and substantive negative effect on the Defence and the patent fairness of the trial. The regime for disclosure must be completely balanced and fair as:-

(i) it is an accused's constitutional right to a fair trial and to make a full answer in the case of the Defence;

(ii) to resolve non contentious and time consuming issues well in advance, for more efficient use of court time and by avoidance of unnecessary proceedings; and

(iii) for encouraging resolution of cases, including entering of pleas of guilt on an informed basis at an early stage.

1.25 The Law Society recommends that

(i) in the District Court witness statements be served on the Defence as in the High Court or, at the very least, in complex or serious cases in the District Court;

(ii) whilst under clause 168(e) ( Subordinate Courts) and clause 179(e) (High Court) the Case for the Prosecution may contain only part of the statement of the accused (presumably redacted, as is the practice, to exclude prejudicial or inadmissible evidence and for no other reason) the Prosecution must furnish the full statement(s) made by the accused separately at the same time to the Defence and not as part of a court record to enable the accused to be fully informed so as to enable him to file and serve his Case for the Defence:

(iii) where prosecution witness statements are disclosed to the Defence in the Subordinate Courts, the requirement under clause 168 for the Prosecution to serve a summary of the facts be dispensed with following the procedure set out in clause 179 ( High court trials);

(iv) the Prosecution discloses to the Defence the accused's investigation statement where it is made under clause 26(1) irrespective of whether the Prosecution intends to use it at the trial together with his Notice statement made under clause 27(1);

(v) clause 171(1)( Subordinate Court) and clause 182(1)( High Court) relating to subsequent disclosure *of part(s)* of the accused's statement(s) be removed;

(vi) the Prosecution discloses to the Defence what is commonly known as 'unused material' before the case for the Prosecution is filed and served. In this regard clause 174(1) and clause 185(1) provisions negating any duty on the Prosecution to discover 'material' that….' it does not intend to use' be deleted and a duty cast on the Prosecution to disclose such material to the Defence when requested;

(vii) the Prosecution have a duty of continual disclosure in respect of physical and documentary exhibits which come into its custody, care or control after the case for the Defence is filed;

(viii) provision be made for visual inspection of physical case exhibits which cannot be copied or duplicated and copies be permitted to be made by the Defence of such other voluminous relevant documentary exhibits after inspection as may be required of the Defence;

(ix) a copy of such material in the possession of the Prosecution that is adverse to the credit or credibility of the accused person be furnished to the Defence; and

(x) clause 174(2) prohibiting certain communications to the accused or defence counsel contain a protective clarification where the Defence intends to elicit evidence on the matter from a potential defence witness if it becomes an issue in the trial.

(xi) clause 24 should not remove the general power currently vested in section 58 of the CPC to order production of documents for any investigation, trial or other proceedings.

## (D) SENTENCING

1.26 Our response on the area of sentencing in the DCPCB is found at Chapter 5 of this Report.

*Summary Recommendations:-*

1.27 "Life Imprisonment" (clause 2)

It should be for the trial judge to decide whether a sentence to "life imprisonment" should be for the duration of the offender's natural life or for such other fixed term after taking into account all the circumstances of the offence including the age of the offender and the gravity of the offence. Such a discretion would minimize inequality in sentencing produced by an inflexible definition of life imprisonment which leaves no room to consider relevant factors such as different degrees of culpability and the age of the offender.

1.28 Compounding offences (clauses 199 – 201)

The proposed changes will effectively remove the role of the Court as the final arbiter or decision maker as to whether an offence is compoundable. The proposed changes will grant such discretion to the Public Prosecutor who will also be empowered to set such terms and conditions as he thinks fit.

The Law Society is of the view that the power and discretion should remain with the Court. The Court will make its decision based on all facts and submissions by the Defence and the Prosecution.

In addition, the Law Society proposes that additional Penal Code offences (e.g. Sections 379 and 509) and any offence punishable with a fine only should also be compoundable (e.g. Miscellaneous Offences).

1.29 Caning (clauses 282, 286)

There should be no additional sentence of imprisonment in lieu of caning even if the Court could have meted out more strokes than the specified limit for the relevant offences. The general principle is that any punishment meted out should not exceed the maximum prescribed by law for the offence. Similarly the sentencing jurisdiction of the court should not be exceeded on account of the court being unable to impose caning beyond the specified limit.

The Law Society is of the view that where a person is found unsuitable on medical grounds to be caned, there is no necessity to impose an additional sentence. The circumstances in which a person may be found to be unsuitable are beyond his control and this should not result in longer custodial terms.

The Law Society recommends that clauses 282 and 286 are not necessary and should not be enacted.

1.30 Prosecution costs and costs against the prosecution (clause 291)

Given the growing complexity of cases brought before the District Courts and the proposed increase in the jurisdictions of the Magistrate and District courts there should not be a cap of $10,000 in respect of legal costs, charges and expenses

incurred by an accused who has been acquitted.

The requirement that the accused has to prove to the satisfaction of the Court that the prosecution is frivolous and vexatious sets too high a burden on the accused. An appropriate test is that where the Prosecution is unable to prove a prima facie case against the accused or where the Court is of the view that the Prosecution was unreasonable in all the circumstances of the case.

The power to order prosecution costs should be restricted to cases where the defence was clearly frivolous and vexatious, and / or unreasonable so that there is no disparity in the award of costs for the Prosecution or the Defence in a conviction or acquittal respectively.

1.31 Corrective Training (CT)/Preventive Detention (PD) (Clause 261)

This is a punitive sentencing option and should be used sparingly. The Law Society proposes that the Court should have the discretion to depart from the prescribed ranges. In the case of CT, the qualifying age should be raised to 21 years (i.e. beyond the age of reformative training).

In all cases, the Law Society would recommend strict criteria to be set out before such a sentence of CT/PD is imposed.

1.32 Reformative Training (RT) (Clause 262)

The Law Society is of the view that the Court should be given a discretion as warranted by the nature of the offence and the circumstances of the offender and should not be restricted to sentencing an offender to between 18 and 36 months of RT in every case.

1.33 Imprisonment in default of fines/penalties (Clause 276)

The Law Society recommends that these sentences be backdated to the date of arrest and the default sentence should also be subject to one-third remission.

1.34 Presidential pardon, remission and commuting of sentences (clause 290)

There is no provision to allow the offender (or counsel) to review or respond to the opinion of the Judge. The offender or his counsel should be allowed to give his views to the President. Clause 290(1) does not require the offender to accept the conditions set by the President in the exercise of this power. The Law Society recommends that the position as set out in the current section 237 of the CPC that the offender is required to accept the conditions imposed be retained.

Section 238 of the CPC which grants power to the President to commute offences has been omitted in the DCPCB, despite the retention of the title to Division 3 above Clause 290 (“Suspensions, remissions and commutations of sentences”). Section 238 of the CPC should not be deleted as this gives the President specific powers of commutation in a deserving case.

1.35 Death penalty (clauses 271, 272)

The Law Society recommends that a provision to empower the sentencing court to deviate from the mandatory death penalty and impose life imprisonment in any other circumstance deemed appropriate and necessary by the court be

added/included. This would give an offender who is found guilty of a capital offence the opportunity to mitigate the circumstances of the offence and the chance to avoid the death penalty as an automatic consequence.

## (E) LEGAL PROFESSIONAL PRIVILEGE: SEARCH & SEIZURE

1.36 Our response on the area of discovery in criminal trials is found at Chapter 6 of this Report.

*Summary Recommendations:-*

1.37 The issue whether legal professional privilege ("LPP") entitles a party to criminal investigations or proceedings to resist the disclosure of privileged communications in the face of coercive information-gathering powers of the investigatory authorities is unclear in Singapore. The CPC, including the proposed amendments, is silent on this.

1.38 There is a need to establish a process for an independent adjudication by the court of the legitimacy of the claim to LPP in situations where doubt arises as to whether an accused person's claim that the documents are indeed privilege.

1.39 To streamline the position in Singapore and to bring it in line with the common law, the Law Society recommends

(i) The consolidation of the common law position on LPP in relation to search and seizures, and the various statutory provisions that exempt privileged information from disclosure, within the CPC.

(ii) Establishing a procedure within the CPC to resolve claims of privilege during search and seizures.

## (F) MISCELLANEOUS

1.40 Our response to sections in the DCPCB not dealt with in the aforementioned parts of the report is found at Chapter 7 of this report.

*Summary Recommendations:-*

1.41 Consent of Public Prosecutor (clause 14)

The arrest, charging or producing of an accused person in court should only commence after the Public Prosecutor's written consent has been obtained.

The written consent should set out the particular offence.

The failure to obtain the Public Prosecutor's written consent cannot be remedied simply on account of the Prosecution being conducted by the Solicitor General, Deputy Public Prosecutor and Assistant Public Prosecutor.

1.42 Notice to attend court (clause 114)

There are no justifiable grounds for the process prescribed by clause 114, especially as it includes non-seizable offences. The current provisions requiring a complaint to be filed before a magistrate would suffice and has thus far satisfactorily served the purpose.

1.43 Calling defence at close of Prosecution's case (clause 189(i))

The defence of the accused should not be called without giving the court the discretion to carry out a minimum evaluation test at the close of the Prosecution case. Section 180(g) of the CPC should be retained.

1.44 Summary rejection of appeal (clause 318)

There is no justification for summary dismissal of appeal based on the grounds of appeal pleaded in the Petition of appeal, without hearing the appellant. This is especially so in criminal cases where the life and liberty of an individual is at stake.

1.45 Arrest of respondent (clause 323(1))

There is no reason for the extension of the powers to arrest a Respondent and the current provisions in section 255 of the CPC are sufficient.

Chapter

2

## 2. THE RIGHT TO BE INFORMED OF THE RIGHT TO COUNSEL

### A. THE PREVAILING LAW IN SINGAPORE

### B. THE LAW IN OTHER MAJOR DEVELOPED COMMON LAW JURISDICTIONS

### C. OBSERVATIONS AND PROPOSALS ON THE RIGHT TO BE INFORMED OF THE RIGHT TO COUNSEL

*i. The right to be informed of the right to counsel*

*ii. Waiver of the right to counsel*

*iii. Access to counsel*

*a. Time to contact counsel by the telephone after arrest*
*b. Access to counsel over the telephone*
*c. Access to counsel in person*
*d. Private time with counsel*
*e. Interviews to commence after access to counsel is given or exceeded*

### D RECOMMENDATIONS

### E CONCLUSION

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## A. THE PREVAILING LAW IN SINGAPORE

2.1. The right to counsel is entrenched in Article 9(3) of the Singapore Constitution: -

"Where a person is arrested, he shall be **informed** as soon as may be of the grounds of his arrest **and** shall be allowed **to consult and be defended** by a legal practitioner of his choice."

2.2. No other legislation in Singapore deals with the issue of the right to counsel of arrested persons and the interpretation of Article 9(3) has been left to the courts. There is no issue as to arrested persons being allowed to consult and be defended by a lawyer of their own choice. The right is granted. The issue arises as to whether arrested persons have the right to be informed of their right of access to counsel and as to the timing of when arrested persons are allowed access to and consultation with counsel.

2.3. The High Court has indicated that in the absence of express wording in Article 9(3), it is for the legislature to determine whether an accused has the right to be informed of the right to counsel.[1]. The Court of Appeal has held that an accused must be allowed to exercise his right to counsel within a reasonable time, but has not specified factors to determine the same[2]. It is therefore timely to review the adequacy of legislative provisions in relation to an accused's right to counsel.

2.4. The absence of the right to be informed of one's right to counsel and immediate access to counsel is undesirable and an area of concern. The Australian Law Reform Commission has stated with conviction and clarity:

> "*It should not be necessary to argue that if a person has rights he should be made aware of them. Whether, once informed, he has the will, the wit or the wisdom to take advantage of them is probably something no criminal justice system can completely ensure. Perhaps it should not try. But no criminal justice system deserves respect if its wheels are turned by ignorance. Any system which pays lip-service to the existence of rights yet does nothing to ensure that they are known and understood – and indeed which may depend on their not being understood – is a system that discriminates against the weak, the unintelligent and the uncomprehending in favour of the strong-willed, the smart and the linguistically competent*."

2.5. The Law Society shares the above view.

2.6. Further, there are no sound reasons for delaying any arrested person immediate access to counsel, particularly when he would otherwise be facing alone the whole weight of the investigative and prosecutorial agencies over a period which may extend to 48 hours and beyond. The suggestion that allowing an arrested person access to counsel would impede investigations has no actual empirical

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[1] Later in ***Rajeevan Edakalavan v. PP*** [1998] 1 SLR 815 the High Court held that there is no constitutional right in Singapore to be informed of the right to counsel. The Court added that 'to accept the argument that there is a right to be so informed… will amount to this court acting as the legislature itself, in defiance of the clear wording of art. 9(3).'

[2] In ***Lee Mau Seng v Minister for Home Affairs, Singapore*** [1971] 2 MLJ 137 and ***Jasbir Singh v PP*** [1994] 2 SLR 18 the Court held that the right to counsel is not immediate, but must be granted to a suspect within a reasonable period from the time of his arrest. However, the courts did not specify what factors are relevant to determine what is to be considered a reasonable amount of time. It appears that the burden of proof lies with the prosecution to prove in each case that the delaying of the right to access to counsel was justifiable. In ***PP v Leong Siew Chor*** **[2006] 3 SLR 290** the High Court held that 'it is a question of balancing an accused person's rights against the public interest that crime be effectively investigated'.

basis – in every local case on this issue, the Courts have simply assumed this to be so on a purely theoretical basis. To conclude that access to counsel *per se* would impede police investigations or detract from the public interest is no more than a baseless indictment of the integrity of members of the Singapore bar.

2.7. Notably, the right to counsel is enshrined in the very same Article that provides that arrested persons have the right to be informed of the grounds of their arrest "*as soon as may be*". It is therefore illogical for an arrested person's corresponding right to access to counsel to arise only after a reasonable period of time. The Law Society does recognise that there are instances in which immediate access to counsel can be reasonably denied on certain exceptional grounds relating to public interest, but such cases should be the exception, rather than the norm[3]. Public interest alone cannot and should not justify delaying access to counsel in each and every case.

2.8. In addition, by virtue of Section 147(3) of the Evidence Act (Cap 97) statements given by an accused person at a police station are admissible as evidence in court if he contradicts that evidence in court and his police statement becomes his evidence subject to such weight as is given to it in preference to his sworn evidence in court. Further by virtue of Section 30 of the Evidence Act as interpreted in ***Chin Seow Noi v PP***[4] the out-of-court statement of a co-accused may be made the sole basis of a conviction of an accused in the absence of any other evidence implicating the accused. The playing field clearly needs to be levelled, especially when the arrested person's life or liberty is at stake.

2.9. There is no proposal in the DCPCB that addresses the right to be informed of the right to counsel. The various major developed common law jurisdictions have developed and now enshrine the right for an accused to be informed and have immediate access to counsel by way of statutory intervention. The Law Society believes that the time is right for a reconsideration of the judicial interpretation of the Right to Counsel, especially given developments in these other jurisdictions, which the Courts have not had the opportunity to consider in the few cases where this issue has been dealt with.

2.10. Article 9(3) must be read as a whole and purposively interpreted. Parliament clearly intended for the police to not only inform an arrested person of the ground of his arrest as soon as possible, but also of his concomitant right to counsel thereby, so as to allow him access to counsel expeditiously. The current bifurcated interpretation of the relevant timings in Article 9(3) prejudices arrested persons as they are bereft of legal advice before they commit themselves to various positions in police investigations, whether in recorded statements or otherwise.

## B. THE LAW IN OTHER MAJOR DEVELOPED COMMON LAW JURISDICTIONS

2.11. New Zealand, the United States, Canada, the United Kingdom and Australia all recognise the right to be informed of the right to counsel after arrest and upon being answerable to a charge. The extracts of the relevant laws are set out hereunder.

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[3] UK provisions; see Sections 8 and 8A of the *Police and Criminal Evidence Act*, 1984.

[4] *Chin Seow Noi v PP* [1994] 1 SLR 135

## (1) NEW ZEALAND

**Bill of Rights Act 1990**

**23** Rights of persons arrested or detained

(1) Everyone who is arrested or who is detained under any enactment—

(b) Shall have the right to consult and instruct a lawyer **without delay and to be informed of that right**

…

## (2) UNITED STATES OF AMERICA

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

…

## (3) CANADA

Constitution Act, 1982
Schedule B Constitution Act, 1982
Part I Canadian Charter of Rights and Freedoms

**10.** Arrest or detention
Everyone has the right on arrest or detention
(b) to retain and instruct counsel without delay **and to be informed of that right**

…

## (4) UNITED KINGDOM

Police and Criminal Evidence Act 1984 (Ch 60)

58. Access to legal advice.

(1) A person arrested and held in custody in a police station or other premises shall be entitled**, if he so requests, to consult a solicitor privately at any time.**

(2) Subject to subsection (3) below, a request under subsection (1) above and the time at which it was made shall be recorded in the custody record.

(3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an

offence.

(4) If **a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section.**

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.

(6) Delay in compliance with a request is only permitted—
(a) in the case of a person who is in police detention for a serious arrestable offence; and
(b) if an officer of at least the rank of superintendent authorises it.

(7) An officer may give an authorisation under subsection (6) above orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

(8) [Subject to sub-section (8A) below]
**An officer may only authorise delay where** he has reasonable grounds for believing that the exercise of the right conferred by subsection (1) above at the time when the person detained desires to exercise it—
**(a)** **will lead to interference with or harm to evidence** connected with a serious arrestable offence or interference with or physical injury to other persons; or
**(b)** **will lead to the alerting of other persons** suspected of having committed such an offence but not yet arrested for it; or
**(c)** **will hinder the recovery of any property** obtained as a result of such an offence.

(8A) **An officer may also authorise delay** where the serious arrestable offence is a drug trafficking offence [or an offence to which Part VI of the Criminal Justice Act 1988 applies] and the officer has reasonable grounds for believing—

**(a)** where the offence is a drug trafficking offence, that the detained person has benefited from drug trafficking and that the recovery of the value of that person's proceeds of drug trafficking will be hindered by the exercise of the right conferred by subsection (1) above; and

**(b)** where the offence is one to which Part VI of the Criminal Justice Act 1988 applies, that the detained person has benefited from the offence and that the recovery of the value of the property obtained by that person from or in connection with the offence or of the pecuniary advantage derived by him from or in connection with it will be hindered by the exercise of the right conferred by subsection (1) above.

(9) If delay is authorised—
(a) the detained person shall be told the reasons for it; and
(b) the reason shall be noted on his custody record.

(10) The duties imposed by subsection (9) above shall be performed as soon as is practicable.

(11) There may be no further delay in permitting the exercise of the right conferred by subsection (1) above once the reason for authorising delay ceases to subsist.

(12) Nothing in this section applies to a person arrested or detained under the terrorism provisions

…

## (5) AUSTRALIA

Governed by the Common Law, State Legislation and Police Operational Manuals. We set out here the relevant provisions of Australia's most populous state, New South Wales.

Law Enforcement (Powers and Responsibilities) Act 2002 (as at 01.01.09)

**Section 123- Right to communicate with friend, relative, guardian or independent person and legal practitioner**

(1) Before any investigative procedure in which a detained person is to participate starts, **the custody manager for the person must inform the person orally and in writing** that he or she may:

(b) communicate, or attempt to communicate, with a legal practitioner of the person's choice and ask that legal practitioner to do either or both of the following:

(i) attend at the place where the person is being detained to enable the person to consult with the legal practitioner,

(ii) be present during any such investigative procedure.

(2) If the person wishes to make any communication referred to in subsection (1) the custody manager must, as soon as practicable:

(a) give the person reasonable facilities to enable the person to do so, and

(b) allow the person to do so in circumstances in which, so far as is practicable, **the communication will not be overheard.**

**(3) The custody manager must defer for a reasonable period any investigative procedure** in which the person is to participate:

(a) to allow the person to make, or attempt to make, a communication referred to in subsection (1), and

(b) if the person has asked any person so communicated with to attend at the place where the person is being detained:

(i) to allow the person communicated with to arrive at that place, and

(ii) to allow the person to consult with the person communicated with at that place.

(5) If the person has asked a legal practitioner communicated with to attend at the place where the person is being detained, the custody manager must:

(a) allow the person to consult with the legal practitioner in private and must provide reasonable facilities for that consultation, and

(b) if the person has so requested, allow the legal practitioner to be present during any such investigative procedure and to give advice to the person.

(6) Anything said by the legal practitioner during any such investigative procedure is to be recorded and form part of the formal record of the investigation.

…

(9) The duties of a custody manager under this section owed to a detained person who is not an Australian citizen or a permanent Australian resident are in addition to the duties of the custody manager owed to the person under section 124.

(10) After being informed orally and in writing of his or her rights under this section, the person is to be requested to sign an acknowledgment that he or she has been so informed

## C. OBSERVATIONS AND PROPOSALS ON THE RIGHT TO BE INFORMED OF THE RIGHT TO COUNSEL

2.12. We propose that the right to counsel be incorporated as an integral part of the Criminal Procedure Code and detailed provisions marking the extent of those rights (which stem from Article 9(3)) be set out in the CPC.

### *i. The right to be informed of the right to counsel*

2.13. Of particular importance is the right to be informed of the right to counsel. It would be counterintuitive to have a right to counsel without also clearly stipulating when the accused is to be informed of his right to consult a lawyer, and how he can go about contacting a lawyer. In every single one of the foreign jurisdictions examined above, arrested persons have the right to be informed of their right to counsel.

2.14. Echoing the words of the Australian Law Reform Commission[5] set out above, the Royal Commission on Criminal Procedure in the United Kingdom[6] also stated that the right to consult a lawyer 'should not be dependent upon the suspect happening to be aware that he has the right.' Clearly, where many in society are quite ignorant of the fact that the law gives them a right against self-incrimination, Article 9(3) should be given an interpretation that gives individuals the full measure of their fundamental liberties: ***Ong Ah Chuan v PP*** [1980] 1 MLJ 64.

2.15. As such, **we propose that the accused should be informed of his right to consult a lawyer upon arrest.** Arresting officers should verbally inform the accused and/or show the accused this information in writing, so that the accused can then decide whether to exercise or waive this right.

### *ii. Waiver of the right to counsel*

[5] Australian Law Reform Commission, Criminal Investigation, 1975 Report 2 at [99]
[6] Cmnd 8092 (1981)

2.16. **We propose that measures must be taken to ensure that the accused understands the right to counsel, especially if he subsequently decides to waive it**. As astutely stated by the Court of Appeal in the recent case of ***Tan Chor Jin v PP***[7]:

> "… *there will be accused persons who persistently refuse legal representation in good faith, only to discover, after all is said and done, that trials are complex proceedings in respect of which legal assistance is required*."

2.17. While the above statement was made in the context of the right to counsel at trial, we submit that the principles espoused are equally applicable to pre-trial proceedings. It is trite to say that the course of proceedings before trial may have a real impact on the accused's defence and how the case can subsequently proceed at trial.

2.18. Thus, it is equally important that the accused understands the import of waiving the right to counsel before police interrogations, before he can be said to have voluntarily waived this right. We propose that a standard form be prepared wherein all necessary information on the right to counsel be set out (this form could also serve the purpose of informing arrested persons of their right to counsel) and that arrested persons who wish to waive their right to counsel be made to sign an acknowledgement that they are making an informed decision to do so and have done so of their own accord. Such a practice would also avoid any potential allegations by arrested persons against the police that they had not waived their right to counsel or had done so only under duress or coercion.

### *iii. Access to counsel*

#### *(a) Time given to contact counsel by the telephone after arrest*

2.19. Under our proposal, **once an accused person has indicated his desire to exercise the constitutional right to counsel, he should be given up to 2 hours to contact a lawyer by telephone during office hours**[8]. Reasonable assistance should also be given by the police to facilitate contact with a lawyer.

2.20. In New Zealand, the duty to facilitate contact with a lawyer is triggered when an accused indicates the desire to consult a lawyer.[9] We believe the same should apply in Singapore. What is required of the police will depend on the individual circumstances of each case.

2.21. **As it is relatively more difficult to contact a lawyer after office hours, it is our proposal that the accused be given up to 4 hours to contact a lawyer by telephone, if it is after office hours**.

2.22. Even then, it may not be reasonable to expect a lawyer to be contactable after office hours, especially where it is late at night. **In the alternative, we propose that the accused be given till 10.00 am the next day to contact counsel (i.e. 2 hours after regular office hours begin)**.

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[7] [2008] SGCA 32 at [51]

[8] In the New South Wales Law Reform Commission Report 66 of 1990, the NSW LRC proposed that "the person must be given the opportunity to meaningfully exercise [the right to communicate with a lawyer]".

[9] *R v. Mallinson* [1993] 1 NZLR 528; (1992) 8 CRNZ 707 (CA)

2.23. In the event that an accused is arrested after office hours, the time between the arrest and 10.00 am the following morning need not necessarily be wasted. To begin with, the police can carry on with all other aspects of investigation (e.g. forensic tests).

2.24. Understandably, not all accused persons will be prepared to do so, particularly if they are involved in straightforward cases like being caught shoplifting red-handed, or if they do not intend to engage counsel in any event. We foresee that the vast majority of cases will fall within this category and therefore our proposal would not be applicable or relevant to these cases. Nonetheless, accused persons arrested for more complex or serious crimes ought to be properly availed of access to counsel, otherwise the right would be rendered redundant if the arrest is effected after office hours when access to counsel is severely limited.

Reasonable diligence

2.25. To ensure that police interviews are not unduly delayed, **we propose that if the accused is unable to get his preferred lawyer, he shall exercise reasonable diligence in getting another one, failing which he should only be afforded an extension of time in exceptional circumstances**. We do not seek to impede police investigations unnecessarily and a fair compromise will be reached by placing the above-mentioned time limits of 2 hours or until 10.00 am the following day (for arrests outside of office hours).

2.26. Lamer J in *R v. Smith*[10] explained that reasonable diligence was a reasonable limit on the duties of the police:

> "This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the [Canadian] *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks."

Custody record form

2.27. In the United Kingdom, the police use a custody record form[11]. This form records, *inter alia*, the time taken in waiting by the police. **We suggest that in Singapore the practice of using such a custody record form be put in place** on top of any existing practices. At the very least, the times spent in waiting should be clearly recorded and the accused should be given a copy upon leaving police custody.

2.28. The purpose of the custody record form is to ensure that the time given to the accused to contact counsel and to wait for counsel to arrive is strictly complied with and to ensure that the accused may not later complain that he or she has been deprived of his or her full right to counsel.

[10] (1989), 50 C.C.C (3d) 308 (Canada) at p. 314
[11] UK Code of Practice C, 2

### *(b) Access to counsel over the telephone*

2.29. **We propose that if counsel is unable to rush down to the police station within 2 hours or if counsel has no time to meet the accused in person or whatever the case may be that counsel is unable to meet the accused in person, there should at minimum be a right to consult counsel on the telephone privately**. In this way, it ensures that the accused would be adequately aware of his legal rights as an accused person.

2.30. As with consultation with counsel in person, it is proposed that consultation with counsel on the telephone be allowed for a maximum of 2 hours.

### *(c) Access to counsel in person*

2.31. Under certain circumstances, **the accused may be more comfortable speaking to counsel in person and thus should be allowed to do so**. Again, to ensure that police interviews are not unduly delayed, it is proposed that once the accused successfully contacts a lawyer who is willing to meet him at the police station counsel has up to about 2 hours to show up[12].

2.32. With respect to the time allowed with counsel in person, we propose that it be limited to 2 hours, as with access to counsel over the telephone.

### *(d) Private time with counsel*

2.33. **It is our proposal that the accused be given private time to consult with his lawyers.** That the right to counsel entails a right to consult counsel in private is recognized in many jurisdictions such as New Zealand[13], the United States of America[14], the United Kingdom[15], and the European Union[16], amongst others.

2.34. The right to consult counsel in private also reinforces the notion that correspondence between counsel and the accused person should be accorded lawyer-client privilege.

2.35. As such, it **proposed that the accused consultation with his lawyer be in private, whether it is over the telephone or in person**. **Even if the police wish to have a visual of the meeting between the accused and his lawyer, it should never be within the earshot of the police**[17].

### *(e) Interviews to commence after access to counsel is given or exceeded*

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[12] This was also proposed by the New South Wales Law Reform Commission in Report 66 of 1990, Recommendation 5.3.4.
[13] *R v Narayan,* [1992] 3 NZLR 145 (CA)
[14] *Miranda v Arizona*, 384 U.S. 436 (1966) (Supreme Court of the United States)
[15] UK Code of Practice C, 6.1
[16] European Convention on Human Rights, Art. 6 s.3(b), as interpreted in *Can v. Austria*.
[17] The European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights states that interviews with legal advisers may be 'within sight but not within hearing' of a representative of the authorities.

2.36. Unless the time limits as stipulated above are exceeded, we propose that the investigative authorities should only start interviewing the accused *after* the accused has consulted with counsel (whether in person or on the telephone). This is in line with the approaches taken in leading common law jurisdictions where the police have a duty to refrain from attempting to elicit evidence until the person has had a reasonable opportunity to contact a lawyer.[18] In exceptional cases a senior officer can authorise the interview without counsel in the instances which are set out in the UK under section 58 of the Police & Criminal Evidence Act 1984 (Cap. 60) referred to a paragraph 4(4) supra.

2.37. Unless an arrest is made, members of the public should know that by law, they are under no compulsion to follow police officers back to the police station for interviews if they wish to consult a lawyer first. They can ask the police officers for time to seek legal advice, and the police can always issue a letter requiring witnesses to attend police stations at a later date if they believe these witnesses can provide information relating to the offence. There is thus increased fairness between the parties involved.

### (f) Persons who voluntarily assist in police investigations

2.38. From experience, persons who are asked by the Police to 'assist' in investigations and who thereafter voluntarily do so are often regarded as suspects and subsequently, accused persons. As such, we recommend that the right to counsel be extended to persons who voluntarily assist in police investigations, i.e. they should be informed of their right to counsel and be allowed to consult a legal practitioner prior to the recording of statements from them, should they choose to avail themselves of such consultation.

## D. RECOMMENDATIONS

2.39. In light of the foregoing, we believe that amendments to the Criminal Procedure Code to ensure the protection and proper administration of the constitutional right to counsel are overdue. The Law Society therefore urges that provisions along the lines of the annexed Schedule I be added to the new Criminal Procedure Code to ensure that the fundamental liberties of arrested persons are given proper protection.

SCHEDULE I

(To be inserted in Part IV – Division 2 of the Criminal Procedure Code)

**Right to counsel**
**Section 27A**

(1) When a person is arrested and informed of the grounds of his arrest, he shall thereafter be informed, by the investigating officer, of his right to be allowed to consult and be defended by a legal practitioner of his choice.

[18] *R v. Taylor* [1993] 1 NZLR 647; (1992) 9 CRNZ 481 (New Zealand CA), *R v. Feeney* [1997] 2 S.C.R. (Supreme Court of Canada), *Miranda v. Arizona* 384 U.S. 436 (1966) (Supreme Court of the United States); UK Code of Practice C, 6.6 subject to certain restrictions

(2) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a legal practitioner after his arrest privately in person or over the telephone up to a period of 2 hours.

(3) The right explained by the investigating officer pursuant to subsection (1) or the request under subsection (2) above and the dates and times at which the explanation and request were made shall be recorded in a custody record form, save where the request is made in court and by a person in custody.

(4) Except to the extent that delay is permitted by this section, a person exercising the right in subsection (2) above shall be allowed to consult a legal practitioner within two hours of his request where the request is made between 8.00am and 5.00pm on the day of his arrest and by 10.00am the following day where the request is made after 5.00pm on the day of his arrest.

(5) No examination of a person under Section 26 or Section 27 may proceed until a request under subsection (2) has been met, subject to subsections (7) to (9) and save where the right under subsection (2) has been waived pursuant to subsection (6).

(6) An arrested person may waive his right to consult counsel before being examined under Section 26 or Section 27 and such waiver shall be reduced to writing and signed by the arrested person. It shall also be recorded in a custody record form.

(7) A delay in compliance with a request is only permitted if an officer of at least the rank of inspector authorises it orally or in writing, but if he gives it orally, he shall confirm it in writing as soon as is practicable.

(8) An officer of at least the rank of inspector may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by subsection (2) above at the time when the person detained desires to exercise it—

(a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
(b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
(c) will hinder the recovery of any property obtained as a result of such an offence.

(9) If delay is authorised—
(a) the arrested person shall be told the reasons for it; and
(b) the reason shall be noted on a custody record form.

(10) The duties imposed by subsection (9) above shall be performed as soon as is practicable.

(11) There may be no further delay in permitting the exercise of the right conferred by subsection (2) above once the reason for authorising delay ceases to subsist.

(12) Nothing in this section shall apply to a person arrested under the terrorism provisions or any law which provides for preventive detention.

## E. CONCLUSION

2.39 Singapore has not kept abreast with the major developed common law jurisdictions in our development of the right to counsel in encapsulating in it, the right to be informed of the right to counsel. It is submitted that the protection of this fundamental right should be done through legislation rather than through the common law, or to revisit the issue through the Courts. Any reservations that recognising such a right will interfere with police investigations will be laid to rest by the **delay** mechanism in granting such a right as proposed and recommended following the law in the other advanced Commonwealth countries.

Chapter

3

## 3. RECORDING AND ADMISSIBILITY OF STATEMENTS

## A. INTRODUCTION

## B. CLAUSE 26: INVESTIGATION STATEMENT/CLAUSE 27: CAUTIONED STATEMENT

## C. CLAUSE 216 : ADMISSION OF ACCUSED'S STATEMENTS

## D. CLAUSE 217: ADMISSION OF WITNESS STATEMENTS

## E. CLAUSE 220: ADMISSION/NON COMPLIANCE OF CLAUSES 26 AND 27

## F. CLAUSE 224: CONDITIONED STATEMENTS

## G. CLAUSE 230: ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

## H. CLAUSE 239: PROCEDURE DETERMINING ADMISSIBILITY OF STATEMENTS

## I. SUMMARY OF RECOMMENDATIONS

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## A. INTRODUCTION

3.1. The recording of statements by the police is set out in clause 26 (witness statements) and clause 27 (accused's statements) of the DCPCB. The admissibility of the said statements is set out in clause 216 (accused's statement) and under clause 217 (admissibility of witness statement). The other consequential sections touching on admissibility and considered here are clauses 216, 217, 220, 224 and 239.

3.2. The manner and timing in which statements are recorded, to ensure that they are made voluntarily and comply with the law and therefore become admissible is of great importance.

3.3. The position in the UK was set out in the Judges' Rules which contained procedural guidelines for the police since 1912. These Judges' Rules have been subject to revision and refinement throughout the century. Code C of the UK *Police and Criminal Evidence Act 1984* (PACE) replaced the Judges' Rules and currently represents the rules applicable to recording of statements.

3.4. PACE is being replaced now after review with appropriate and proportionate provisions where necessary to reflect the mores and fairness demanded of a current justice system

## B. CLAUSE 26: INVESTIGATION STATEMENT/CLAUSE 27: CAUTIONED STATEMENT

3.5. The manner, protocol and the circumstances of recording statements from an accused/witness is critical in the administration of justice in Singapore.

*Clause 26: Power to Examine Witnesses*

3.6. Clause 26 of DCPCB states that a "police officer" may examine orally any person who has knowledge of the case and he is bound to state what he knows. However clause 26(2) specifically states further that the person 'need not say anything that might expose him to a criminal charge, penalty or forfeiture'.Clause 26(3) then spells out the following conditions (a) to (e) that must be satisfied:

(a) The statement must be in writing;
(b) The statement must be read over to its maker;
(c) The statement must state the date and time during which the statement was made to the recording officer, and interpreted by the interpreter, if applicable;
(d) The statement, if the person making the statement does not understand English, must be interpreted to him in his own language or in a language he understands; and
(e) The statement must be signed by its maker.

*Observation of The Law Society:-*

3.7. Clause 26 does not incorporate the following conditions as safeguards, and /or require their enactment under subsidiary legislation, to ensure the integrity of the

process and to add credence to statements taken from witnesses who are potential accused:-

(i) The duty of the police officer to read out the conferred right under clause 26(2) to a potential accused i.e his right not to say anything that might incriminate him. A right without knowledge of its existence is a negation of that right. There must be equality in the interrogation process for the poor and uninformed person with the knowledgeable and the well-off.

(ii) A provision governing the constitutional right of above person to be informed of right to counsel at that stage of investigation and of legal advice (please see Chapter 2 above).

(iii) Provisions relating to the detention, treatment (including medical treatment) and questioning of above persons by police officers and that of maintenance of custody records (i.e. lock up diary and station diary).

(iv) Provisions governing or to be subsequently made by rules of the conditions of detention, conditions of the cell, access to toilets, rest and meals.

(v) Interviews with vulnerable persons i.e. juveniles, mentally disordered/ mentally handicapped persons must be regulated by a protocol to cater for the special needs and vulnerability of the persons interviewed.

(vi) Interviews with suspects must be tape recorded and provisions put in place regulating such interviews.

3.8. In the UK Codes of Practice (Code C PACE) and New South Wales (Codes of Practice) guidelines and statutory legislation are in place to regulate the police investigation process to ensure a transparent regime is in place which will result in public confidence in the process. These guidelines will also eliminate unnecessary challenge to the admissibility of statements and would save valuable court time.

*Recommendation of the Law Society:-*

3.9. The Law Society recommends that:

(i) a witness being examined by the police be informed under clause 26(2) of his vested right *'that he need not say anything that might expose him to a criminal charge, penalty or forfeiture'*,

(ii) only police officers who are at least of the rank of sergeant be allowed to record investigation statements under clause 26,

(iii) that provisions be put in place to regulate matters referred to in the above para. 3.7 (iii) to (vii).

*Clause 27: Cautioned Statements*

3.10. Clause 27 of the DCPCB states that if an accused is charged or informed by an "investigation officer" that he may be charged, the accused shall be cautioned in the following words:

*"Do you want to say anything about the charge that was just read to you? If you keep quiet now about any fact or matter in your defence and you reveal this fact or matter in your defence only at your trial, the judge may be less likely to believe you. This may have a bad effect on your case in court. Therefore it is better for you to mention such fact or matter now. If you wish to do so, what you say will be written down, read back to you for any mistakes to be corrected and then signed by you."*

3.11. Clause 27 also spells out the following conditions (a) to (e) that must be satisfied:

(a) The statement must be in writing;
(b) The statement must be read over to its maker;
(c) The statement must state the date and time during which the statement was made to the recording officer, and interpreted by the interpreter, if applicable;
(d) The statement, if the person making the statement does not understand English, must be interpreted to him in his own language or in a language he understands; and
(e) The statement must be signed by its maker.

3.12. Clause18 of the DCPCB defines "investigation officer" as "any police officer or class of police officers" to be appointed by the Commissioner of Police. This definition is unsatisfactory as it brings about uncertainty. The Consultation Paper does not shed any light on the reasons for such a definition or the vesting of power in the Commissioner of Police. It should be Parliament that should set out the status of this important officer as a person charged can be convicted solely on his statement. Under the current CPC, only police officers who are at least of the rank of sergeant may record cautioned statements. The Consultation Paper provides no explanation or justification for the departure from the current position.

3.13. The language used in the caution under clause 27, words such as *"it is better for you…. such fact or matter now"* are manifestly intimidating and could be construed by an accused as a threat (especially in the absence of counsel). Further, such language fails to communicate to the accused that he/she has a right to remain silent.

3.14. Code C of PACE on the other hand uses language (reproduced below) that appears more neutral and informative as to an accused's rights:

*"You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."*

3.15. As in the case with clause 26 statements, clause 27 does not envisage any audio or tape recording of cautioned statements. It was recognised in Code E of PACE, which regulates the audio recording of cautioned statements, that audio recording "shall be carried out openly to instill confidence in its reliability as an impartial and accurate record of the interview." Code E also provides that "[a] decision not to

audio record an interview for any reason may be the subject of comment in court. The authorizing officer should be prepared to justify that decision."

3.16. Section 118 of the Western Australian Criminal Investigation Act 2006 states that an admission by a juvenile in relation to an indictable offence and by an adult in relation to an indictable offence which cannot be dealt with summarily, is inadmissible unless an audiovisual recording of the admission is available or if the Prosecution can prove on the balance of probabilities that there is a reasonable excuse (as set out in section 118) why no audiovisual recording was taken.

3.17. In light of modern technology, the Law Society is of the view that there is no reason why Singapore ought not to increase the reliability of cautioned statements by requiring audio or video recording of the interview. Such recordings would not only protect the rights of the accused but could completely minimize challenges to admissibility of statements based on the issue of voluntariness, thereby saving the Court's time.

*Recommendation of The Law Society:-*

3.18. The Law Society recommends that:-

(i) the definition of "investigation officer" be set and made clear;

(ii) only police officers who are at least the rank of sergeant be empowered to record Cautioned Statements;

(iii) the recommendations in respect of clause 26 (please see above) be put in place to safeguard the recording of Cautioned Statements;

(iv) the Caution should also include the right to silence and adopt more neutral words as spelt out in PACE Code C referred to above;

(v) audio or video recording be made compulsory for the taking of cautioned statements relating to more serious offences;

(vi) only Magistrates be empowered to take statements in capital offence cases (this was the position in Singapore prior to the abolition of the Judges' Rules in 1976 to provide a higher safeguard) as there is only one judge now sitting to try capital cases instead of two previously or a jury prior to that;

(vii) that a provision be enacted (as it is absent in the DCPCB) for a statement made by an accused containing material implicating a co-accused to be given to the co-accused and vice-versa to enable the said person to respond to the allegations contained against him contemporaneously, as a co-accused in a joint trial can be convicted on such evidence when introduced under section 30 of the Evidence Act, and vice-versa if such a statement is made by a co-accused against an accused. This was the position under our Judges Rules in Schedule E of the CPC before the said Schedule was abolished. For accomplices facing joint trial, to face such statements at the

trial only, when revealed by the Prosecution and to answer the allegations against them many months or a year or so later is unrealistic and undermines their right to a fair trial.

## C. CLAUSE 216 : ADMISSION OF ACCUSED'S STATEMENTS - THE VOLUNTARINESS ISSUE

3.19. In view of the circumstances highlighted earlier the law governing the admissibility of an accused's statement is critical in the trial process.

3.20. Clause 216 of the DCPCB subjects the admissibility of a confession made by an accused to the voluntariness test; that is:-

*"the court shall refuse to admit the confession of an accused or allow it to be used in the manner referred to in that subsection if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused grounds which would appear to him reasonable for supposing that by making the confession he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."*

3.21. The clause goes on to provide an Explanatory Note, which inter alia provides for the following exceptions which would not render 'a confession inadmissible':

(1) under a promise of secrecy, or deception practised on the accused for the purpose of obtaining it;

(2) when the accused was drunk;

(3) in answer to questions which the accused need not have answered whatever may have been the form of those questions; or

(4) when the accused is not warned that he was not bound to make the confession and that evidence of it might be given against him.

*Observation of The Law Society:-*

3.22. A number of concerns may be expressed.

3.23. Clause 216 removes the requirement under the current law for statements, other than confessions, made by the accused which are subject to the voluntariness test. The concern is the narrowing of the category of statements which is subject to the voluntariness test.

3.24. Apart from the statement that it is an alignment with the rules in the Evidence Act, the Consultation Paper, provides no valid justification for excluding all statements

made by the accused that do not amount to confessions from the voluntariness test.

3.25. Clause 216 is also inconsistent with the provisions of the Prevention of Corruption Act and will create a potential conflict where CPIB commences investigations ahead of the police and statements are recorded pursuant to section 27 of the Prevention of Corruption Act.

3.26. The Explanatory Note, also states that statements made under secrecy and deception may be admitted which could fail the voluntariness test which renders statements involuntary if made under "inducement" or "promise".

3.27. Further, the Explanatory Note also states that, a statement made whilst the maker is intoxicated is not rendered inadmissible. It raises the obvious question of why an accused is required to give a statement while under the influence of alcohol ? Why would the police not wait until the effects of alcohol have worn of before recording a statement. To admit a statement made "when the accused was drunk" cannot be correct in law especially in the light of fact that intoxication can be a defence under the Penal Code in certain cases. Further, the amendment is a clear contravention of the fundamental principle that 'oppression' will render a statement involuntary and inadmissible. Further, the Court of Appeal expressly stated in *Gulam Bin Notan* [1999] 2 SLR 181 that a statement would be involuntary if the giver "*was in a state of near delirium such that his mind did not go with his statement*". A drunk person cannot be said to be otherwise than in such a state and it is wholly prejudicial to allow the admission of a statement recorded under such circumstances.

3.28. Finally, the Explanatory Note states that a statement made when an accused has not been warned is not inadmissible. This roundly defeats the purpose of any Caution administered. It is simply not possible for any judge to draw an adverse inference if the accused does not state his defense which is the very purpose of the section. The law must not be set in a spin.

*Recommendation of The Law Society:-*

3.29. The Law Society recommends that:-

(i) all statements made by the accused whether amounting ' to a confession or not' be subject to the voluntariness test, as provided for under section 122(5) of the CPC and the Proviso thereto;

(ii) all statements made by co-accused which implicate the accused be subject to the voluntariness test and that proof of involuntariness goes to admissibility and not just weight; and

(iii) the Explanatory Note be excluded from clause 26 as it encourages or increases the risk of such interviews producing unreliable evidence.

## D. CLAUSE 217: ADMISSION OF WITNESS STATEMENTS

3.30. By clause 217 of the DCPCB the voluntariness test does not apply to statements recorded from witnesses. As explained above, the Law Society recommends that the voluntariness test (sans the Explanatory Note in the proposed clause 216) apply to witness statements against an accused.

*Observation of The Law Society:-*

3.31. In *Cheng Swee Tiang v PP [1964] MLJ 291*, the court recognised that it had the judicial discretion to exclude witness statements made involuntarily:

> *"To be consistent with this policy consideration, and as a prudent measure, the court will generally have to be satisfied as to its voluntary nature before it allows the admission of previous inconsistent statements of such witnesses… The practice of the courts in several previous cases has been to conduct voir dires to ascertain the voluntariness and admissibility of the witness' statement."*

3.32. Similarly, in *PP v Heah Lian Khin [2000] 3 SLR 609*, Chief Justice Yong Pung How recognized situations where a witness may be exposed to pressure when making his/her statement:

> "*Complications may arise… when the witness is not a mere witness, but an 'accomplice' who has either been dealt with or, for whatever reason, was not charged. Such a witness would have been either a suspect or an accused person at the time of recording of the statements and was no different in status from any other accused person. He may therefore be expected to be exposed to the same danger of pressure or harassment. The prosecution would have to prove that the statement was voluntary before it could be tendered into evidence in a criminal proceedings involving that accomplice or in a joint trial with the accused on the same charge (neither of which was the case here). The same policy reasons for the statutory safeguards exist regardless of the current status of the individual."*

*Recommendation of The Law Society:-*

3.33. The Law Society recommends that, for the sake of certainty and fairness, the voluntariness test applied to witness statements by the court in its judicial discretion be given statutory force.

## E. CLAUSE 220: ADMISSION/NON COMPLIANCE WITH CLAUSES 26 AND 27

3.34. Clause 220 DCPCB states that statements not complying with the conditions set out in clauses 26 and 27 may be admissible "if the error has not prejudiced the accused's defence on the merits".

Observation Of The Law Society:-

3.35. This section *undercuts* the need to comply with the conditions governing the manner of recording statements. The Consultation Paper offers no justification in this regard. Such a section could lead to the absurd situation where an accused or witness disputes having made an unsigned statement but that statement is nonetheless admitted by the court if that "error" does not prejudice the accused on the merits. Again, oral evidence of what should be written down by the investigating officer of what he or the interpreter did would prejudice the accused.

*Recommendation of The Law Society*

3.36. The Law Society recommends that the proposed clause 220 must make clear what errors may not be consequential to the admissibility of the statement and what errors will invariably or automatically render a statement inadmissible. This is the only way in which the conditions set out in clauses 26 and 27 are not proved superfluous.

## F. CLAUSE 224: CONDITIONED STATEMENTS

3.37. The admissibility of conditioned statements is crucial in a criminal trial as it seeks to facilitate the expediency of the trial process. It is akin to Affidavits of Evidence-in-Chief in civil trials. The use of conditioned statements ought to be encouraged.

*Observation of The Law Society:-*

3.38. Clause 224 DCPCB is similar to section 371 of the CPC. However, it appears that the right to object to a conditioned statement being admitted in evidence under section 371(2)(d) of the CPC has been omitted.

3.39. Further, one of the more important flaws of the rule governing conditioned statements has also not been rectified. That is, there is no deadline prior to the relevant hearing by which the conditioned statement must be served on the other party (usually the accused). All that is required under section 371(c) of the CPC is that the statement is served prior to the start of the hearing. In practice, this has allowed the Prosecution to serve conditioned statements on the accused at the very last minute. This does not serve justice since the accused's counsel would not have sufficient time to digest, much less prepare cross-examination, based on that statement. Clause 224, unfortunately, does not even attempt to change this state of affairs.

3.40. Section 65B of the Hong Kong Criminal Procedure Ordinance (Cap 221), for example, provides that a conditioned statement purported to be admitted at a hearing must be served on the other party before the hearing and that an objection to the admissibility of that statement may be served within 14 days from the date the statement is served.

*Recommendation of The Law Society:-*

3.41. The Law Society recommends that the right to object to a conditioned statement should not be removed by clause 224, and that clause 224 incorporates a time for service (for example, 7 clear days before the hearing) of conditioned statements and for objections to be made before the hearing.

## G. CLAUSE 230: ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

3.42. Clause 230 DCPCB is similar to section 378 of the CPC.

*Observation of The Law Society:-*

3.43. Clause 230 is an extremely important provision as it governs the admissibility of "hearsay" evidence against the accused. As held by the Court of Appeal in *Lee Chez Kee v PP [2008] 3 SLR 447*, the current CPC provisions need to be improved on and clarified.

3.44. In the case of *Lee Chez Kee v PP*, the Court of Appeal ruled that the proviso in section 378 of the CPC (which is in substance reproduced by section 230) that the section is subject to "the rules of law governing the admissibility of confessions" includes all rules of law governing the admissibility of confessions, and not just the rules relating to voluntariness.

3.45. Even though clause 216 clarifies the scope of admissibility relating to confessions, it would be necessary and prudent to further make clear in clause 230 that confessions are only admissible under the CPC or other written laws, and that clause 230 does not apply to confessions at all. This would avoid the situation that appeared in *Lee Chez Kee* where the Prosecution ingeniously attempted to admit a dead co-accused's confession against the accused by claiming that the death of the co-accused altered the nature of his confession so that it became the statement of a dead witness, admissible under section 378 of the CPC.

3.46. Although case law now precludes the Prosecution's interpretation as to the confession of a dead co-accused, Prosecutors may be tempted to invoke this section to admit statements made by co-accused who have absconded or are overseas or are not contactable. Such statements may then be used as evidence against the accused which may be relied upon by the Court in convicting the accused. The admissibility of such out of court statements are also highly prejudicial to the Defence as the Defence Counsel is denied the fundamental right to cross - examine the witness or co-accused. Thus, it is extremely important to scrutinise when such out of court statements can be admitted as evidence.

*Recommendation of The Law Society:-*

3.47. The Law Society therefore recommends, for the sake of clarity, that clause 230 be made subject to *"all rules of law governing the admissibility and/or inadmissibility of confessions including but not limited to the rules relating to voluntariness".*

## H. CLAUSE 239: PROCEDURE DETERMINING ADMISSIBILITY OF STATEMENTS

3.48. Clause 239 DCPCB is a new provision which seeks to govern the procedure of a *voir dire* or trial within a trial. It includes illustrations as to when a *voir dire* is necessary. Illustration (d) states that when "the prosecution seeks to admit a confession of the accused, who denies that he made it. No ancillary hearing is necessary as this does not relate to the voluntariness of the confession".

*Observation of The Law Society:-*

3.49. The Law Society cannot find any justification for the inclusion of the rule in illustration (d) and cannot agree that the issue "does not relate to the voluntariness of the confession" since the underlying question is whether the confession was indeed made by the accused. Reliability and voluntariness are complementary and related factors that ought to be considered by the court in determining admissibility.

3.50. As the admissibility of any statements has a material impact on the outcome of the trial, the procedure which seeks to govern it must be equally robust and equitable. The Law Society welcomes the attempt to set out such procedure. However, the mechanics of clause 239 are not entirely satisfactory.

3.51. In particular, clause 239 still envisages that the same Judge presiding in the same court should hear both the *voir dire* and the main trial. The new provisions also make it clear that all evidence in the *voir dire* will form part of the main trial and this would be prejudicial to the accused.

3.52. As Wee Chong Jin CJ held in *Lim Seng Chuan v PP [1975-1977] SLR 136*:

> *"It seems to us that fairness to the accused, which is a fundamental principle of the administration of criminal justice, requires that a trial within a trial ought to be considered a separate or collateral proceeding. In the course of a trial within a trial evidence may be given which would be inadmissible evidence on the charge against the accused but may be relevant on the issue to be decided at the trial within a trial. In such a situation it would be grossly unfair to the accused if the true principle is that evidence called at a trial within a trial is before the court for all purposes."*

*Recommendation of The Law Society:-*

3.53. The Law Society recommends that illustration (d) be removed from clause 239, and that a separate court/ judge preside over the *voir dire*. This will uphold justice to the maximum in ensuring that the prejudicial value of any evidence heard during the

*voir dire* would not form part of the knowledge of the trial court.

3.54. To this extent, the Law Society acknowledges that time and resources are required to implement this fairer system. However, the Law Society is of the view that where an individual's freedom or life is at stake, all time and resources necessary to facilitate justice must be spent. Further, if the recommendations of The Law Society in respect of audio- recording are implemented, it may minimize the need to hold a *voir dire* thus resulting in saving considerable court time and costs with such savings offsetting the aforesaid costs.

## I. SUMMARY OF RECOMMENDATIONS

3.55. The Law Society recommends that:

(i) a witness being examined by the police be informed under clause 26(2) of his vested right that he need not say anything that might expose him to a criminal charge, penalty or forfeiture;

(ii) only a police officer of at least the rank of a sergeant be allowed to record a cautioned /notice statement under clause 27;

(iii) that provisions be put in place to regulate matters referred to at section B of this Chapter above;

(iv) the definition of "investigation officer" be set and made clear;

(v) only police officers who are at least the rank of sergeant are empowered to record Cautioned Statements under clause 27;

(vi) the recommendations in respect of clause 26, set out at section B of this Chapter above be put in place to safeguard the recording of Cautioned Statements;

(vii) the caution administered under clause 27 should also include the right to silence and adopt more neutral words as spelt out in PACE Code C referred to above;

(viii) audio or video recording is made compulsory for the taking of cautioned statements relating to more serious offences; and

(ix) only Magistrates be empowered to take statements in capital offence cases (this was the position in Singapore prior to the abolishment of the Judges' Rules in 1976 to provide a higher safeguard) as there is only one judge now sitting to try capital cases instead two previously or a jury prior to that;

(x) that a provision be enacted (as it is absent in the DCPCB) for a statement to be made by an accused containing material implicating a co-accused to be given to the co-accused and vice-versa to enable the said person to respond to the allegations contained against him contemporaneously, as a co-accused, in a joint trial can be convicted on such evidence when introduced under section 30 of the Evidence Act, and vice-versa if such a statement is made by a co-accused against an accused. This was the position under our Judges Rules in Schedule E of the CPC before the said Schedule were abolished . For accomplices facing joint trial, to face such statements at the trial only, when revealed by the Prosecution and to answer the

allegations against them many months or a year or more later is unrealistic and undermines their right to a fair trial;

(xi) all statements made by the accused whether amounting ' to a confession or not' are subject to the voluntariness test, as provided for under section 122(5) of the CPC and the Proviso thereto;

(xii) all statements made by co-accused which implicate the accused be subject to the voluntariness test and that proof of involuntariness goes to admissibility and not just weight;

(xiii) the Explanatory Note at clause 216 (admissibility of accused's statements) be excluded from the clause as it encourages or increases the risk of such interviews producing unreliable evidence

(xiv) the voluntariness test applied to witness statements by the court in its judicial discretion is, for the sake of certainty and fairness, be given statutory force;

(xv) clause 220 to make clear what errors may not be consequential to the admissibility of the statement and what errors will invariably or automatically render a statement inadmissible. This is the only way in which the conditions set out in clauses 26 and 27 are not proved superfluous;

(xvi) that the right to object to a conditioned statement should not be removed by clause 224, and that clause 224 incorporates a time for service (for example, 7 clear days before the hearing) of conditioned statements and for objections to be made before the hearing;

(xvii) that clause 230 be made subject to "all rules of law governing the admissibility and/or inadmissibility of confessions including but not limited to the rules relating to voluntariness";

(xviii) that illustration (d) be removed from clause 239 and that if an accused denies he made the statement, there should be a *voir dire* for the reasons explained.

(xix) that limitations be imposed on the length of any continuous period of interrogation of a witness, and that provisions be enacted for reasonable rest periods and meal breaks (and the adequacy of the facilities for rest and meals).

Chapter

4

# 4. DISCOVERY IN CRIMINAL TRIALS

## A. INTRODUCTION

## B. OBSERVATIONS AND REMARKS

## C. CONCLUSION

## D RECOMMENDATIONS

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## A. INTRODUCTION

4.1. The significance of discovery in criminal trials has been aptly described by the UK Attorney General in his forward to The Attorney General's Guidelines, 1981 (updated and reissued in April 2005)[19] in the following terms:-

> "Disclosure is one of the most important issues in the criminal justice system and the application of the proper and fair disclosure is a vital component of a fair criminal system. The "golden rule" is that fairness requires that full disclosure should be made of all materials held by the Prosecution that weakens its case or strengthens that of the Defence."

4.2. In England and other common law jurisdictions statutory intervention has imposed a duty on the Prosecution to disclose in advance witness statements and case documents and other specified materials, subject to exceptions.

4.3. In Singapore, section 58 of the CPC generally and section 150 of the CPC provide the basis for discovery in criminal cases tried at the High Court. However, no similar provision as the above section 150 of the CPC exists for discovery at Summary trials at the Subordinate Courts, except for the following rudimentary documents:-

(i) The charge;
(ii) First information report;
(iii) Arrest report; and
(iv) An accused's Notice / Caution statement under s122(6) of the CPC.

4.4. A review of the CPC has been long overdue. It is the desired hope of the Law Society that the Singapore justice system, known for its efficiency, keeps abreast of fair procedural and evidential practices which have evolved in other common law jurisdictions in respect of the administration of criminal justice in Singapore.

4.5. The DCPCB has spelt out the discovery process in separate provisions for summary trials at the Subordinate Courts and the High Court. The key clauses of prosecution material that is to be discovered in the Subordinate Courts and the High Court are set out in clauses168 and 179 respectively.

*Subordinate Court Trials: Clause 168*

4.6. Clause 168 provides that for trials in the Subordinate Courts the Prosecution must provide discovery of:

(a) copy of the charge;
(b) summary of the facts in support of the charge;
(c) list of names of the Prosecution witnesses;
(d) list of exhibits that the Prosecution intends to admit at the trial; and
(e) any statement or and part of the statement of the accused recorded by any person under and provision of any law which the Prosecution intends to adduce in evidence as part of the Prosecution's case.

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[19] The Attorney General's Guidelines, 1981 (updated and reissued in April 2005)

4.7. By contrast, clause 179 provides that for trials in the High Court the Prosecution must provide discovery of:

(a) copy of the charge;
(b) list of names of the Prosecution witnesses;
(c) list of the exhibits that the Prosecution intends to admit at the trial;
(d) the **signed statements of the witnesses** …..;
(e) a statement or any part of the statement made by the accused recorded by any person under the provision of any law, which the Prosecution intends to produce in evidence as part of the Prosecution's case.

## B. OBSERVATIONS AND REMARKS

4.8. The following aspects of the provisions found in clause 168 (Subordinate Courts) not only considerably favour the Prosecution and do not address the frequently raised concerns of the Law Society for reasonable discovery, they have added more concerns:-

(i) **Firstly,** in Subordinate Court trials, the Prosecution is not required at the pre-trial stage to serve on the Defence witness statements unlike in the High Court and not necessarily the accused's statement(s) at all.

(ii) **Secondly** It is clear from illustrations (a) & (b) of clause 168, that the summary of facts required only in Subordinate Court trials would really be a very brief and inadequate allusion to the facts. For there to be any meaningful summary it has to amount to a proper and fair disclosure so that an accused is sufficiently seized of the material particulars to be able to respond with a meaningful summary of his own in defence. In this regard a clause should be inserted in the provision to provide in place of the proposed sub-clause (b) the following … "(b) a summary consisting of a concise statement of the facts to be proved by the named witnesses in para (c) below".

(iii) **Thirdly**, the disclosure provided for under clause 168, *initially,* only provides for a list of exhibits that the Prosecution intends to admit at the trial and no more. Copies of the *documentary exhibits* are only to be furnished to the Defence *after* the Case of the Defence is filed and served (please see clause 171(1))

(iv) **Fourthly**, there is no express duty on the Prosecution in the DCPCB to furnish statements and documentary exhibits in the possession of the police, prosecuting authorities, or other government agencies which the Prosecution does not intend to adduce at the trial in the Subordinate or the High Court i.e. what is commonly known as "unused materials" (subject of course always to restrictions relating to state immunity and the non disclosure requirements concerning informants). This complete exclusion of duty is undesirable. This aspect is elaborated further at para17 below. There are comprehensive guidelines and statutory provisions in place in other common law jurisdictions to ensure that such materials are made available to the Defence, subject to defined exceptions.

(v) **Fifthly**, the DCPCB does not provide for continuing disclosure of prosecution materials after the initial disclosure has been complied with.

(vi) **Sixthly,** Clauses 168 171 (Subordinate Courts) and 179 (High Court) seem to omit the *viewing* by the Defence of relevant *physical* evidence (e.g. drugs and drug related paraphernalia, account books seized etc) in the custody of the police of which no copies can be made for service, and / or which, for security or other tenable reasons may not be handed to the Defence as well as material in the possession, if any of the Prosecution that is adverse to the credit or credibility of the accused.

(vii) **Seventhly**, clause 168(e) Subordinate Courts), clause 179(e) (High Court) provide for the disclosure of the Accused's statement or any part of it in the Case of the Prosecution **only in the eventuality** that the Prosecution is intending to adduce evidence in respect **thereof** as part of the Prosecution's case. The reference to 'any part of any statement' made by the accused may well refer to the redaction process i.e. inclusionary part minus part(s) removed because of inadmissible material or the accused's previous record or sometimes parts which can be interpreted as exculpatory. This simply implies that not all the statement(s) of the accused will be furnished by virtue of clause 168(e) of the DCPCB. Redaction of the statement for the purpose of exclusion on the grounds of inadmissibility or because of a narration of previous record is acceptable. The Defence by virtue of clause 170 of the CPC (Subordinate Courts) and clause 181 (High Court) is required to set out: (i) its Summary of Defence Case, (ii) under clause 170(b) a list of names of its witnesses and (iii) under clause 170(c) objections to issues of fact and law raised by the Case for the Prosecution filed in Court and served on the Defence . The Defence has to respond with filing its Case based on <u>partial</u> disclosure by the Prosecution of an accused's statement, if at all, and without the written statements of the Prosecution witnesses, or documentary exhibits.

*Discovery for Complex or Serious Cases in District Court Trials*

4.9. The discovery provisions in High Court trials by virtue of clause 179(d) mandate that the Prosecution serves signed witness statements including the documentary evidence referred in it on the Defence before the Defence files its Summary of Case. **The Law Society's view is that if it is not practicable to serve witness statements in every case that goes for trial in the District Courts, at the very least there should be no distinction in the discovery process between the High Court and District Court trials as to furnishing witness statements to the defence where the District Courts try *complex* or *serious cases* or when the District Court *otherwise* orders discovery in its discretion**. There may also be other types of cases in the District Courts with their own peculiar facts where witness statements are required or where psychiatric, forensic or other expert witness evidence obtained by the Prosecution is highly relevant to the defence that should be included in its Summary. This is only fair, particularly in the light of the fact that the punitive powers of the District Courts are being enhanced by the DCPCB. It is plainly evident that some of the most *serious* or *complex* cases (fraud, revenue, financial and securities, criminal breach of trust, and cheating cases to name a few categories) are tried by the District Courts with the District Judge now being able to sentence a convicted accused for up to 10 years imprisonment (up from 7 years) and well beyond that sentence under a confluence of provisos and situations. The power to decide whether a case is *complex* or *serious* should be vested in the court. The court in such cases will

have to be satisfied that it will be a 'complex or serious' trial having regard to the following accepted considerations:

(i) the likely length of the trial,
(ii) the severity of punishment under the charge,
(iii) the nature of the evidence to be adduced at the trial, and
(iv) the legal issues likely to arise at the trial.

4.10. We cannot maintain weaker safeguards in the criminal area where the criminal process is highly punitive than those in the civil forum where full disclosure of evidence is required.. We also cannot maintain weaker standards than that available in High Court trials for serious and complex cases that are tried there. The dual standard under the proposed new CPC is undesirable for the reasons advanced.

*Defence Summary of Facts/And Objections Required of Prosecution Case Without Adequate Prosecution Disclosures*

4.11. Clause 170 requires the Defence to furnish by way of discovery:-

(a) Summary of the facts;
(b) List of Defence witnesses
(c) Objections if any as to the facts and law contained in the Prosecution's case and the issues in connection thereto.

(i) Firstly, as stated earlier, the Defence will be required to put up a summary of facts in support of the Defence when:-

(a) The witness statements are not furnished.
(b) Without being furnished copies or having sight of the relevant exhibits as the case may be.
(c) Possible partial disclosure of the accused's own statement if it is intended to be used by the Prosecution at the prosecution stage; and
(d) Without being furnished any "unused material" in the possession of the Prosecution which the Prosecution does not intend to adduce as part of its case.

(ii) Secondly, whilst the Defence is required by virtue of clause 170(c) to specify its objection as spelt out in para 11(c) supra, the Prosecution has no corresponding obligation to similarly set out their objections to the Defence Case, which may come at a late stage.

4.12. *Questions arising:* All of the above shortcomings beg the following questions:

(i) What is the nature and purpose of reference to the partial statements that are not to be disclosed until after the defence has filed its summary of Defence Case? If the purpose is to exclude prejudicial material against the Defence, in the Case of the Prosecution, why not serve on the Defence all of the complete statements ***separately*** so that the accused is fully informed before he files his Case for the Defence? Why deprive the accused of using any material that may serve his defence when it is needed?

(ii) How can the accused be fairly expected to give a Summary of Facts of his Defence Case especially in *serious* or *complex* cases when crucial documentary exhibits, partial statements and witness statements, including

expert witnesses are suppressed from the accused at that stage? Why are case exhibits under clause168(e) furnished to the Defence only after an accused has served and filed his Case?

(iii) Will not all the omitted evidence, (prior to the filing of the Case for the Defence) have an adverse effect on the administration of criminal justice and prolong the trial as disputes between defence counsel and the Prosecution shift into the trial court on the effect, credibility, or impact of any late rebuttal evidence offered by the defence?

(iv) The DCPCB fails to provide to an accused his statement(s) made to a police officer in investigations, **unless** the prosecutor intends to adduce evidence during the prosecution case. By not producing an accused's statement or portions of it the Prosecution can spring a surprise on the accused when the accused is making his defence in court to impeach his evidence or worse to replace his evidence with the unsworn out of court statement recorded by a police officer, thereby maintaining the status quo under the present CPC procedures in respect of which the Law Society has repeatedly requested for a reform.

*Response to Discernable Prosecution Assumptions and Objections to Greater Disclosure to the Defence*

4.13. It would appear that there are some discernable assumptions and objections on the part of the Prosecution for not furnishing witness statements to the Defence or an accused's statement or his <u>full</u> statement before trial in the Subordinate Courts (some of which are set out and answered by Kan J in *PP v Ng Beng Siang & Others* [2003]4 SLR 627). However, these assumptions and objections taking into consideration the provisions on discovery in the DCPCB, may be addressed as follows:

(i) *Firstly,* as to the pre-trial discovery of Prosecution witness statements, that trials in the Subordinate Courts are not as *complex* or *serious* as the trials in the High Court (the High Court routinely tries offences punishable with death or life imprisonment).That assumption is not sustainable in view of what has been said in para 4.9 above. Questions of complexity or *seriousness* whilst they impinge on capital punishment or life imprisonment must also eventually depend on the internal facts of the case and on issues of law related to them. Likewise, *complexity* or s*eriousness* is also present in many cases which are triable in the District Court. In fact, many of the trials in the High Court in criminal cases whilst serious are not necessarily complex. In *Boddington v British transport Police* [1999] 2 AC 143, Lord Steyn observed:-

> *"It is truth generally acknowledged… that the complexity of a civil or criminal case does not depend on the level of the hierarchy of courts where it is heard and added that frequently magistrates are called upon to decide complex questions of fact and law with the aid of justice's clerks to exercise control over proceedings …. The working assumption has been that every court including magistrates court must decide all issues of fact or law which need to be determined etc. (pg 165)"*

(ii) *Secondly*, that the much larger volume of cases prosecuted in the District Courts will be too burdensome to provide witness statements for all cases that go for trial in that forum. If it is not practicable to serve witness

statements in every case that goes for trial in the District Courts, the Law Society proposes that, at the very least, for *complex* or *serious* cases in a District Court the Prosecution should be required to furnish witness statements under clause 168 as mentioned in para 4.9 earlier. If this proposal is accepted, then it would not be necessary for the Prosecution to file its Summary of Case. The procedure would then be on par with the High Court provision as contained in clause 179.

(iii) *Thirdly,* principally as to an accused's statement which the Prosecution did not disclose in the past and even now refuses to disclose unconditionally, the Prosecution's general fear has been that an accused may *tailor* his defence according to his statement or some part of it. This fear has not dissipated.

4.14. As for tailoring of an accused's testimony to match that of his statement if it is disclosed in advance, *Sopinka J in* Stinchcombe V Her Majesty The Queen [1991]3 SCR 326 put that fear at rest when he said :

> *"I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material," (emphasis added)*

4.15. The Marshall Law Revision Commission's working paper in Canada issued much earlier in 1974, had concluded in a voluminous work:

> *"It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless whilst those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court but not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective role of the prosecution and the defence."*
>
> In *Boucher v The Queen* [1955] SC, Rand J states at pp 23-24:
>
> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel has a duty to see that all available legal proof of the facts is present: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none*

*charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

***"I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."***

*Section 147(3) Evidence Act (Cap 97) – The Prosecution's "Ace in the Hole"*

4.16. The Law Society wishes to stress that Parliament itself has already previously made a radical provision in section 147(3) of the Evidence Act (which is not legislated elsewhere in the world), for any previous police statement recorded from the accused (although unsworn) to be effectively **substituted** in evidence in place of the accused's testimony if he should resile from such previously made statement and contradict it materially. The court then assesses the weight to be given to it. The present general practice in the High Court and Subordinate Courts is for the Prosecution to withhold an accused's police statement from the accused and his counsel until he has testified. An accused will have to think twice in the light of this provision to materially depart from his previously long statement, and must provide a good reason if he does so. It is also a testing time for his memory as to what the police recorded from him months earlier, and memory lapses can end up as an issue of lack of credibility instead. Yet prosecution witnesses are allowed to revisit their statements made to the police to refresh their memory by being allowed to read their statements before trial. The above procedure is additional to the customary impeachment process in section 147(1) of the Evidence Act and is the preferred route taken by the Prosecution when an accused contradicts his statement when he testifies in his defence.

*Defence Team also has to Make an Assessment*

4.17. The system must not encourage the Prosecution to withhold information from the Defence without just reason. Withholding information can disparage a trial. The Prosecution has access to all the evidence gathered in the course of the investigations. The Prosecution has to assess the relevance of the evidence for the purposes of filing the case for the Prosecution. The Defence should also be allowed access to the same evidence to make their own assessment and may come to a different conclusion as to the relevance or significance of the evidence for the purposes of filing the case for the Defence.

*Courts' Role is Minimised*

4.18. *The Courts' power of discovery is minimised and that of the Prosecution maximised*: The courts' powers to order discovery in the exercise of its discretion if the justice of the case demands it, are circumscribed by the provisions relating to discovery, as they spell out rigidly what can be discovered and at what stage, leaving both the District Court and the High Court bereft of substantive discretion. Clauses 174(1) (Subordinate Courts) and 185(1)( High Court) of the DCPCB do not impose any duty on the Prosecution to disclose to the accused any material that the Prosecution intends or does not intend to use at the trial *unless* a specific duty is prescribed by the provisions relating to discovery. This means that material that the Prosecution is not going to use i.e. 'unused material' would not therefore be available to the Defence although some part of it may, if allowed to be sighted by the Defence, may possibly be found to be relevant to the Defence. By such wording, the Police and the Prosecution have exclusive control over what is

disclosed to the Defence. The disclosure provisions must not be seen to encourage the Prosecution to withhold information from the Defence. The Attorney-General of England realising that the withholding of information can disparage the trial process, has issued a guideline to ensure that the disclosure regime is both proper and fair and to achieve a fair criminal justice system. Such material should therefore be accessible to the Defence in the interests of justice as it does not prejudice the position of the Prosecution but enhances the quality of justice. Investigation material, subject to known exceptions of public interest immunity, informer identity, or third party confidentiality should be made available to the Defence.

*Courts Should be Final Arbiters on Discovery*

4.19. Subject to what has been said, the Courts are best placed to supervise the substantive discovery process and should be the final arbiter in the event of any dispute between the Prosecution and Defence. They should be vested with discretion to give directions in such cases on discovery whether the trial is in the Subordinate Courts or the High Court.

For instance section 58 CPC (Summons to Produce) is replaced with a reworded clause 24 in the DCPCB. Clause 24 removes the power of the court to order production of documents for any investigation, trial or other proceedings and vests such power solely in a police officer. Such general power must always remain with the court for a just and fair investigation and trial process.

*Penalty for Disclosure to Others*

4.20. *Penalty for disclosure to others under clause 174(2) and (3)*: Clause 174(2) provides for the powers of the Court in certain cases order that the information in the case for the Prosecution should not be communicated to any person. Breach of this provision is punishable with a fine not exceeding $5000 or for imprisonment for a term not exceeding 12 months or to both (clause 174 (3) . The concern is that the provision defining the prohibition does not seem to bear in mind that the Defence may have to communicate the Summary of the Prosecution's case to a potential defence or expert witness in order to elicit a response for defence purposes. The Defence has to make its own assessment of the evidence. The system must not encourage the Prosecution to withhold evidence from the Defence without just reason.

## C. CONCLUSION

4.21. The Law Society advocates that that the procedural deficiencies for criminal discovery have a substantial and substantive negative effect on the defence and the patent fairness of the trial should be addressed and remedied. Any delayed disclosure, should not be encouraged. The Law Society at the same time recognises that the obligation to disclose is not absolute. It is subject to the discretion of the Public Prosecutor to withhold information relating to the rules of privilege, immunities, protection of identity of informers or where the public interest will be prejudiced.

4.22. The new CPC therefore should be the Code for 21st century justice. The above provisions for disclosure and the regime for disclosure must be completely balanced and fair as:

(i) it is an accused's constitutional right to a fair trial and to make a full answer in the case of the Defence;

(ii) to resolve non contentious and time consuming issues well in advance, for more efficient use of courts time and by avoidance of unnecessary proceedings; and

(iii) for encouraging resolution of cases, including entering of pleas of guilt on an informed basis at an early stage.

4.23. Benefit of a fair disclosure not only serves the interest of the accused but also has significant tangible benefits in ensuring that Singapore maintains a First World system in the administration of criminal justice. The Law Society therefore makes the following recommendations:

## D. RECOMMENDATIONS

4.24. The Law Society's recommendations on discovery under the proposed new CPC are:

(i) That in the District Court witness statements be served on the Defence as in the High Court or, at the very least, in complex or serious cases in the District Court.

(ii) That whilst under clause 168(e) ( Subordinate Courts) and 179(e) ( High Court) the Case for the Prosecution may contain only part of the statement of the accused (presumably redacted, as is the practice, to exclude prejudicial or inadmissible evidence and for no other reason) the Prosecution must furnish the full statement(s) made by the accused **separately** at the same time to the Defence and not as part of a court record to enable the accused to be fully informed so as to enable him to file and serve his Case for the Defence.

(iii) That where prosecution witness statements are disclosed to the Defence in the Subordinate Courts, the requirement under clause 168 for the Prosecution to serve a summary of the facts be dispensed with following the procedure as set out in clause 179 ( High court trials).

(iv) That the Prosecution disclose to the Defence the accused's investigation statement where made under clause 26(1) irrespective of whether the Prosecution intends to use it at the trial together with his Notice statement made under clause 27(1).

(v) Following from (iv) above clauses 171(1)( Subordinate Court) and 182(1)( High Court) relating to subsequent disclosure *of part(s)* of the accused's statement(s) be removed.

(vi) That the Prosecution disclose to the Defence what is commonly known as 'unused material' before the case for the Prosecution is filed and served. In this regard clauses 174(1) and 185(1) provisions negating any duty on the Prosecution to discover 'material' that….' it does not intend to use' be deleted and a duty imposed on the Prosecution to disclose such material to the Defence when requested.

(vii) That the Prosecution have a duty of continual disclosure in respect of physical and documentary exhibits which come into its custody, care or control after the case for the Defence is filed.

(viii) That provision be made for visual inspection of physical case exhibits which cannot be copied or duplicated and copies be permitted to be made by the Defence of such other voluminous relevant documentary exhibits after inspection as may be required of the Defence.

(ix) A copy of such material in the possession of the Prosecution that is adverse to the credit or credibility of the accused person be furnished to the Defence.

(x) That clause 174(2) prohibiting certain communications to the accused or defence counsel contain a protective clarification where the Defence intends to elicit evidence on the matter from a potential defence witness if it becomes an issue in the trial.

(xi) That clause 24 should not remove the general power currently vested in section 58 of the CPC to order production of documents for any investigation, trial or other proceedings.

Chapter

5

## 5. SENTENCING

## A. LIFE IMPRISONMENT (CLAUSE 2)

## B. COMPOUNDING OFFENCES (CLAUSES 199 – 201)

## C. CANING (CLAUSES 282, 286)

## D. PROSECUTION COSTS AND COSTS AGAINST THE PROSECUTION (CLAUSE 291)

## E. CORRECTIVE TRAINING/PREVENTIVE DETENTION (CLAUSE 261)

## F. REFORMATIVE TRAINING (CLAUSE 262)

## G. IMPRISONMENT IN DEFAULT OF FINES/PENALTIES (CLAUSE 276)

## H. PRESIDENTIAL PARDON, REMISSION AND COMMUTING OF SENTENCES (CLAUSE 290)

## I. DEATH PENALTY (CLAUSES 271, 272)

## J. ALTERNATIVES TO SENTENCING NOT IN THE DCPCB

## K. CONCLUSION

**********

*Introduction*

5.1. The DCPCB proposes amendments to Part XIV of the CPC dealing with the sentences. The Law Society's observations and recommendations in respect of the sentencing options are set out below.

## A. LIFE IMPRISONMENT (CLAUSE 2)

5.2. Clause 2 defines "life imprisonment" as "imprisonment for the duration of a person's natural life".

*Observation/Recommendation of the Law Society*

5.3. It should be for the trial judge to decide whether a sentence to "life imprisonment" should be for the duration of the offender's natural life or for such other fixed term after taking into account all the circumstances of the offence including the age of the offender and the gravity of the offence. Such a discretion would minimize inequality in sentencing produced by an inflexible definition of life imprisonment which leaves no room to consider relevant factors such as different degrees of culpability and the age of the offender.

## B. COMPOUNDING OFFENCES (CLAUSES 199 – 201) - THIS SHOULD BE AT THE INSTANCE OF THE COURT

5.4. Clauses 199 to 201 change the current regime for compounding offences. In particular these changes are:-

a. Clause 199 provides that the compounding of offences listed in the Second Schedule to the CPC are compoundable only with the consent of the Public Prosecutor ("PP"), on such terms as he may determine.

b. Clause 200 provides that the PP may on such terms and conditions as he may determine, at any time compound any offence or class of offences as may be prescribed. This Clause expands the range of offences which can be compounded with the consent of the PP.

c. Clause 201 essentially provides the same terms for compounding offences under other written laws (apart from the Penal Code).

*Observation of the Law Society:-*

5.5. The proposed changes will effectively remove the role of the Court as the final arbiter or decision maker as to whether an offence is compoundable. The proposed changes will grant such discretion to the Public Prosecutor who will also be empowered to set such terms and conditions as he thinks fit.

5.6. It is undesirable to repose such power and discretion solely to the Public Prosecutor and to exclude the involvement of the Court. Particularly in cases where the complainant is agreeable to compound the offence on terms acceptable to the complainant. Once the matter is before the Court, the Court's role in resolving the matter by compounding is an indispensable one.

*Recommendation of The Law Society:-*

5.7. The Law Society is of the view that the power and discretion should remain with the Court and the victim. The Court will make its decision based on all facts and submissions by the Defence and the Prosecution.

5.8. In addition, the Law Society proposes that additional Penal Code offences (e.g. Sections 379 and 509) and any offence punishable with a fine only should also be compoundable (e.g. Miscellaneous Offences).

## C. CANING (CLAUSES 282, 286) - PRESCRIBED POWERS OF AND JURISDICTION OF THE COURT SHOULD NOT BE EXCEEDED

5.9. Clause 282(5) provides that the number of strokes that can be imposed be capped at 24 for adults and 10 for juveniles for each occasion of sentencing (sub-clause (5)). This is known as the specified limit.

5.10. Clause 282(2) provides that where the accused would have but for clause 182(1) received a sentence of caning which exceeds the specified limit, the Court may impose a term of imprisonment of up to 12 months in lieu of such strokes which exceed the specified limit.

5.11. Clause 282(3) also empowers the Court to impose a term of imprisonment under clause 282 (2) even though the aggregate of such additional term and the imprisonment term imposed for any of the relevant offences exceed the maximum term of imprisonment prescribed for that offence.

5.12. Clause 282(4) also provides that a District Court and a Magistrate Court may in a case under Clause 282(2), impose an aggregate imprisonment sentence which exceed their respective jurisdiction set out under clause 260.

5.13. Clause 286 proposes that if a person is deemed unable to carry out or complete the sentence of caning, the offender must remain in custody until the court that passed the sentence can revise it. That court may then remit the sentence; or impose a term of imprisonment of 12 months or less, which may be in addition to any punishment to which he has been sentenced for the same offence

*Observation/Recommendation Of The Law Society:-*

5.14. There should be no additional sentence of imprisonment in lieu of caning even if the Court could have meted out more strokes than the specified limit for the relevant offences. The general principle is that any punishment meted out should not exceed the maximum prescribed by law for the offence. Similarly the sentencing jurisdiction of the court should not be exceeded on account of the court being unable to impose caning beyond the specified limit.

5.15. Where there is potential of such additional punishment, it will make it difficult for defence counsel to advise an accused on the sentence he may have to face should he be convicted of an offence. This creates unnecessary uncertainty for accused persons.

5.16. The Law Society is of the view that, where a person is found unsuitable on medical grounds to be caned, there is no necessity to impose an additional sentence. The circumstances in which a person may be found to be unsuitable are beyond his control and this should not result in longer custodial terms.

5.17. The Law Society recommends that clauses 282 and 286 are not necessary and should not be enacted.

## D. PROSECUTION COSTS AND COSTS AGAINST THE PROSECUTION (CLAUSE 291)

5.18. Clause 291(2) will empower the Court to order the Prosecution or the complainant or the person on whose information the prosecution was instituted to pay costs and/or compensation to the accused of a sum not exceeding $10,000 provided that:

a. the accused is acquitted of any charge for any offence; and

b. if it is proved to the satisfaction of the court that the prosecution was frivolous or vexatious.

*Observation/Recommendation Of The Law Society*

5.19. Whilst clause 291(2) is a step in the right direction, the changes are not a sufficient improvement of the current position set out in section 402 of the CPC.

5.20. Firstly, there is currently no monetary cap of $10,000 in a case where the accused is acquitted in the High Court or District Court. In fact, under section (402(2)) of the CPC the court can order the payment of full costs, charges and expenses, and the same to be taxed by the Registrar or District Judge, incurred by the accused in and about his defence. While the removal of the $50 cap in Section 402(1) for cases in the Magistrate's Court is appropriate, there is no reason why there is to be a cap of $10,000 for all cases. Given the growing complexity of cases brought before the District Courts and the proposed increase in the jurisdictions of the Magistrate and District Courts, there should not be a cap of $10,000 in respect of legal cost, charges and expenses incurred by an accused who has been acquitted.

5.21. Secondly, the requirement that the accused has to prove to the satisfaction of the Court that the prosecution is frivolous and vexatious sets too high a burden on the accused. An appropriate test is that where the Prosecution is unable to prove a prima facie case against the accused or where the Court is of the view that the Prosecution was unreasonable in all the circumstances of the case.

5.22. Thirdly, the Law Society notes that there is still a disparity of treatment in terms of awarding costs between cases where an accused is convicted and where the accused is acquitted. In every conviction, the court would have discretion to order prosecution costs and there is no requirement for the burden to show that the defence was frivolous or vexatious. The right to defend oneself is a fundamental right of an accused and the burden is on the Prosecution to prove his or her guilt beyond a reasonable doubt. The power to order prosecution costs should be restricted to cases where the defence was clearly frivolous and vexatious, and / or

unreasonable so that there is no disparity in the award of cost for the Prosecution or the Defence in a conviction or acquittal respectively.

5.23. **The Law Society recommends** that the disparity in awarding costs to the Prosecution and Defence should be removed and that there is no need to cap the costs at $10,000.

## E. CORRECTIVE TRAINING ("CT")/PREVENTIVE DETENTION ("PD") (CLAUSE 261)

5.24. Clause 261(1) deals with the sentence of CT for offenders above 18 years old and below 30, whereas Clause 261(2) deals with the sentence of PD for offenders 30 years old and above. For both instances, a report is prepared, a copy given to the offender and his counsel, for the purposes of sentencing. The court is required to consider the physical and mental condition of the offender as well as his suitability for the sentence.

5.25. The duration of CT is between 5 and 14 years and the duration of PD is between 7 and 20 years.

*Observation/Recommendation Of The Law Society*

5.26. This is a punitive sentencing option and should be used sparingly. The Law Society proposes that the Court should have the discretion to depart from the prescribed ranges. In the case of CT, the qualifying age should be raised to 21 years (i.e. beyond the age of reformative training).

5.27. In all cases, **the Law Society would recommend** strict criteria to be set out before such a sentence of CT/PD is imposed. *For instance,*

*(a) raise the minimum age limit of CT from 18 years to 21 years so that RTC is the custodial rehabilitative option for a young offender up to 21 years of age.*

*(b) CT should only be imposed if an offender does not qualify for RTC and that the court should only impose PD if the offender has already undergone CT.*

*(c) there should not be a mandatory minimum period of CT/PD i.e. the court should decide subject to a maximum of 10 years and 20 years respectively.*

5.28. On the issue of Preventive Detention, the Law Society recommends that consideration be given to Imprisonment for Public Protection sentences (IPPs) which have been in use for some years in the UK.

5.29. IPPs are a discretionary sentence that the Court may impose if the seriousness threshold is met i.e. the minimum term of sentence is at least two years or if the person has been convicted for certain very serious offences, and if the Court is of the opinion that the person is a danger to

society. The underlying basis of IPPs is the protection of society and not the rehabilitation of the criminal.

5.30. Indeterminate sentences comprise of three portions. The first is the court setting of a minimum term (tariff) which must be served. The next step is the Parole Board considering whether it is safe to release the offender, failing which the prisoner remains in detention. The last, assuming that parole is successful, is that after release, the person remains on license i.e. a set of terms and conditions the breach of which sends the parolee back into prison.

5.31. This has the advantage of giving the prisoner some hope that his behaviour in prison could directly affect the length of his sentence and give him greater incentives for reform. At the same time, society is protected from individuals who have not truly reformed as an indeterminate sentence, as the name implies, is for an indeterminate period of time *until such time he is fit to be released back into society*. Such sentencing fulfils, in one fell swoop, the retributive, rehabilitative and incarceration (protective) elements of punishment.

## F. REFORMATIVE TRAINING (CLAUSE 262)

5.32. Clause 262 of the CPCB allows an order of reformative training for offenders between 16 and 21 years of age and even for offenders between 14 and 16 years of age if the offender has been previously dealt with under Section 64 of the Children and Young Persons Act (Cap. 38).

5.33. The provisions define a “youthful offender” as a child between 7 and 16 years of age (usually referred to as a “juvenile”) and prescribe that such an offender may be dealt with in the manner provided under the Children & Young Persons Act - however, such youthful offenders may still be subject to caning (albeit with a “light rattan”).

5.34. Any offender between the age of 16 and 21, although still young, may be sentenced as an adult – except that the death penalty cannot be passed on an offender below the age of 18 years. The option of Reformative Training is only available to such offenders between the ages of 16 and 21 years for a period of detention of not less than 18 months and not more than 36 months.

*Observation/Recommendation Of The Law Society*

5.35. The Law Society is of the view that the Court should be given a discretion as warranted by the nature of the offence and the circumstances of the offender and should not be restricted to sentencing an offender to between 18 and 36 months of RT in every case.

## G. IMPRISONMENT IN DEFAULT OF FINES/PENALTIES (CLAUSE 276)

5.36. Clause 276 prescribes for the term of imprisonment in default of payment of a fine.

*Observation/Recommendation Of The Law Society*

5.37. There are no provisions for backdating such default sentences to the date that the accused was first arrested and remanded. The Law Society proposes that a default section should be backdated to the date of first remand.

5.38. **The Law Society recommends** that these sentences be backdated to the date of arrest and the default sentence should also be subject to one-third remission.

## H. PRESIDENTIAL PARDON, REMISSION AND COMMUTING OF SENTENCES (CLAUSE 290)

*5.39.* Clause 290 provides that where a person has been sentenced to punishment for an offence, the President, acting in accordance with the Constitution, may grant a pardon, reprieve or respite, on such conditions as the President thinks fit, of the execution of the sentence, or remit the whole or any part of the sentence. Should the conditions not be fulfilled to the satisfaction of the President, the President may then cancel the suspension or remission and upon such cancellation, the person may be arrested without warrant and remanded to undergo the unexpired portion of the sentence.

*Observation/Recommendation Of The Law Society*

5.40. This provision allows the President to suspend or remit (with or without conditions) the whole or part of any punishment imposed and the sentencing judge is required to state his opinion as to whether the application should be granted.

5.41. The Law Society notes, however, that there is no provision to allow the offender (or counsel) to review or respond to the opinion of the Judge. The offender or his counsel should be allowed to give his views to the President.

5.42. The Law Society also notes that the Clause 290(1) does not require the offender to accept the conditions set by the President in the exercise of this power. **The Law Society recommends** that the position as set out in the current section 237 of the CPC that the offender is required to accept the conditions imposed be retained.

5.43. The Law Society also notes that section 238 of the CPC which grants power to the President to commute offences has been omitted in the CPCB, despite the retention of the title to Division 3 above Clause 290 (“Suspensions, remissions and commutations of sentences”).

5.44. **The Law Society recommends** that Section 238 of the CPC should not be deleted as this gives the President specific powers of commutation in a deserving case.

## I. DEATH PENALTY (CLAUSES 271, 272)

5.45. The Law Society notes that Clauses 271 and 272 provide that a sentence of death penalty should not be imposed against persons below 18 or pregnant women, even if they have committed offences for which the death penalty is mandatory.

*Observation/Recommendation Of The Law Society*

5.46. **The Law Society recommends** that a provision to empower the sentencing court to deviate from the mandatory death penalty and impose life imprisonment in any other circumstance deemed appropriate and necessary by the court. This would give an offender who is found guilty of a capital offence the opportunity to mitigate the circumstances of the offence and the chance to avoid the death penalty as an automatic consequence.

## J. ALTERNATIVES TO SENTENCING NOT IN THE DCPCB

5.47. The CPC Consultation Paper has sought for views on possible alternative forms of sentencing which have not been included in the current CPCB. These include[20]:

a. Mandatory Treatment Order ("MTO")
b. Short Detention Order ("SDO")
c. Day reporting Order ("DRO")
d. Community Work Order ("COMWO)
e. Expanding the Community Service Order ("CSO")
f. Expanding the Conditional Discharge

5.48. The Law Society is of the view that these sentencing options are a step in the right direction and will draw us closer to the sentencing regimes in other developed common law jurisdictions. The Law Society looks forward to reviewing the proposed Clauses in the CPCB and makes the following comments at this juncture.

### Mandatory Treatment Order (MTO)

5.49. The Law Society views this as a positive development subject to further information being made available as to the offences and manner in which this is implemented.

5.50. Present provisions empower the court to report an accused person who would have been guilty but for "unsoundness" to the Minister who may then order that person to be confined in a mental hospital, prison or other suitable place of safe custody indefinitely (Section 315).

5.51. There are currently no provisions in place to manage offenders with mental illness not amounting to "unsoundness" and such offenders are imprisoned.

[20] Paragraph 47(a) to (f) of the CPCB Consultation Paper

5.52. MTOs are useful sentencing options in such cases so that appropriate medical treatment can be used as part of the sentencing options to rehabilitate such offenders.

**Short Detention Order (SDO)**

5.53. The Law Society suggests that, if the purpose is not to stigmatise or avoid contamination, the accused particularly the young and/or junior offenders, should be kept outside the prison system entirely. Probation or the other forms of sentences proposed should be the preferred options.

**Conditional Discharge/ Probation**

5.54. In respect of Conditional Discharge, the existing provision is found in Section 8 of the Probation of Offenders Act (Cap 252). However, this option is available for offenders below 21 years. The Law Society is of the view that the age cap should be lifted as there are deserving cases where adult offenders should also be given a conditional discharge.

**ALTERNATIVES SUGGESTED BY THE LAW SOCIETY**

**Suspended or deferred Sentence**

5.55. The DCPCB Consultation Paper makes no reference to empowering the Court to suspend sentences. This sentencing option is based on the principles of deterrence and rehabilitation. It sends a signal to the offender and the community that the offence has been treated seriously and marks the beginning of the rehabilitative regime. It has been applied in jurisdictions such as England, Australia and Hong Kong where, the court has the power to suspend the passing of sentence and place the offender on probation.

5.56. For instance, Australian legislation[21] provides that:

> *"A court that imposes a sentence of imprisonment on an offender may make an order suspending execution of the whole of the sentence for such a period… as the court may specify in the order"*

5.57. In England, the option was introduced to manage overcrowding in prisons. In Australia, the suspended sentence targets the offender whose crime deserves jail but shows a need to remain at liberty e.g. to care for a child or sick relative, to complete study or a rehabilitation program or to work and pay compensation.

5.58. Recently, a Singaporean lawyer, Choy Chee Yean, was given a suspended sentence of 2 years' imprisonment by the courts in Hong Kong for the offence of theft on account of being a first-offender who committed the offence due to psychological stress.

[21] The Criminal Law (Sentencing) Act

5.59. Further, at the 68th plenary meeting of the United Nations General Assembly on 14 December 1990, the General Assembly resolved to adopt the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) and in so doing expressed its conviction that:

*"alternatives to imprisonment can be an effective means of treating offenders within the community to the best advantage of both the offenders and society."*

5.60. Section 212(3) of the CPC provides that the court may, instead of pronouncing judgment, direct that the accused be released on his entering into a bond to appear before the court if directed to do so and on condition of keeping the peace and being of good behavior. Such a provision appears to have been omitted in clause 255.

5.61. The Law Society recommends that a provision equivalent to section 212(3) of the CPC be included in clause 255. If implemented, the sentencing court may limit its application to circumstances and where the judge is of the opinion that the offender will be unlikely to commit another offence.

**Home Confinement Order**

5.62. The DCPCB Consultation Paper does not make reference to Home Confinement Orders. Home Confinement Orders are akin to home detention and is an alternative to imprisonment. They aim to reduce re-offending while also coping with expanding prison numbers and rising costs. It allows eligible offenders to retain or seek employment, maintain family relationships and responsibilities and attend rehabilitative programs that contribute towards addressing the causes of their offending.

5.63. In such cases, offenders are confined at home save that in certain cases they may be allowed to leave the house. Examples of such movement can include visits to the probation officer or police station, or being allowed to go to the office of a doctor or dentist.

5.64. During the SARS epidemic, the MOH invoked the Infectious Diseases Act to quarantine people exposed to SARS patients. This legislation allows mandatory home quarantine for 10 days, which was enforced by CISCO, a Singapore Security Agency. CISCO serves the quarantine order and installs an electronic picture (ePIC) camera at the home of each contact.

5.65. This mechanism is currently used by the Singapore Prison Service for inmates who have been released after serving a portion of their custodial sentence; however there is no impediment to this measure being adopted as a sentencing option.

5.66. **The Law Society recommends** that these confinement orders be used as a sentencing option.

**Protection/Restraining Order**

5.67. The DCPCB Consultation Paper does not make reference to protection or restraining orders.

5.68. The Courts are currently not empowered to make any such order upon conviction of an offence and while a similar option is available if the act falls within the definition of "family violence", there is no recourse where the parties are not "family".

5.69. This sentencing option may be useful where the offender has committed an offence against the complainant/victim and an order mandating that a pattern or firm of conduct should cease.

5.70. The Law Society recommends that the authorities consider adding this sentencing option in the DCPCB.

## K. CONCLUSION

5.71. The sentencing courts should be vested with unfettered discretion to assess the offence and the offender and impose a sentence based on this often cited truism by the Honourable the Chief Justice Yong Pung How (as he then was):

> *"the regime of sentencing is a matter of law which involves a hotchpotch of such varied and manifold factors that no two cases can ever be completely identical in this regard. Whilst past cases are no doubt helpful and sometimes serve as critical guidelines for the sentencing court, that is also all that they are, i.e., mere guidelines only. This is especially so with regard to the unreported cases, in which the detailed facts and circumstances are hardly, if ever, disclosed with sufficient clarity to enable any intelligent comparison to be made. At the end of the day, every case which comes before the courts must be looked at on its own facts, each particular accused in his own circumstances, and counsel be kept constantly and keenly apprised of the fact that it is just not possible to categorise cases based simply on mere numerals and decimal points."*

5.72. There will be ideological, philosophical and jurisprudential reasons to justify the retention, the revision or the removal of sentencing provisions. However, the Law Society believes that the fundamental and prevailing principle is that the sentencing court should not be constrained or restrained by statute from imposing the most appropriate and proportionate sentence.

Chapter

6

# 6. LEGAL PROFESSIONAL PRIVILEGE (LPP): SEARCH & SEIZURE

## A. THE PREVAILING LAW IN SINGAPORE

## B. THE LAW IN OTHER MAJOR DEVELOPED COMMON LAW JURISDICTIONS AND THE EUROPEAN UNION

- i. United Kingdom
- ii. Australia
- iii. Canada
- iv. New Zealand
- v. Hong Kong
- vi. South Africa
- vii. European Union

## C. OBSERVATIONS ABOUT LPP IN RELATION TO SEARCH AND SEIZURES AND PROPOSALS

## D. RECOMMENDATIONS

- i. ***Recommendation 1 – Consolidation of common law and statutory provisions***
- ii. ***Recommendation 2 – Establishment of a procedure to resolve claims of privilege***

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## A. THE PREVAILING LAW IN SINGAPORE

6.1. The issue whether legal professional privilege ("LPP") entitles a party to criminal investigations or proceedings to resist the disclosure of privileged communications in the face of coercive information-gathering powers of the investigatory authorities is unclear in Singapore. The CPC, including the proposed amendments, is silent on this.

6.2. The provisions in the *Evidence Act* relating to LPP are similarly silent on whether they apply to the exercise of coercive information gathering powers in non-judicial contexts.[22]

6.3. There are numerous pieces of legislation in Singapore, which, while conferring coercive information-gathering powers on the relevant investigative bodies, expressly provide that communications subject to LPP shall not be provided or disclosed.

Section 66(3) of the *Competition Act*[23] provides that:

*"(3) Nothing in this Part shall –*

*(a) compel a professional legal adviser to disclose or produce a privileged communication, or a document or other material containing a privileged communication, made by or to him in that capacity".*

*(b) authorise the taking of any such document or other material which is in his possession.*

*(4) A professional legal adviser who refuses to disclose the information or produce the document or other material referred to in subsection (3) shall nevertheless be obliged to give the name and address (if he knows them) of the person to whom, or by or on behalf of whom, that privileged communication was made."*

Section 153(3) of the *Securities and Futures Act* is worded similarly to section 66(3) of the *Competition Act*. It however refers to an "advocate and solicitor" instead of a "professional legal adviser".[24]

Section 393 of the *Companies Act* provides that "*No inspector appointed under this Act shall require disclosure by a solicitor of any privileged communication made to him in that capacity, except as respects the name and address of his client*."[25]

Section 54 of the *Media Development Authority of Singapore Act*,[26] section 76 of the *Gas Act*,[27] and section 57 of the *Electricity Act*[28] provide that:

*"A person shall not be required, under any provision of this Part, to produce or disclose a communication —*

*(a) between a professional legal adviser and his client; or*

[22] *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.), sections 128(1) and 131
[23] *Competition Act* (Cap 50B, 2006 Rev. Ed. Sing.)
[24] *Securities and Futures Act* (Cap 289, 2006 Rev. Ed. Sing.)
[25] *Companies Act* (Cap 50, 2006 Rev. Ed. Sing.)
[26] *Media Development Authority of Singapore Act* (Cap 172, 2003 Rev. Ed. Sing.)
[27] *Gas Act* (Cap 116A, 2002 Rev. Ed. Sing.)
[28] *Electricity Act* (Cap 89A, 2002 Rev. Ed. Sing.)

*(b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,*

*which in proceedings in a court would be protected from disclosure on grounds of privilege."*

Section 39 of the *Trust Companies Act* (Cap. 336) provides that:

*"(1) Nothing in this Part shall —*

*(a) compel an advocate and solicitor to disclose or produce a privileged communication, or a document or other material containing a privileged communication, made by or to him in that capacity; or*

*(b) authorise the taking of any such document or other material which is in his possession.*

*(2) An advocate and solicitor who refuses to disclose the information or produce the document or other material referred to in subsection (1) shall nevertheless be obliged to give the name and address (if he knows them) of the person to whom, or by or on behalf of whom, that privileged communication was made.*

*(3) Any advocate and solicitor who contravenes subsection (2) shall be guilty of an offence."*

Section 30 of the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* (Cap. 65A) provides that

*(1) An authorised officer may, for the purpose of an investigation into drug trafficking or criminal conduct, as the case may be, apply to a court for an order under subsection (2) [...]*

*(2) Subject to section 42 (10), the court may, if on such an application it is satisfied that the conditions to subsection (4) are fulfilled, make an order that the person who appears to the court to be in possession of the material to which the application relates shall —*
*(a) produce the material to an authorised officer for him to take away; [...]*

*(4) The conditions referred to in subsection (2) are — [...]*
*(b) that there are reasonable grounds for believing that the material to which the application relates [...]*
*(ii) does not consist of or include items subject to legal privilege; [...]*

*(9) An order under subsection (2) —*
*(a) shall not confer any right to production of, or access to, items subject to legal privilege; [...]*

Section 35 of of the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act* further provides that
*[...]*
*"items subject to legal privilege" means —*
*(a) communications between an advocate and solicitor and his client or any person representing his client made in connection with the giving of legal advice to the client;*
*(b) communications between an advocate and solicitor and his client or any person representing his client or between such an advocate and solicitor or his*

*client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and*

*(c) items enclosed with or referred to in such communications and made —*

*(i) in connection with the giving of legal advice; or*

*(ii) in connection with or in contemplation of legal proceedings and for the purposes of such proceedings,*

*when they are in the possession of a person who is entitled to possession of them, but excluding, in any case, any communications or item held with the intention of furthering a criminal purpose;*

6.4. The above pieces of legislation show that Parliament recognizes that communications subject to LPP in the context of these particular investigations or proceedings are protected from disclosure from the investigative bodies.

6.5. Given the current state of the common law (including the recent Singapore court decisions), our courts will likely recognize the applicability of LPP to non-judicial proceedings in pre-trial contexts. In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and other appeals,* the Singapore Court of Appeal recognized that LPP's protection exists both within the common law and the statutory framework under section 128 and 131 of the *Evidence Act*.[29] This recognition opens the way for our courts to draw on the decisions reached by the commonwealth jurisdictions (discussed below), which have unanimously held that communications subject to LPP are protected at common law from disclosure during search and seizures operations by police and other investigative bodies.

## B. THE LAW IN OTHER MAJOR DEVELOPED COMMON LAW JURISDICTIONS AND THE EUROPEAN UNION

6.6. The Commonwealth authorities in United Kingdom, Australia, Canada, New Zealand, South Africa, Hong Kong and the European Union show overwhelming support for the proposition that LPP is a substantive rule of common law that applies in non-judicial contexts such as search and seizures, and is not limited to a rule of evidence in judicial proceedings.

### i. United Kingdom

6.7. In Regina v Derby Magistrates' Court, Ex parte B,[30] the House of Lords held that LPP "is a fundamental condition on which the administration of justice as a whole rests." The House of Lords noted that LPP was an area that Parliament left "so far untouched" and stated conclusively that "no exception should be allowed to the absolute nature of legal professional privilege, once established."[31] This decision was notably affirmed in General Mediterranean Holdings S.A. v. Patel[32]. In Regina (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax and another,[33] Lord Hoffmann held that LPP can only be overridden by express statutory provision or necessarily implication.

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[29] *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and other appeals,* [2007] 2 SLR 367 [*APB case*]

[30] *Regina v. Derby Magistrates' Court, Ex parte. B., [1995] 1 AC 487, 507.*

[31] *Ibid,* at 508.

[32] *General Mediterranean Holdings S.A. v. Patel,* [1999] QBD 272

[33] *Regina (Morgan Grenfell & Co Ltd) v. Special Commissioner of Income Tax and another,* [2003] 1 AC 563

### ii. Australia

6.8. In *Baker v. Campbell*,[34] the Australian High Court held that LPP is applicable to both judicial and non-judicial proceedings and is a fundamental common law right, which can be abrogated by Parliament only by clear words or necessary implication. In so holding, the Court overruled its earlier decision in *O'Reily v. State Bank of Victoria Commissioners*, which held that LPP is only applicable to judicial proceedings.[35] *Baker v. Campbell* has since been approved and followed in subsequent Australian decisions.[36]

6.9. In 2008, the Australian Law Reform Commission released a report in which it recommended the enactment of a federal statute of general application to cover aspects of the law and procedure governing the client legal privilege claims in federal investigations.[37] It also concluded that key to addressing the problems identified is to focus upon practice and procedure relating to the assertion of LPP during the course of investigations. This issue has also been considered by several Australian states' reform commissions.[38]

6.10. Guidelines regarding searches of lawyers' offices and Parliamentarians have also been established in Australia. These guidelines and protocols set out a pre-agreed set of procedures when search warrants are executed.[39]

### iii. Canada

6.11. In *Descôteaux v. Mierzwinski,* the Supreme Court of Canada confirmed that LPP had evolved into a principle of substantive law, which entitles a party to resist search and seizures of privileged communications by investigatory bodies.[40] *Descôteaux* has since been affirmed and followed in later Canadian decisions.[41]

### iv. New Zealand

6.12. *Commissioner of Inland Revenue v. West-Walker*[42] sets out the position in New Zealand that LPP is not limited to judicial or quasi-judicial proceedings, but also to processes outside the courts, in particular investigative procedures. LPP is a substantive rule of common law and can be taken away or abrogated only by a statute that clearly expresses such a legislative intention.

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[34] *Baker v. Campbell* (1983) 153 CLR 52 (Aus.HC)
[35] *O'Reily v. State Bank of Victoria Commissioners* (1983) 153 CLR 1 (Aus.HC) [*O'Reily*]
[36] *Corporate Affairs Commission of NSW v Yuill and others* (1991) 172 CLR 319 (Aus.HC); *Commissioner of Australian Federal Police and others v Propend Finance Pty Limited and Others,* (1997) 188 CLR 501 (Aus.HC); *The Daniels Corporation International Pty Ltd v. Australian Competition and Consumer Commission,* (2002) 213 CLR 543 (Aus.HC); *AWB Ltd v Cole and Another,* (2006) 232 ALR 743 (Fed.Ct.Aus); *OKE v Commissioner of the Australian Federal Police,* [2007] FCA 27 (Fed.Ct.Aus) *Valentine v. Technical and Future Education Commission,* (2007) 97 ALD 447 (SC.NSW)
[37] Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations,* (2008) ALRC Report 107, <available online: http://www.austlii.edu.au/au/other/alrc/publications/reports/107/1.pdf> [*ALRC Report*]
[38] Joint Law Commissions, *Uniform Evidence Law*, ALRC R102; NSWLRC R112; VLRC Final Report, Sydney 2005, at 455-493
[39] General guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers' premises, law societies and like institutions in circumstances where a claim of legal professional privilege is made, <available online: http://www.lawcouncil.asn.au/policy/1959496083.html> ; Guidelines: Australian Taxation Office – Access to Lawyers' Premises, <available online: http://www.lawcouncil.asn.au/policy/1959496147.html>; "Protocol for execution of search warrants on members' offices", Legislative Council, Privilege Committee, <available online: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/851DCBAD570A1D6ACA2571240003E4E6>
[40] *Descôteaux v. Mierzwinski,* [1982] SCR 860 (SCC) [*Descôteaux*]
[41] *R v. McClure,* [2001] 1 SCR 445 (SCC); *R v. Lavallee, Rackel & Heintz,* [2002] 3 SCR 209 (SCC); *Maranda v. Richer,* [2003] 3 SCR 193 (SCC); *Law Society of Upper Canada (Re)*, (2006) 84 O.R. (3d) 133; *R v. Fuller,* [2008] S.J. No 237 (Saskatchewan Court of Queen's Bench)
[42] *Commissioner of Inland Revenue v West-Walker*, [1954] NZLR 191 (NZCA) [*West-Walker*]

6.13. In 2007, the New Zealand Law Commission had issued a report in which it recognized that uncertainty arising from the operation of the doctrine of LPP in the *Evidence Act 2006* and the common law.[43] It recommended that in the interest of clarity and uniformity, the LPP sections of the *Evidence Act 2006* be extended to apply to pre-trial contexts such as search and seizures. It also concluded that a clear statutory procedure is needed to govern the preservation of LPP in the exercise of search and surveillance powers.

**v. Hong Kong**

6.14. *Shun Tak Holdings Limited and others v. The Commissioner of Police* sets out the well established position in Hong Kong that communications subject to LPP cannot be seized or disclosed under coercive information gathering powers.[44] This position was recently affirmed by the Hong Kong Court of Appeal in *RMBSA Corporate Services Ltd & Anor v. Secretary for Justice & Anor,*[45] and has since been consistently followed in subsequent Hong Kong decisions.[46] There are also numerous statutory provisions in Hong Kong which expressly exclude communications subject to LPP from disclosure under coercive information-gathering powers.[47]

6.15. A procedure was enacted within Order 116 rule 7 and 8 of *The Rules of the High Court* to deal with claims of privilege in relation to the *Organised and Serious Crimes Ordinance*.[48] It sets out procedures to bring any dispute relating to assertions of privilege in relation to coercive information gathering powers to be resolved by the court.

**vi. South Africa**

**6.16.** In *Bogoshi v Director Office for Serious Economic Offences & Others*,[49] the Supreme Court of Africa held that LPP is a fundamental right that can be claimed not only in actual litigation, but also to prevent seizure by warrant. *Bogoshi* has been followed in later South African decisions.[50]

6.17. The South African Parliament has enacted a statutory procedure to deal with claims to privilege in the course of execution of search warrants. S.29(11) of *National Prosecuting Authority Act* establishes the procedure to deal with claims of privilege during such searches.[51] Any person who claims privilege over items during a search may request the Registrar of the High Court or his delegate to seize and remove the item for safe custody until a court of law has made a ruling on the question whether the information concerned is indeed privileged.

**vii. European Union**

6.18. The confidentiality of written communications between a lawyer and client is protected from disclosure under European Union (EU) laws. In *AM & S Europe Ltd*

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[43] New Zealand Law Report Commission, *Search and Surveillance Powers,* (2007) Report 97, <available online: http://www.lawcom.govt.nz/ProjectReport.aspx?ProjectID=96>
[44] *Shun Tak Holdings Limited and others v. The Commissioner of Police* [1995] 1 HKCLR 48 (HK.HC)
[45] *RMBSA Corporate Services Ltd & Anor v. Secretary for Justice & Anor* [2006] 4 HKC 198 (HK.CA)
[46] See *Time Super International Ltd & Ors v. Commissioner of the Independent Commission against Corruption* [2002] 2 HKC 581 (HK. Court of First Instance); *Pang Yiu Hung Robert v. Commissioner of Police & Anor* [2002] 4 HKC 579 (HK Court of First Instance); *RMBSA Corporate Services Ltd v. Secretary for Justice* [2008] HKEC 247 (HK.CA).
[47] See section 15(1) of *Prevention of Bribery Ordinance*; section 21(5) of *Drugs Trafficking (Recovery of Proceedings) Ordinance*; section 15(1) of *Prevention of Bribery Ordinance*; Section 15(5) of *Mutual Legal Assistance in Criminal Matters Ordinance*.
[48] *The Rules of the High Court* (Cap 4A)
[49] *Bogoshi v Director Office for Serious Economic Offences & Others*, 1993 (3) SA 953 (T) (South Africa Sup.Ct) [*Bogoshi*]
[50] *Mahomed v. NDPP and Others,* 2006 (1) SACR 495 (W) (HC); *Sasol 3 (Edms) Bpl v Minister van Wet & Orde 1991 (3) SA 766 (T); JG Zuma v. NDPP* 2006 (1) SACR 468 (D) (HC); *NDPP v. Zuma,* [2007] SCA 137. (South Africa Sup.Ct)
[51] *National Prosecuting Authority Act,* Act No. 23 pf 1998

*v Commission of the European Economic Communities,*[52] the European Court of Justice held that privileged communications are protected from disclosure requirements of the European Commission, provided the written communication emanates from an independent lawyer. This was affirmed by the European Court of First Instance in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities*.[53]

6.19. Apart from case law from the ECJ, the *Council Directive On prevention Of The Use Of The Financial System For The Purpose Of Money Laundering* is an example of EU legislation that protects communications between independent legal professionals and their clients.[54] Article 6(3) of the directive provides that disclosure requirements in money laundering legislation do not apply to notaries, independent legal professionals, auditors, external accountants and tax advisors, with regards to information they receive or obtain from clients in the course of giving advice, or for representation in judicial proceedings.

## C. OBSERVATIONS ABOUT LPP IN RELATION TO SEARCH AND SEIZURES AND PROPOSALS

6.20. Drawing on the experience of many Commonwealth jurisdictions and legislation in various countries, it is evident that documents subject to LPP can and ought to be protected from disclosure in the course of police investigations. There is a need to establish a process for an independent adjudication by the court of the legitimacy of the claim to LPP in situations where doubt arises as to whether an accused person's claim that the documents are indeed privileged.

6.21. To streamline the position in Singapore and to bring it in line with the common law, we make the following recommendations:

a) The consolidation of the common law position on LPP in relation to search and seizures, and the various statutory provisions that exempt privileged information from disclosure, within the CPC.

b) Establishing a procedure within the CPC to resolve claims of privilege during search and seizures.

6.22. The proposals here are not radical or new. The protection of documents subject to LPP is already recognized under different legislation in Singapore, including the *Competition Act*, *Securities and Futures Act*, *Companies Act, Media Development Authority Act, Trust Companies Act, Gas Act* and the *Electricity Act*. Our CPC is silent on this question of the protection of documents which are subject to LPP. As the overwhelming weight of the common law authorities shows, LPP is a substantive right which an accused person is entitled to raise to protect the disclosure of documents which are subject to LPP. We, therefore, strongly recommend that a provision be added to the *CPC Bill* to set out a procedure to resolve claims of LPP in the course of police investigations. The suggested procedure would preserve the confidentiality of disputed documents while the LPP claim is adjudicated by the court.

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[52] *AM & S Europe Ltd v Commission of the European Economic Communities,* [1983] 3 WLR 17 (ECJ) [*AM&S*]
[53] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities,* (Joined Cases T-125/03 and T-253/03) (Court of First Instance) [*Akzo Nobel*]
[54] *Directive 2001/97/EC*, amending *Directive 91/308/EEC*.

## D. RECOMMENDATIONS

### i. *Recommendation 1 – Consolidation of common law and statutory provisions*

6.23. It is recommended that this consolidation should be done within the CPC. As the law commissions in Australia and New Zealand have observed, it is undesirable to have the common law and statutory provisions operating concurrently in relation to the protections of LPP. The question that arises is whether the desired course is the enactment of a separate piece of legislation that would codify the existing law on LPP, or to simply insert a provision into the CPC.

6.24. While it may be desirable to have a single legislation to contain the law of LPP in Singapore, we suggest that a relatively simpler addition to the CPC would suffice to consolidate the existing law. In this regard, we recommend that a provision be added to the CPC to provide that the exercise of the search and seizure powers set out in Part IV Division 3 of the CPC Bill and under any other written law is subject to LPP.

### ii. *Recommendation 2 – Establishment of a procedure to resolve claims of privilege*

6.25. We also propose that a procedure to resolve claims to LPP be established within the proposed amendments to the CPC.[55] This procedure is intended to establish a minimum framework to address claims of LPP in response to coercive information-gathering powers, and should be complemented by additional policies/guidelines by the investigatory bodies. In light of the fact that the proposed procedure envisages judicial determination of any claims of privilege during search and seizures, the rules relating to the proposed procedure should, therefore, ideally be enacted among the other rules within the CPC, which regulates criminal procedure in Singapore.

6.26. Drawing on the experience of the Commonwealth jurisdictions and EU in relation to procedures dealing with claims of privilege, we recommend the following procedure to resolve such claims to LPP:-

- Pre-search stage:
    - Prior to the execution of the search warrant, the investigating officer should inform those persons subject to the search of their right to assert LPP over any privileged communications
    - Such persons should be given reasonable time to seek legal advice or instructions as to whether LPP should be claimed over any document(s).
- During the search:
    - Persons claiming privilege should be permitted to provide relevant materials that would establish the privileged nature of the documents in question.

[55] See the procedure established within Hong Kong's *Rules of Court,* O. 116 r. 7 & 8.

- Where the investigating officer is dissatisfied with the materials provided, the documents can only be seized if they are sealed and stored with a view to judicial determination of the claim to LPP.
    - If documents are to be removed, the person subject to the search should be allowed to make copies of the documents, subject to the supervision of the investigating officer.
- Communications that are claimed to be privileged must not be disclosed or inspected by the investigating body until the claim to privilege has been judicially determined.
- If the investigative body so requests, persons seeking to claim privilege should be required to make a statutory declaration as to the particulars of the privilege over the documents in question.

- After the search:
    - Reasonable time must be given for the persons subject to the search to seek a judicial ruling on the privilege claim, before it is considered to have waived LPP (21 days).
    - The court should have discretion to waive the default of the claimant of the privilege in failing to comply with the procedure or any inadvertent waiver of privilege where it is appropriate to do so.

6.27. This procedure envisages that all claims of LPP should be resolved judicially, where a Judge would inspect the documents in question. This is supported by the comments of Andrew Phang JA in the *APB case,* where His Honour pointed out that:

> "*One of the major difficulties facing the court in situations involving a claim of either legal advice privilege and/or litigation privilege is the fact that the claim is invariably based on affidavit evidence. … An inspection by the judge, pursuant tosection164 of the Act, would quickly solve the dispute between the parties, thus saving time and money for the parties. … Such an approach might be an effective and practical "middle ground" which ensures that the claim to legal professional privilege is not abused, hence ensuring that the competing public policy that all available evidence ought to be disclosed is fulfilled to the fullest extent possible.*"[56] [emphasis added]

6.28. The experience of the law commissions in Australia and New Zealand shows that there are some issues to consider while formulating a procedure to resolve claims of privilege. These issues mainly center on concerns of potential abuse of LPP to shield evidence from investigative bodies under the guise of claiming privilege. For example, the ALRC identified the following issues in its report:[57]

- Lack of consistency in the manner in which claims are made;
- Lack of transparency in claims;
- Need to address blanket claims of privilege;

[56] *APB Case*, *supra* note 29, at 407.
[57] *ALRC Report, supra* note 37, at 385

- Placing prejudicial documents with lawyers under the cover of spurious requests for legal advice so as to permit a claim for privilege; and

- Concerns about the inadvertent waiver of privilege in the process of making a claim.

6.29. Where privilege is asserted during search and seizures, there are always competing interests to be reconciled. On the one hand, there is the interest of protecting the confidential nature of communications between a lawyer and his client, which the courts have emphasized is fundamental to the administration of justice. On the other hand, there is also the wider public interest in ensuring that investigations into crimes are not unduly hampered by abuses of LPP in shielding incriminating evidence from the investigating authorities.

6.30. To some extent, providing relevant materials to satisfy the investigating authority that the documents in question are privileged goes some way in promoting a more consistent and transparent claim to privilege. There is greater difficulty with regards to blanket claims of privilege. We are mindful that the volume of documents may be such that blanket claims may be necessary as it would be difficult to examine every single document to ensure that privilege is not inadvertently waived.

6.31. The investigative authorities' overriding concern at this stage is that no evidence should be disposed of when privilege is asserted. The requirement that documents should be sealed, removed, and not inspected before the claim is judicially determined would go some way towards addressing concerns of confidentiality. As long as the documents are neither disposed of by persons subject to an investigation nor inspected by the investigating authority, such claims can always be resolved by a judge who can inspect the documents to determine the veracity of the LPP claims. The fact that there is potential inconvenience caused to investigating authorities when blanket claims are asserted should not undermine legitimate claims over voluminous amounts of privileged communications.

6.32. It is suggested that in addition to the above procedures, the investigative body may require persons asserting privilege to provide a statutory declaration as to the particulars of the privilege over the documents in question. The fact that section 14 of the *Oaths and Declaration Act* provides that a person who knowingly makes a false declaration shall be guilty of an offence would go some way in deterring persons who falsely and deliberately seek to shield incriminating evidence under the guise of a privilege claim.[58]

[58] *Oaths and Declaration Act,* (Cap 211, 2001 Rev.Ed.Sing.)

Chapter

7

# 7. MISCELLANEOUS

## A. CONSENT OF THE PUBLIC PROSECUTOR (CLAUSE 14)

## B. NOTICE TO ATTEND COURT (CLAUSE 114)

## C. CALLING DEFENCE AT CLOSE OF PROSECUTION'S CASE (CLAUSE 189(i))

## D. SUMMARY REJECTION OF APPEAL (CLAUSE 318)

## E. ARREST OF RESPONDENT (CLAUSE 323)

**********

*Introduction*

7.1. This chapter deals with the Law Society's observations and recommendations in miscellaneous DCPCB clauses not previously dealt with in the aforesaid chapters.

## A. CONSENT OF THE PUBLIC PROSECUTOR (CLAUSE 14)

7.2. This clause deals with consent of the Public Prosecutor in respect of offences specified in clause 14(1)(a) to (c). Clause 14(1)(c) lists out offences under any miscellaneous law other than offences under the Penal Code. In addition a person may be charged, arrested and produced in court before the consent of the Public Prosecutor has been obtained (clause 14(3) and (4). Clause 14(7) deems that the consent is given if the Solicitor General, Deputy Public Prosecutor and Assistant Public Prosecutor appears in court to conduct the prosecution.

*Observation Of The Law Society*

7.3. The consent of the Public Prosecutor is required to ensure that before an accused is charged for a serious criminal offence, The Public Prosecutor has considered all the evidence and circumstances of the case. Permitting an accused person to be charged, arrested or produced in court before the consent is given would defeat the rationale of requiring the Public Prosecution to consider the evidence to ensure that a prosecution is warranted. It would effectively leave the prosecutorial discretion to the Police.

7.4. Secondly, after an accused person has been charged in court without obtaining the consent of the Public Prosecutor, the appearance of the Solicitor General, Deputy Public Prosecutor and even an Assistant Public Prosecutor to conduct the prosecution can have the effect of rectifying the omission.

*Recommendation Of The Law Society*

7.5. **The Law Society recommends that** :

(i) As the Public Prosecutor's consent is required in only serious cases, the arrest, charging or producing of an accused person in court should only commence after the Public Prosecutor's written consent has been obtained

(ii) The consent should set out the particular offence.

(iii) The failure to obtain the Public Prosecutor's written consent cannot be remedied simply on account of the prosecution being conducted by the Solicitor General, Deputy Public Prosecutor and Assistant Public Prosecutor.

## B. NOTICE TO ATTEND COURT (CLAUSE 114)

7.6. Clause 14 permits a police officer to serve a notice on any person on reasonable grounds that the said person has committed an offence to attend court. Failure to attend may result in warrant of arrest being issued.

*Observation Of The Law Society*

7.7. Firstly, the clause governs any offence which would therefore include non seizable offences.

7.8. Secondly, the mode of service of the notice specified under section 3(f) may result in a warrant of arrest being issued when the said notice has not been served personally or in such a manner that the person will have knowledge of the service.

*Recommendation Of The Law Society*

7.9. There are no justifiable grounds for the process prescribed by clause 114, especially as it includes non seizable offences. The current provisions requiring a complaint to be filed before a magistrate would suffice and has thus far satisfactorily served the purpose.

## C. CALLING DEFENCE AT CLOSE OF PROSECUTION'S CASE (CLAUSE 189(i))

7.10. Clause 189(i) provides that the court must call on the accused to give his defence if there is some evidence which is not inherently incredible which meets the elements of the charge.

*Observation Of The Law Society*

7.11. Section 180(f) of the CPC which clause 189(i) seeks to replace permitted the court to carry out what has been termed a 'minimum' evaluation of the Prosecution's case and to acquit the accused if the evidence is inherently weak.

7.12. Clause 180(f) as it is worded does not permit the court to evaluate the evidence even if the evidence is inherently weak and the court must call the defence of the accused unless the evidence is inherently incredible.

*Recommendation Of The Law Society*

7.13. The defence of the accused should not be called without giving the court the discretion to carry out a minimum evaluation test at the close of the Prosecution case. Section 180(g) of the CPC should be retained.

## D. SUMMARY REJECTION OF APPEAL (CLAUSE 318)

7.14. Clause 318(1) empowers an appellate court to summarily reject an appeal against conviction and sentence after the of petition setting out the grounds of appeal has been filed. Clause 318(4) allows the appellant within 7 days to file an application for leave to amend the grounds of appeal by raising question of law and the advocate undertakes in writing to argue the appeal. Clause 318(5) states that an appeal against a reduction of sentence will be deemed not to be a question of law.

*Observation Of The Law Society*

7.15. Firstly, a petition of appeal setting out the grounds of appeal has to be filed within 14 days of receipt of the record of appeal. The grounds of appeal in a criminal appeal are crafted in general terms without referring to the specific paragraphs of

the grounds of decision, Notes of Evidence or Exhibits. It is not meant to be the skeletal argument. For an appellate court to dismiss an appeal by referring to the grounds of appeal would infringe the basic rules of natural justice i.e the right of the appellant to be heard.

7.16. Secondly, without the benefit of submissions which are usually filed after the petition of appeal has been filed, the court will not have the benefit of the submission from the Appellant and the Respondent and will not be in the best position to determine the appeal.

7.17. Thirdly, if it is an appeal against a decision of the Subordinate Courts the right of appeal to a single Judge of the Supreme court is virtually the last avenue available to an appellant unless he can show that there is a point of law of Law of public interest involved. The experience at the Criminal Bar is that appeals on a point of law of public influence are rarely allowed.

7.18. Fourthly, The provisions do not provide for a similar summary dismissal of appeals by the Prosecution.

*Recommendation Of The Law Society*

7.19. **The Law Society recommends** that there is no justification for summary dismissal of appeal based on the grounds of appeal pleaded in the Petition of appeal, without hearing the appellant. This is especially so in criminal cases where the life and liberty of an individual is at stake.

## E. ARREST OF RESPONDENT CLAUSE 323(1)

7.20. Clause 323(1) extends the powers of the District Court to order the arrest of an accused on the application of the Public Prosecutor, when the Public Prosecutor intends to appeal against the acquittal of an accused person. The accused person may be remanded for up to 48 hours.

*Observation Of The Law Society*

7.21. The High Court hears serious cases where the sentence imposed may be the death sentence or a term of life imprisonment. To extend the powers, to arrest a Respondent, to the District Courts which do not have the powers to enforce the aforesaid sentences of death or life imprisonment would be unjustifiably harsh.

*Recommendation Of The Law Society*

7.22. **The Law Society recommends** that there is no reason for the extension of the powers to arrest a Respondent and the current provisions in section 255 of the CPC are sufficient.

**Annex A**

## LIST OF MEMBERS OF THE CRIMINAL PRACTICE COMMITTEE OF THE LAW SOCIETY 2009

| S/N | NAME | LAW PRACTICE/ORGANIZATION |
|---|---|---|
| 1 | Mr. Sant Singh SC (Chairman) | Tan Rajah & Cheah |
| 2 | Mr. Wendell Wong (Vice Chairman) | Drew & Napier LLC |
| 3 | Mr. Anand Nalachandran (Council Representative) | ATMD Bird & Bird LLP |
| 4 | Mr. Amarjeet Singh SC | KhattarWong |
| 5 | Mr. K S Rajah SC | Harry Elias Partnership |
| 6 | Mr. B Rengarajoo | B Rengarajoo & Associates |
| 7 | Mr. Chia Boon Teck | Chia Wong LLP |
| 8 | Mr. Alfred Dodwell | Clifford Law LLP |
| 9 | Mr. Philip Fong Yeng Fatt | Harry Elias Partnership |
| 10 | Ms. Gloria Magdalene James | Hoh Law Corporation |
| 11 | Mr. Peter Ong Lip Cheng | Peter Ong & Raymond Tan |
| 12 | Ms. Rajvant Kaur | Lau & Gur |
| 13 | Mr. Vincent Leow | Allen & Gledhill LLP |
| 14 | Mr. Derek Kang Yu Hsien | Rodyk & Davidson LLP |
| 15 | Mr. Christopher De Souza | Lee & Lee |

**Annex B**

## LIST OF MEMBERS OF COUNCIL OF THE LAW SOCIETY 2009

| S/N | NAME | LAW PRACTICE |
|---|---|---|
| 1 | Mr. Michael Hwang SC (President) | Michael Hwang |
| 2 | Mr. Wong Meng Meng SC (Vice-President) | WongPartnership LLP |
| 3 | Ms. Malathi Das (Vice-President) | Joyce A Tan & Partners |
| 4 | Rajan Menon | KhattarWong |
| 5 | Lok Vi Ming, SC | Rodyk & Davidson LLP |
| 6 | Young Chee Foong | Legis Point LLC |
| 7 | Wong Siew Hong | Infinitus Law Corporation |
| 8 | Dilhan Pillay Sandrasegara | WongPartnership |
| 9 | Leo Cheng Suan | Infinitus Law Corporation |
| 10 | Yap Teong Liang | T L Yap & Associates |
| 11 | Stefanie Yuen Thio | TSMP Law Corporation |
| 12 | Joseph Tan Chin Aik | L F Violet Netto |
| 13 | Rajan Chettiar | Rajan Chettiar & Co |
| 14 | Lisa Sam | Lisa Sam & Company |
| 15 | Anand Nalachandran | ATMD Bird & Bird LLP |
| 16 | Christopher Koh | Allen & Gledhill LLP |
| 17 | Lee Terk Yang | Characterist LLC |
| 18 | Laura Liew | Samuel Seow Law Corporation |
| 19 | Wilma Muhundan | Gurbani & Co |
| 20 | Vanessa Sandhu | WongPartnership LLP |