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Comment

2018 CHANGES TO THE EVIDENCE ACT AND CRIMINAL PROCEDURE CODE

The Criminal Justice Reform Bill and Evidence (Amendment) Bill

Various portions of the Evidence Act (Cap 97, 1997 Rev Ed) and Criminal Procedure Code (Cap 68, 2012 Rev Ed) were amended in 2018 *vide* the Criminal Justice Reform Bill (Bill 14 of 2018) and Evidence (Amendment) Bill (Bill 15 of 2018); this was a continuation of a series of gradual but important changes to the criminal justice system that had begun in 2010 when the old Criminal Procedure Code (Cap 68, 1985 Rev Ed) was replaced. This legislation comment outlines and briefly analyses some of the most substantive changes brought about by the 2018 amendments: the video-recording of interviews in criminal proceedings; the introduction of a psychiatrist panel to regulate the reception of evidence from expert psychiatric witnesses in criminal proceedings; and the use of deferred prosecution agreements for certain corporate offenders.

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1 Following a relatively lengthy period of wide-ranging public consultations in 2017 to strengthen Singapore's criminal justice framework[1] and fairly robust debates in Parliament,[2] a slew of amendments was made to the Evidence Act[3] ("EA") and Criminal

* The authors thank Chia Chen Wei and Melissa Ng for their research assistance. All errors remain the authors'.

1 See Ministry of Law, "Responses to Feedback Received from the Public Consultation on Proposed Amendments to the Criminal Procedure Code and Evidence Act" (28 February 2018) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Response%20to%20Public%20Consultation%20Feedback.pdf> (accessed July 2018).

2 See *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94.

3 Cap 97, 1997 Rev Ed.

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Procedure Code[4] ("CPC") in March 2018 *vide* the Criminal Justice Reform Bill[5] and Evidence (Amendment) Bill[6] (collectively referred to herein as the "Reform Bill").[7] According to the Senior Minister of State for Law who tabled the amendments in Parliament, this was a bid to continue the country's march – the CPC had been overhauled and substantially rewritten back in 2010, for instance – towards a "more progressive, balanced and modern criminal justice system".[8]

2 This legislation comment outlines and briefly analyses some of the most substantive statutory changes brought about by the 2018 amendments: first, the video-recording of interviews ("VRIs") when statements are taken in criminal proceedings;[9] secondly, the introduction of a psychiatrist panel to regulate the reception of evidence from expert psychiatric witnesses in criminal proceedings;[10] and finally, the use of deferred prosecution agreements ("DPAs") for certain corporate offenders.[11] Each change will now be considered *in seriatim*.

I. Video-recording of interviews

A. Evidential difficulties that arise when statements are alleged to have been recorded involuntarily

3 Under the CPC, the recording of statements of accused persons must comply with both procedural and substantive requirements.[12] The former is straightforward and seldom presents great evidential

4 Cap 68, 2012 Rev Ed.
5 Bill 14 of 2018.
6 Bill 15 of 2018.
7 This was later passed as the Criminal Justice Reform Act 2018 (Act 19 of 2018), but for convenience, reference to the bill and its clauses will be maintained in this piece. In total, 52 changes were made to various portions of the Evidence Act (Cap 97, 1997 Rev Ed) and Criminal Procedure Code (Cap 68, 2012 Rev Ed). Those changes, other than those discussed herein, pertained to areas such as abuse of process, bail, computer evidence, female suspects, vulnerable victims, victim compensation and community sentencing.
8 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law). Other changes that were part of this series include amending the Evidence Act (Cap 97, 1997 Rev Ed) in 2012 regarding the cross-examination of sexual offence complainants and (also in that year) giving the courts sentencing discretion over the death penalty for certain types of homicide and drug trafficking offences.
9 See paras 3–15 below.
10 See paras 16–27 below.
11 See paras 28–44 below.
12 The procedural requirements are mainly found in ss 22 and 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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difficulties in terms of proving compliance,[13] though the implications for breach in extreme cases can be severe and lead to the complete exclusion of such statements.[14] In respect of the latter, s 258(3) provides that the court shall refuse to admit the statement of an accused person:[15]

> … if the making of the statement 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 statement he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

4 If a statement is alleged by the accused person to have violated the aforesaid prohibition, the court will conduct an ancillary hearing[16] to make a finding on the issue – and unlike the admissibility of most other types of evidence generally,[17] the CPC makes it plain that there is no judicial discretion to admit the statement if there has been a violation of s 258(3). The burden of proof is on the Prosecution to show, beyond a reasonable doubt, that no breach of s 258(3) has occurred.[18] Further, it should be noted that s 258(3) applies to both long statements (otherwise known as investigation statements) and cautioned statements.[19] Such statements often contain highly inculpatory evidence – including confessions – and their admissibility can therefore have a great bearing on whether an accused person is successfully convicted or acquitted, especially when there is a paucity of direct evidence proving or disproving the offence in question.[20]

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13 Specifically, these requirements are that the statement must be in writing, read over to the accused person, interpreted for the accused person in a language that he understands if he does not understand English, and be signed by the accused person.

14 See *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [140]–[147].

15 Explanation 2 to this provision clarifies that if:

> … a statement is obtained from an accused by a person in authority who had acted in such a manner that his acts tend to sap and have in fact sapped the free will of the maker of the statement, and the court is of the opinion that such acts gave the accused grounds which would appear to the accused reasonable for supposing that by making the statement, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, such acts will amount to a threat, an inducement or a promise, as the case may be, which will render the statement inadmissible.

16 See s 279(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Previously, this was known as a *voir dire* or a trial-within-a-trial.

17 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) ch 2.

18 See, for instance, *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 at [83].

19 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) ch 7.

20 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) ch 7.

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5 However, how does a court ascertain with sufficient confidence where the truth lies if, say, an accused person claims that he was threatened or induced into making a particularly inculpatory statement, but the investigator flatly denies making any threat or inducement? Without the benefit of video recordings, the recording of statements is ultimately a process without witnesses apart from the makers and takers of the statement, and one would think that if there was indeed, say, any threat made to an accused person, the authorities would unlikely be so careless so as to leave behind an incriminating trail of physical or medical evidence.[21] In this regard, it should also be borne in mind that even though the right to counsel is guaranteed by the Constitution of the Republic of Singapore[22] ("Constitution") for criminal cases,[23] the Court of Appeal has consistently maintained that accused persons who have been brought in for investigations do not have an immediate right to counsel – reasonable time must be given for the necessary police investigations to take place first, which would include the taking of statements.[24]

6 In most situations, therefore, it is ultimately a case of whose account the court chooses to believe more than the other or whether the court sufficiently believes an account, since independent witnesses and counsel would not be available to testify directly as to whether there was any threat, inducement, promise or oppression during the recording of statements. The court in this endeavour can of course have recourse to the demeanour and credibility of the accused person and the officer who recorded the statement when they take the stand in court to be cross-examined, as well as any surrounding circumstances that corroborate either account,[25] but the question is whether there are better ways to promote due process rights for accused persons – without unduly

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21 As it were, allegations of breaches of s 258(3) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) almost never succeed: see generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 2018) ch 7.

22 1999 Reprint.

23 Article 9(3) of the Constitution of the Republic of Singapore (1999 Reprint) states:

> 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.

In capital cases, the State would also provide legal assistance under the Legal Assistance Scheme for Capital Offences; the Criminal Legal Aid Scheme exists for needy accused persons in less serious crimes.

24 *James Raj s/o Arokiasamy v Public Prosecutor* [2014] 3 SLR 750 at [29]–[33].

25 See, for instance, *Tey Tsun Hang v Public Prosecutor* [2014] 2 SLR 1189 at [100]–[108].

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hampering investigative efforts by the authorities, allowing the system to be abused or expending great resources.[26]

B. Whether video recordings are a plausible solution

7 The 2018 amendments to the CPC introduced VRIs to address this evidential difficulty, albeit in a rather guarded way.[27] During the second reading of the Reform Bill, the Senior Minister of State for Law explained that VRIs would "assist the Courts to try cases more effectively when investigation statements are sought to be admitted" because they "will be able to take into account the interviewee's demeanour" and "provide an objective account of the interview, to assist the Court in deciding on any allegations made about the conduct of the interview".[28] In other words, this obviates the need for either the interviewer or interviewee to recall details of an interview that took place some time ago since there is now an objective record of the event. A Member of Parliament ("MP") also pointed out that VRIs will:[29]

> … [set] the record straight with regard to allegations of oppression, inducement, threat or promise – issues that go towards admissibility. The evidence-gathering process would hence become more

26 As to whether due process and crime control are necessarily antithetical to each other, see Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23.

27 It should be noted that the possibility of introducing the video-recording of interviews was already mentioned in Parliament in 2016, but the Government said it needed more time to conduct feasibility studies: *Singapore Parliamentary Debates, Official Report* (10 October 2016) vol 94 at p 108 (K Shanmugam, Minister for Home Affairs and Minister for Law). The Government was to repeat its stance in 2017: *Singapore Parliamentary Debates, Official Report* (3 March 2017) vol 94 (Desmond Lee, Senior Minister of State for Home Affairs and National Development).

28 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law). See also cl 62 of the Criminal Justice Reform Bill (Bill 14 of 2018), which amends s 235 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC"). The relevant part (s 235(7)) states:

> … where a statement made by a person is recorded in the form of an audiovisual recording, if a court considers that the production of the audiovisual recording is necessary of desirable for the purposes of any inquiry, trial or other proceeding … the court may only order the prosecution to do either or both of the following:
>
> (*a*) to produce the audiovisual recording in court;
>
> (*b*) to arrange for the defence to view the audiovisual recording at the police station or any other prescribed place.

The new s 264A of the CPC also confirms that statements recorded in the form of audiovisual recordings can be admissible evidence to the same extent and to the same effect as oral evidence given by the person.

29 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Christopher de Souza).

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> transparent and there can be no allegations of the statement not being read back in a language the accused is familiar with.

Further, beyond ensuring fairness to accused persons, VRIs will "reduce the likelihood of frivolous allegations being made against investigators which in turn will save court time".[30] At the same time, potential police misconduct will probably be greatly deterred if there is knowledge that interviews will be video-recorded, and in turn, there will be greater confidence in the criminal justice process.[31]

8 Despite these perceived advantages to both accused persons and the investigating authorities, it was made clear that VRIs would be implemented in staggered stages as the Government took the view that the introduction of such technology required "significant investment of infrastructure and training", and that the first phase of offences for which VRIs would apply to in the interim would be a limited category of sexual offences.[32] Presumably, subsequent types of offences to be eventually included would be prioritised based on the gravity of the offence (and concomitantly, the severity of the potential penalties) – offences involving severe violence readily come to mind. But what complications in using VRIs might give the Government some pause in implementing it across a wider spectrum of offences? To appraise this, one must consider how the VRI amendment was framed. Clause 6 of the Reform Bill first states that s 22(3) of the CPC (s 22 governs the procedure for long or investigation statements) will be replaced with the following subsections:

> (3) Subject to subsection (5), a statement made by a person examined under this section must be recorded —

30 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Sylvia Lim).

31 See generally Alex Birtles, "The European Committee for the Prevention of Torture and the Electronic Recording of Police Interviews with Suspects" (2001) 1 Hum Rts L Rev 67; Thomas Sullivan, "Recording Federal Custodial Interviews" (2008) 45 Am Crim L Rev 1297.

32 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law). It was also added in Parliament that the police:

> … have a training programme in place, for taking statements while on camera. They go through a four-day course which includes interview skills, administrative procedures in conducting a video interview and how to tackle equipment failure. This is vital for consistency in the way video interviews are conducted … The Police will fine-tune the training programme, as they gain experience from the use of VRIs.

See *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

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(a) in writing; or

(b) in the form of an audiovisual recording.

…

(5) Where, before a person makes a statement under this section, any police officer or forensic specialist examining the person reasonably suspects the person of having committed an offence specified in the Third Schedule,[33] any statement made by the person during the examination must be recorded in the form of an audiovisual recording, unless any of the following applies:

(a) due to an operational exigency, it is not feasible to record the statement in the form of an audiovisual recording;[34]

(b) the equipment designated for recording the statement in the form of an audiovisual recording —

(i) does not work; and

(ii) cannot be repaired or replaced within a reasonable time;

(c) the person requests that the statement be recorded in writing instead of in the form of an audiovisual recording, and the police officer or forensic specialist examining the person reasonably believes that the granting of the request will facilitate the investigation.

(6) Despite subsection (5) —

(a) a mere failure to comply with subsection (5) does not render a statement by a person examined under this section inadmissible if the statement is otherwise admissible; and

(b) no inference is to be drawn by the court from a mere failure to comply with that subsection.

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33 That is, ss 375–377B of the Penal Code (Cap 224, 2008 Rev Ed), which pertain to rape, sexual assault by penetration, sexual penetration of minor, commercial sex with minor, commercial sex with minor outside Singapore, tour outside Singapore for commercial sex with minor, sexual grooming of minor, procurement of sex with person with mental disability, incest, sexual penetration of a corpse, outrages on decency, and sexual penetration with living animal.

34 As explained in *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law):

> For example, there may be a need to record a handwritten contemporaneous statement from an accused person at the scene of the crime, when the person is arrested at the scene. The legislation allows for flexibility to take into account such operational exigencies.

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9 Clause 7 of the Reform Bill then replaces ss 23(3) and 23(5) of the CPC (s 23 governs the procedure for cautioned statements) with subsections that are identical to cl 6, save for the following:

> (6) Where a statement made by an accused, in answer to a notice read to the accused under subsection (1), is recorded in the form of an audiovisual recording —
>
> > (a) if requested by the defence, arrangements must be made for the accused and the accused's advocate (if any) to view the audiovisual recording of the statement, as soon as practicable after the audiovisual recording is made, at a police station or at any other prescribed place; and[35]
> >
> > (b) if a transcript of the audiovisual recording is made, a copy of the transcript must be given to the accused as soon as practicable after the transcript is made.

10 Perhaps the most immediate questions that arise from a plain reading of the amended ss 22 and 23 of the CPC are not from what is stated, but what is not stated therein or in any of the other related CPC provisions that were amended.[36] One such question relates to the existence of safeguards to ensure accuracy and reliability of the evidence, since the audiovisual recording is in most cases meant to be a substitute or alternative to the written statement (as the amended ss 22(3), 23(3) and 23(3E) suggest), particularly for offences that fall under ss 22(5) and 23(3B). More specifically, as noted by an MP during the second reading of the Reform Bill, how does one know if the recording captures the entire interrogation process – a threat may have been made before the recording started, for instance, or there might have been multiple rounds of pre-questioning before the recording that weakened the resolve of the accused person.[37] The same MP also said that the recording could be manipulated at various points, from how the camera frames the shot to how the footage is edited before being made

35 See also cll 42, 52 and 54 of the Criminal Justice Reform Bill (Bill 14 of 2018), which amend ss 166, 214 and 218 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) ("CPC") respectively. The new s 225B also states that the Prosecution is not required to produce either the audiovisual recording or a copy of that recording to the defence for statements made under s 22 of the CPC.

36 These include ss 225B, 235 and 264A of the Criminal Procedure Code (Cap 68, 2012 Rev Ed). Due to space constraints, matters related to privacy, legal professional privilege and vulnerable interviewees will not be discussed here.

37 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Kok Heng Leun, Nominated Member of Parliament). In fairness, even in fairly liberal jurisdictions such as Australia, Canada and the UK, there is no mandatory requirement to videotape interrogations, even if the practice is commonplace.

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available for viewing.[38] And even if the recording is not manipulated, what happens if the equipment malfunctions (whether before, during, or after the recording) in some way or runs out of storage space?[39] What happens if parts of the recording have only sound or picture but not the other?[40]

11 To begin answering any of these questions, one ought to first recognise the evidentiary role and weight given to VRIs. Like a statement that was recorded on paper rather than on tape, it can be said that a VRI would ordinarily be hearsay unless its admissibility is provided for in either the EA or CPC, though one could of course simply recharacterise it as "real" evidence of the fact that something was said and funnel it under some broader admissibility scheme,[41] or less drastically, the court can rely solely on any written statement given without recourse to any VRI or decide matters based on weight. But regardless of the admissibility route taken, it is likely that any given VRI would assume a critical evidentiary role in disproving any allegations of impropriety during the recording of statements. However, as mentioned, the amended ss 22 and 23 of the CPC only focus on when a VRI may be dispensed with and what happens when not all of the procedural requirements in the VRI are complied with (for completeness, the sections also cover the accused's access to the VRI) but stops short of explicating the safeguards of ensuring VRI reliability and also the consequences of conflicting evidence or problematic recordings.[42] In this connection, the practice of foreign jurisdictions may be instructive.

12 In the UK, for instance, the Code of Practice to the Police and Criminal Evidence Act 1984[43] states that: the recording must ensure coverage of as much of the room as practically possible so that there are no blind spots; steps should be taken to prevent a situation where the

38 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Kok Heng Leun, Nominated Member of Parliament). See also *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (James Chalmers, Fiona Leverick & Alasdair Shaw eds) (August 2014) at p 122.

39 For instance, the audio was not captured or certain portions of the recording are corrupted.

40 As mentioned, since the amended ss 22 and 23 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) only require a statement to be recorded either in written or audiovisual form, the question of what happens if the recording appears to show words different from what are found in the written statement should not arise.

41 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell: 2018) ch 4.

42 Although the provisions do not state so, if the Australian approach were to be followed, a failure to provide good reasons for why audiovisual recordings were not made could result in the exclusion of any unrecorded confessions: see, for instance, *R v Schiavini* [1999] NSWCCA 165.

43 c 60 (UK).

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front of the interviewee or interviewer is not captured; and if the recording device fails, the interview will be stopped, the unaffected parts will be digitally secured and the remainder of the interview recommenced in new recording media.[44] Going a step or two further, in Australia, statements made during a break in a recorded interview are inadmissible, as are those made after the recorded interview had ceased and no further questions were being asked.[45] In light of the above, it would seem that the easiest way to ensure reliability and accuracy – and also to alleviate concerns about how the framing of the shot might have different psychological effects[46] – is to have multiple (at least two, if not three) cameras placed throughout the interview room, armed with the appropriate lenses and image quality, to be in operation when the statement is taken. Footage should be doubly backed during the interview and securely archived, and any breaks in the interview must be properly accounted for (for instance, by leaving the recording running). Doing all of this is neither unduly expensive nor difficult in this day and age of digital video technology, though it may be difficult to completely rule out the possibility that the accused person might have been put under pressure to confess even before the interview is recorded. That is not something VRIs can or are meant to solve.[47]

13 Another issue that VRIs cannot solve is people placing undue reliance on them for various reasons. Those who believe that VRIs will make it more possible for false confessions to be detected need to bear in mind that the consensus among researchers who study the detection of falsehoods is that people generally do little better than chance when it

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44 Code E: Revised Code of Practice on Visual Recording with Sound of Interview with Suspects (May 2018) at para 2.

45 *Kelly v R* [2004] HCA 12; *Nicholls v R, Coates v R* [2005] HCA 1.

46 A considerable body of research demonstrates the existence of "illusory causation". In the context of the video-recording of interviews this means that:

> … video-recorded confessions made with the camera focused on the suspect would lead observers to assess that the suspect's statements were more voluntary and conclude that the suspect was more likely to be guilty than if the camera focused on the interrogator or on both the suspect and interrogator equally.

See Daniel Lassiter & Matthew Lindberg, "Video Recording Custodial Interrogations: Implications of Psychological Science for Policy and Practice" (2010) 38 *Journal of Psychiatry and Law* 177 at 185.

47 See *Post-Corroboration Safeguards Review: Report of the Academic Expert Group* (James Chalmers, Fiona Leverick & Alasdair Shaw eds) (August 2014) at p 122. It should also be noted that this is a different issue from when the recording should begin – in other jurisdictions, the recording can only begin when there is reasonable belief that the interviewee has committed an offence, but s 22 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) is broad enough not to create this dilemma.

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comes to separating lies from the truth.[48] In fact, people perform relatively worse, when they rely primarily on visual cues, particularly those emanating from a person's face, when making judgments on veracity.[49] There is also what psychologists term "fundamental attribution error", which is the phenomenon of observers tending to attribute people's actions to internal causes (dispositions or intentions) even when external forces or pressures in the situation could readily account for their actions.[50] In the context of VRIs, this means that false confessions may not be as easily detected as one would think. The usefulness of VRIs is further complicated by "expectancy effects" as people who expect or desire to see different things very often end up seeing different things despite being shown the same recording.[51]

14 Then there may also be concerns about whether VRIs may have some sort of chilling effect on accused persons in that they would be less likely to speak candidly, and therefore confessions may not be as forthcoming. In the US, the Supreme Court of Massachusetts has dispelled the former, saying that:[52]

> … [t]he principal objection to recording of interrogations springs from the fear that suspects will refuse to talk at all, or will decline to make a full confession, if they know they are being recorded. Based on experience to date in other jurisdictions, those fears appear exaggerated. Moreover, what is posed as an objection to recording of interrogations is itself inherently contrary to our requirement of a knowing and voluntary waiver of the right to remain silent.

On this point, it should also be borne in mind that in Singapore, while accused persons are not obligated to divulge incriminatory information during the recording of cautioned statements as part of the privilege against self-incrimination,[53] they must divulge potentially exculpatory

48 Daniel Lassiter & Matthew Lindberg, "Video Recording Custodial Interrogations: Implications of Psychological Science for Policy and Practice" (2010) 38 *Journal of Psychiatry and Law* 177 at 184.
49 Daniel Lassiter & Matthew Lindberg, "Video Recording Custodial Interrogations: Implications of Psychological Science for Policy and Practice" (2010) 38 *Journal of Psychiatry and Law* 177 at 184.
50 Daniel T Gilbert & Patrick S Malone, "The Correspondence Bias" (1995) 117(1) *Psychological Bulletin* 21 at 24, citing Lee Ross, "The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process" in *Advances in Experimental Social Psychology* vol 10 (Leonard Berkowitz ed) (Academic Press: 1977) at p 174.
51 Daniel Lassiter & Matthew Lindberg, "Video Recording Custodial Interrogations: Implications of Psychological Science for Policy and Practice" (2010) 38 *Journal of Psychiatry and Law* 177 at 182–183.
52 *Commonwealth v DiGiambattista* 442 Mass 423 at 443–444.
53 See, for instance, s 23(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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information or risk having adverse inferences drawn against them.[54] Furthermore, the amended ss 22 and 23 of the CPC give the interviewee the option to request not to have the interview recorded.

15 All things considered, there is no doubt that the introduction of VRIs is a welcome development in improving confidence in the criminal justice process and also an important step taken to minimise wrongful convictions predicated on coerced confessions. As explained above, there should not be any real difficulty, operational or otherwise, in ensuring the reliability and accuracy of VRIs, and the implementation of VRIs across a wider spectrum of offences should be feasible in the foreseeable future. The challenge would be for lawyers and judges to be trained to deal appropriately with VRIs so that they may be fairly interpreted and used.

II. Panel of psychiatrists

A. General framework for admitting expert opinion evidence

16 We turn then to the next substantive change, the introduction of an accredited panel for expert psychiatrists testifying in criminal cases. Under longstanding common law rules of evidence, opinion evidence is by default inadmissible for lack of relevance and reliability (it is also for the court, and not witnesses, to draw the necessary inferences from facts, putting aside the withering influence of the ultimate issue rule).[55] Notwithstanding its fundamentally different admissibility paradigm, the EA implicitly acknowledges this general prohibition, but also recognises that expert opinion evidence may be of value to the courts. Under s 47(1) of the EA:

> … when the court is likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge, the opinions of experts upon that point are relevant facts.

This gateway of admissibility, however, is subject to s 47(4), which states that an opinion "which is otherwise relevant under subsection (1) shall not be relevant if the court is of the view that it would not be in the interests of justice to treat it as relevant".[56] The factors to be considered

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54 This privilege, however, has been described by the Court of Appeal as being neither a constitutional rule nor rule of natural justice: *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at [15]–[19].

55 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell: 2018) ch 6.

56 For a general overview of the admissibility paradigm under the Evidence Act (Cap 97, 1997 Rev Ed), see Chen Siyuan, "Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The

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under the "interests of justice" test include reliability, costs, delay, relevance, prejudice, fairness, and tendency to distract or confuse.[57] The EA does not distinguish between civil and criminal cases under this general framework for admitting expert opinion evidence.[58]

17 For further context, s 47 of the EA was amended in 2012, broadening the admissibility gateway for expert evidence. Whereas the previous touchstone of admissibility was based on whether the expert opinion pertained to fixed categories of assistance (foreign law, science or art, or handwriting or finger impressions), the current iteration of sub-s (1) conceives of possibility of assistance to the court in a much larger realm and using a lower threshold of admissibility, though of course the court is now expressly given the power not to admit the evidence by virtue of sub-s (4).[59] There is no mistaking, however, that Parliament intended s 47 to be interpreted and applied broadly.[60] This position was an endorsement of the notion that as litigation becomes more complex, parties in adversarial proceedings should have the liberty to craft their cases and call upon witnesses as they see fit – in civil cases at least.[61] This would explain as well the 2012 introduction of sub-s (3) to s 47, which clarified that the common knowledge rule would be no bar to admitting expert opinion evidence.

18 To be clear, the scope of s 47 of the EA – even after the 2012 amendments – continues to be delineated by case law, whether for civil or criminal proceedings. For instance, the purported expert should be properly qualified. This goes beyond perusing paper qualifications and asserting credentials as it requires a close examination by the court of the expert's training and experience in the relevant field.[62] The expert also has an overriding obligation to the court to be independent and truthful to the court, even if his services may be paid for exclusively by a party.[63] A lack of independence may be evinced from a lack of coherence

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Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions" (2014) 10(1) ICE 1 and Chen Siyuan & Eunice Chua, "The Indian Evidence Act and Recent Formulations of the Exclusionary Discretion in Singapore" (2018) 15(1) ICE 1.

57 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [106], albeit in the context of interpreting the hearsay equivalent of this provision.

58 See also *ANB v ANC* [2015] 5 SLR 522 at [29].

59 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 (K Shanmugam, Minister for Law).

60 *Singapore Parliamentary Debates, Official Report* (14 February 2012) vol 88 (K Shanmugam, Minister for Law).

61 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell: 2018) ch 6.

62 See, for instance, *Leong Wing Kong v Public Prosecutor* [1994] 1 SLR(R) 681.

63 See, for instance, *Pacific Recreation Pte Ltd v S Y Technology* [2008] 2 SLR(R) 491.

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and rationality in the expert's report or testimony to the court;[64] indeed, prior to testifying in court, experts are expected to furnish detailed grounds – including the consideration of plausible adverse premises – to justify the conclusions they reach, and where there is interaction with witnesses required (for instance, a doctor examining a patient), they are expected to conduct such interactions professionally.[65] None of these extensive requirements should be surprising, given the courts' increasingly heavy reliance on expert testimony[66] and the prohibition on courts from unduly overruling such testimony with their own opinion.[67]

B. Whether it is necessary to reduce pool of psychiatric experts in criminal proceedings

19 If the regime for admitting expert opinion evidence generally is already fairly robust, why is there a need to treat psychiatrists testifying in criminal cases differently by essentially creating an additional hurdle to admissibility? As it were, Singapore continues to retain many aspects of the "crime control" model (as opposed to the "due process" model) of criminal justice, and it is also generally accepted that the resources available to accused persons, be it in the form of legal representation or access to evidence, are more limited when compared to civil proceedings.[68] When it comes to criminal proceedings, the role of psychiatric experts is to either advance – or dispute – the fundamental claim that an accused person did not have a culpable state of mind such as to be found guilty of an offence, or at the very least, there should be mitigation of the punishment. But the effect of limiting the pool of psychiatric experts via the introduction of some sort of a clearing selection committee to accredit them would more likely negatively affect accused persons than the Prosecution, given that the rate of successfully pleading mental defences is already considerably low – a consequence that should not be lightly ignored, in view of the potentially harsh penal sanctions in Singapore upon conviction and the considerable costs that hiring an expert usually entails.[69]

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64 See, for instance, *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong* [2007] 4 SLR(R) 460.

65 See, for instance, *Pacific Recreation Pte Ltd v S Y Technology* [2008] 2 SLR(R) 491.

66 See generally Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell: 2018) ch 6.

67 See, for instance, *Tengku Jonaris Badlishah v Public Prosecutor* [1999] 1 SLR(R) 800 and *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983.

68 See generally Chin Tet Yung, "Remaking the Evidence Code: Search for Values" (2009) 21 SAcLJ 97 and Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23.

69 Indeed, what is interesting is that in the past decade, although the Singapore courts have not held back their criticisms when the Prosecution's expert witnesses have been unprofessional or overzealous (see, for instance, *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167 and *Ong Pang Siew v Public Prosecutor* [2011]

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20 A number of Members of Parliament appeared to be cognisant of the possible unfairness to accused persons that would result from the change in the law, and one of them commented that:[70]

> … to ensure the rationale of fairness remains paramount in the trial process, we should have, in my view, a long panel list of psychiatrist experts, and not restrict the panel to a short list. This will allow a mentally ill accused person to see a medical professional he or she is most comfortable with.

21 The Senior Minister of State for Law responded that it was not the intention of the amendment to "set an extremely high bar for admission to the panel" and it was expected that "most psychiatrists with the relevant forensic training will be able to qualify".[71] Notably, however, no criteria were set out as to how the selection committee would approve admission to the panel, and this is reflected in cl 78 of the Reform Bill (which introduces s 270 to the CPC):

> **270.**—(1) In any criminal proceedings, an opinion of a psychiatrist on any matter concerning psychiatry (when given as the opinion of an expert) is not admissible as evidence, unless the psychiatrist is a member of the panel of psychiatrists (called in this section the Panel) established for the purposes of this section.
>
> (2) A Selection Committee may appoint, or renew the appointment of, a psychiatrist as a member of the Panel, for a period not exceeding 2 years at a time …
>
> …
>
> (4) The Selection Committee may revoke the appointment of a psychiatrist as a member of the Panel in such circumstances as may be prescribed by the Criminal Procedure Rules.
>
> (5) Any psychiatrist who is aggrieved by any decision of the Selection Committee mentioned in the following paragraphs may appeal …
>
> (6) The decision of the Chief Justice on an appeal under subsection (5) is final …
>
> …

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1 SLR 606), there is some concern (which was raised in Parliament as well when the Criminal Justice Reform Bill (Bill 14 of 2018) was debated) that many psychiatric experts testifying for accused persons are not of the requisite quality (see, for instance, *Muhammad Jefrry v Public Prosecutor* [1996] 2 SLR(R) 738; *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205; and *Mehra Radhika v Public Prosecutor* [2015] 1 SLR 96).

70 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Christopher de Souza).

71 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

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(8) The Selection Committee consists of the following persons:

(a) a Judge of the Supreme Court, who is nominated by the Chief Justice for such period as the Chief Justice may determine, and who is the chairperson of the Committee;

(b) a District Judge, who is nominated by the Chief Justice for such period as the Chief Justice may determine;

(c) a public officer, who is nominated by the Minister charged with the responsibility for health …

22 The fact that there have not been any selection criteria formulated is obviously an issue, but even though there appears to be no foreign precedent or practice for reference regarding this amendment, this uncertainty is perhaps going to be resolved by the Criminal Procedure Rules Committee, which was established pursuant to the Reform Bill and will be looking into creating various criminal procedural rules to supplement the CPC. That aside, the most immediate concern that arises from the introduction of this accredited panel is whether psychiatric experts, especially those testifying for accused persons, would be unduly self-conscious and guarded when presenting their evidence to the court so as to "preserve" their standing and reputation for the purposes of being selected or retained for the panel.[72] Relatedly, if a psychiatric expert is regularly engaged by defence counsel – and regularly "loses", given the very high rate of successful convictions in Singapore – does this have any bearing on the expert's credibility and therefore eligibility for the panel? The Ministry of Law has responded to public feedback in this vein by providing reassurance that "[p]sychiatrists will not lose their place on the panel merely because they take a minority view or because the judge does not accept their opinion".[73] However, a more fundamental question is why should psychiatric experts be subject to this "special" treatment when it seems that no other class of expert witness faces a similar (court-administered) accreditation process?[74]

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72 Ng Huiwen, "Proposal to Regulate Psychiatric Expert Evidence Raises Concern" *The Straits Times* (30 July 2017), where Jeffrey Pinsler was quoted as commenting that a panel of appointed experts could lead to "miscarriages of justice", for instance, when a psychiatrist may be unwilling to state his honest but controversial view for fear that he may appear to lack of objectivity and lose his place on the panel.

73 Ministry of Law, "Responses to Feedback Received from the Public Consultation on Proposed Amendments to the Criminal Procedure Code and Evidence Act" (28 February 2018) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Response%20to%20Public%20Consultation%20Feedback.pdf> (accessed July 2018).

74 Ironically, Singapore still largely follows the *Bolam-Bolitho* test – which essentially requires the court to defer to medical expertise – for medical negligence cases even after the recent Court of Appeal decision of *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492.

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23 When the proposed change to the law was first mooted, there were defence counsel in Singapore that took the view that having a panel of psychiatrists could help shave time off court proceedings, assuming that the Prosecution did not challenge reports from private practitioners – sometimes pejoratively referred to as "hired guns" – tendered by the defence in future.[75] At the same time, however, if there remained too few psychiatrists who were "qualified" to testify, they could be overwhelmed by the workload and slow down court processes, to the detriment of accused persons who would mostly either be in remand or on bail prior to trial.[76] This problem might be exacerbated if foreign psychiatrists were preferred (whether because of greater expertise, greater expediency, or more likely, greater availability), in that such psychiatrists who do not have an established "track record" in Singapore might not be so readily accepted by the selection committee as credible enough, not to mention that it already costs more money and time to hire foreign experts. In either scenario, this militates against a party's liberty to run his case and find his own experts as he sees fit within an adversarial model of criminal justice.

24 There are, of course, hitherto largely underused alternatives to this new regime in our system. The first is that of court-appointed experts, and the second is joint expert reports that have gone through "hot-tubbing". Despite the longstanding concerns expressed by the Singapore courts about the great potential for expert witnesses to be partisan,[77] neither scheme has ever been made compulsory, whether for civil or criminal cases. For civil cases, O 40A of the Rules of Court[78] may allow the court to, *inter alia*, limit the number of expert witnesses, prescribe procedures for putting questions to witnesses and for discussion between experts, but it still preserves party autonomy in the appointing of experts – and the route of jointly appointed experts is completely optional. Further, although O 40 theoretically empowers the court to appoint an expert on its own initiative if parties cannot agree on an expert, there have been no reported cases of the court exercising this power over parties' objections. This leads one to think that if civil cases are given libertarian treatment and can run the full adversarial course, why are criminal cases treated more stringently, even if it is only in the context of psychiatric experts?

75 Siau Ming En, "Proposed Psychiatric Panel Must Be Large Enough for Smoother Defence: Lawyers" *Today* (28 July 2017).

76 Siau Ming En, "Proposed Psychiatric Panel Must Be Large Enough for Smoother Defence: Lawyers" *Today* (28 July 2017).

77 See generally Jeffrey Pinsler, "Expert Evidence and Adversarial Compromise" (2015) 27 SAcLJ 55.

78 Cap 322, R 5, 2014 Rev Ed.

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25 One possible justification is that in criminal cases life and liberty may be at stake and that the resources of the State and defendant could be put to better use if all parties had recourse to a panel of psychiatrists who would be objective and professional. Psychiatric evidence is often used to aid the court in determining not only criminal responsibility but also punishment. If the defence relies on an expert who lacks a minimum level of objectivity and professionalism, it is the defendant and the interests of justice that suffer as the court is essentially left with only one expert's view. The panel of psychiatrists strikes a balance between the two competing considerations of obtaining quality evidence by imposing requirements to safeguard objectivity and professionalism and allowing room for exercise of choice by providing a large enough list of local psychiatric experts and permitting *ad hoc* admissions to the panel of foreign psychiatric experts.

26 Nevertheless, the move to have a panel of psychiatric experts remains an unusual one. It may also be viewed as unnecessary given that one would expect defence counsel to generally be able to assist their clients in choosing appropriate experts. Additionally, during the second reading of the Reform Bill, the Senior Minister of State for Law referred to only a "few" instances where psychiatric evidence had fallen short of minimum standards (in perspective, there are just under 300 psychiatrists based in Singapore), suggesting that this was not a widespread problem.[79] Given that all psychiatrists require professional accreditation to practise, perhaps a more proportionate response without compromising on a defendant's freedom of choice of expert would be to work with the Singapore Medical Council to enforce ethical guidelines for doctors giving expert testimony,[80] such that a clear signal is sent and the profession is given an opportunity to self-regulate.

27 With the introduction of the court-administered panel of expert psychiatrists, regulation has been taken out of the hands of the medical profession and placed in the hands of the selection committee, who will comprise a judge of the Supreme Court and a District Judge to be nominated by the Chief Justice, and a public officer to be nominated by the Minister charged with the responsibility for health. It could be said then that the Chief Justice will, through this avenue of a panel of psychiatrists, largely be able to control who may appear before the courts as psychiatric expert witnesses. This is particularly as the selection committee decides by majority vote and the Chief Justice has

79 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

80 Singapore Medical Council, *Ethical Code and Ethical Guidelines* (2016 Ed) at p 54 <http://www.healthprofessionals.gov.sg/>. The guidelines provide that performing the role of expert witness requires doctors to ensure that they are "competent, objective and impartial".

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two nominees out of a total of three. The Chief Justice also has the final say in the event of any appeal being made by any psychiatrist aggrieved by the decision of the selection committee. The role of the Chief Justice in nominating members and deciding appeals may be justified by the purpose of the amendment, which is to safeguard the judicial process from psychiatrists that fail to meet a minimum standard of professionalism and objectivity, and also on the basis of expediency. However, in deciding appeals the Chief Justice may benefit from the views of the psychiatrist's peers as well as the Singapore Medical Council. It may therefore be helpful if in operationalising this amendment the Criminal Procedure Rules provide some room for the consideration of perspectives from the medical profession. This would help to build public confidence in the panel as well as promote the co-operation of psychiatrists with the courts. There should also be continuing efforts to educate psychiatrists and other experts about their responsibility to the courts in the course of giving expert testimony. This would further help to improve the quality of expert evidence that comes before the courts.

III. DPAs

A. Origins of the regime

28 Turning then to the final substantive change to be discussed here, DPAs are agreements entered into between a subject charged with, or whom the prosecutor is considering charging with, an alleged offence

and the prosecutor that a criminal case will not be prosecuted if the subject complies with complies with certain requirements.[81] The origins of DPAs can be traced to the US, which initially used DPAs as "alternative solutions to rehabilitate individuals charged with non-violent offense and other low-level crimes, and … defendants who had particularly sympathetic or compelling cases" via the Speedy Trial Act[82] drafted in 1974.[83] Since 1999, DPAs in the US became used for corporate

81 It should be noted that in the US, there is a distinction between a deferred prosecution agreement ("DPA") and a non-prosecution agreement ("NPA"). A criminal action is filed for DPAs but not for NPAs, where the court plays no role at all.

82 88 Stat 2080, as amended August 2, 1979, 93 Stat 328, 18 USC §§ 3161–3174.

83 Eunice Chua, "Deferred Prosecution Agreements in Singapore?" *Singapore Law Blog* (30 January 2018), citing Paola C Henry, "Individual Accountability for Corporate Crimes after the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform" (2016) 6 Am U Bus L Rev 153 at 157.

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crimes such as corruption, money laundering and fraud.[84] Nevertheless, the US Department of Justice does not articulate a list of offences in which DPAs can be available, but does the contrary in narrowly defining conduct that is not eligible for DPAs.[85] The UK has come much later to use DPAs and in a more limited way. DPAs were formally introduced through the Crime and Courts Act 2013.[86] They are only available to corporate bodies, partnerships or unincorporated associations and in respect of stipulated economic crimes, including money laundering, bribery, fraud, and various offences under company law.[87]

29 Indeed, following the UK approach, it was in the context of corporate crimes that the Ministry of Law first broached the idea of introducing DPAs to the Singapore criminal justice system.[88] Apart from allowing corporations to make reparations for criminal behaviour without the collateral damage of convictions (for instance, the jobs and investments of innocent employees and shareholders respectively), DPAs are meant to avoid lengthy and costly trials without unduly compromising the rule of law and hopefully leading to positive change in corporate behaviour.[89] If the corporation in question does not honour the conditions of the DPA, prosecution may resume. In short, DPAs give prosecutors a unique tool to deal with corporate offenders – they are not required to take down an entire corporation for the misconduct of a few individuals.[90]

30 On the other hand, there are fundamental transparency considerations militating against the complete embracement of DPAs. As it were, the right of prosecutorial discretion already enjoys

84 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at p 8.
85 These include matters involving national security, foreign affairs, and as against an individual with two or more felony convictions. See s 9-22.100 of the US Justice Manual.
86 c 22 (UK).
87 Crime and Courts Act 2013 (c 22) (UK) Sch 17, paras 1(1) and 4(1).
88 Eunice Chua, "Deferred Prosecution Agreements in Singapore?" *Singapore Law Blog* (30 January 2018).
89 Eunice Chua, "Deferred Prosecution Agreements in Singapore?" *Singapore Law Blog* (30 January 2018); Simon Bronitt, "Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements" in *Regulating Preventive Justice: Principle, Policy and Paradox* (Tamara Tulich *et al* eds) (Routledge, 2017) at p 215; Wulf Kaal & Timothy Lacine, "The Effect of Deferred and Non-prosecution Agreements on Corporate Governance: Evidence from 1999–2013" (2014–2015) 70(1) *Business Lawyer* 61 at 63–64.
90 Ellis Martin, "Deferred Prosecution Agreements: Too Big to Jail and the Potential of Judicial Oversight Combined with Congressional Legislation" (2013) 18 NC Bank Inst 457 at 470–471.

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tremendous protection in Singapore.[91] Article 35(8) of the Constitution states: "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence."[92] In terms of jurisprudence, the Court of Appeal has reaffirmed on numerous occasions that while a challenge of prosecutorial discretion is possible on the ground of arbitrariness, the accused person bears the near-impossible burden of establishing a *prima facie* case; further, the prosecutor is not obligated to disclose any reasons behind any prosecutorial decision and the Attorney-General is also presumed to have acted in good faith.[93] In light of this, should even greater discretionary powers be accorded to the Prosecution through the creation of a DPA regime? Although the discourse on prosecutorial discretion in Singapore has centred around individual rather than corporate offenders, DPAs, in essence, still represent a choice not to prosecute what would ordinarily be fairly serious crimes. But whereas individual prosecutions are typically declined on the basis of public interest or resource constraints,[94] DPAs are also motivated by other considerations. These include being able to tailor a proportionate response to the alleged corporate wrongdoing that may go beyond the penalties prescribed by the criminal law (including requiring companies to revamp their practices and to agree to being subject to monitoring) and incentivising corporate entities to confront criminal conduct and co-operate with the authorities to bring individual offenders to justice.[95] There could also be economic reasons as a substantial monetary penalty would certainly benefit the Government.

31 More importantly, the introduction of DPAs raises vital rule of law concerns. Using DPAs only for large-scale corporate crime may create the impression of a two-tier criminal justice system where large companies are "too big to jail".[96] From this perspective, DPAs undermine

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91 See generally Chen Siyuan, "The Limits on Prosecutorial Discretion in Singapore: Past, Present, and Future" (2013) 2(1) *International Review of Law* 1.

92 Section 11(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) also states:

> The Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code or any other written law.

93 See, for instance, *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [44]–[74] and *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [36]–[41].

94 See generally Lucien Wong, "Prosecution in the Public Interest" (2017) 35 Sing L Rev 31.

95 Eunice Chua, "Deferred Prosecution Agreements in Singapore?" *Singapore Law Blog* (30 January 2018); Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at pp 17–19.

96 Matt Trome, "UK Bribery Prosecutions and the Rule of Law" *The Global Anticorruption Blog* (24 August 2017). See also Simon Bronitt, "Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution

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the deterrent effect of the law and reduce the incentive to self-report by lowering the cost to firms from reputational damage or stigma resulting from a criminal settlement.[97] This may lead to companies repeatedly offending. Finally, by giving the prosecutor the ability to essentially find guilt and impose a sentence, there is an argument that could be made that the principle of separation of powers is compromised.[98]

B. Comparing new regime with regimes elsewhere

32 In the US and UK, the DPA regimes have tried to deal with the above concerns in various ways: first, by making transparent the considerations of the prosecutor in relation to DPAs. The UK has a binding Code of Practice that is required by legislation and contains, amongst others, the test for whether it is possible to enter into a DPA, and factors that the Prosecution may take into account in deciding whether or not to enter into a DPA. Although not required by legislation, the US Justice Manual does contain some of the guidelines laid down in various policy memos published by different Attorneys General and Deputy Attorneys General over time.[99] Most notable of these are the Holder memorandum[100] (providing guidance on the factors that should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case),[101] the Thompson

Agreements" in *Regulating Preventive Justice: Principle, Policy and Paradox* (Tamara Tulich *et al* eds) (Routledge, 2017) at p 218.

97 Ellis Martin, "Deferred Prosecution Agreements: Too Big to Jail and the Potential of Judicial Oversight Combined with Congressional Legislation" (2013) 18 NC Bank Inst 457 at 468–469. See also Mike Koehler, "The Façade of FCPA Enforcement" (2010) 41(4) Geo J Int'l L 907.

98 Richard Epstein, "The Deferred Prosecution Racket" *Wall Street Journal* (28 November 2006).

99 Section 9-28.00 (Federal Prosecution of Business Organisations) of the US Justice Manual contains the bulk of the principles, but see also ss 9-16.325 (Plea Agreements, Deferred Prosecution Agreements and "Extraordinary Restitution") and 9-28.1300 (Plea Agreements with Corporations).

100 Memorandum from Attorney General Eric Holder to the United States Attorneys and Assistant Attorney General for the Criminal Division, regarding "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases" (12 August 2013).

101 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at pp 86–91. The eight factors identified by Holder are: (a) the nature and seriousness of the offence; (b) the pervasiveness of the wrongdoing within the corporation; (c) the corporation's history of similar conduct; (d) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to co-operate in the investigation of its agents; (e) the existence and adequacy of the corporation's compliance programme; (f) the corporation's remedial actions; (g) collateral consequences; and (h) the adequacy of non-criminal remedies.

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memorandum[102] (revisions to increase emphasis on and scrutiny of the authenticity of a corporation's co-operation),[103] the McNulty memorandum[104] (addressing two controversial factors – whether a company would waive attorney-client privilege with regard to conversations had by its employees and whether a company had declined to pay attorneys' fees for its employees)[105] and the Morford memorandum[106] (providing specific explanations for DPAs and non-prosecution agreements, the weight of collateral consequences, and setting out guidance in relation to appointment of independent monitors).[107]

33 Secondly, through some level of judicial supervision to mitigate the risk that the DPA is not in the public interest, or that the corporation may be unduly pressured to submit to unduly unfavourable terms.[108] In the US, there is reference in legislation to the "approval of the court"[109] of DPAs. However, this does not seem to be a very strong check as the extent to which judges can oversee the DPAs is not clear. The US Department of Justice has maintained that the judge's role is to grant the adjournment agreed to by the parties and that the judge has no authority to accept or reject the DPA.[110] Federal judges have a different view, though, and many have held hearings before granting the adjournment sought, with one federal judge asserting his authority to review and approve the substance of the agreement by quoting US

102 Memorandum from Deputy Attorney General Larry D Thompson to Heads of Department Components, United States Attorneys, regarding "Principles of Federal Prosecution of Business Organizations" (20 January 2003).

103 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at pp 91–92. The Thompson memorandum also added a ninth factor – "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance".

104 Memorandum from Deputy Attorney General Paul J McNulty to Heads of Department Components, United States Attorneys, regarding "Principles of Federal Prosecution of Business Organizations" (11 December 2006).

105 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at pp 93–96.

106 Memorandum from Acting Deputy Attorney General Craig S Morford to Heads of Department Components, United States Attorneys, regarding "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-prosecution Agreements with Corporations" (7 March 2008).

107 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at pp 97–98.

108 Simon Bronitt, "Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements" in *Regulating Preventive Justice: Principle, Policy and Paradox* (Tamara Tulich *et al* eds) (Routledge, 2017) at p 219.

109 18 USC § 3161(h)(2).

110 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at p 81.

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Supreme Court *dicta* that federal judges "are not potted plants".[111] Nevertheless, once the court approves the DPAs, that is the end of judicial oversight. The question of whether or not a DPA is breached is a matter of prosecutorial discretion. The UK model, on the other hand, has made judicial approval a cornerstone of the DPA framework. UK judges are involved at various stages of the process beginning with in principle approval of a DPA process after negotiations with the defendant have commenced. This is done at a private hearing. Next, after a defendant has accepted the terms of a draft DPA, the prosecutor must again apply to the Crown Court for final approval, following another hearing. While that hearing may be private, if the court decides to approve the DPA, that decision and reasons for it must be given in open court. At both of these stages the court must be satisfied that a DPA is in the "interests of justice" and its "terms are fair, reasonable and proportionate". Last, should there be an alleged breach of the DPA that is not minor and that cannot be resolved through rectification, the prosecutor has to apply to court to seek a finding of breach and explain the remedy it seeks.

34 The third control on DPAs is publication of information, which allows for scrutiny and encourages accountability. In the US, all DPAs are published, but the Government does not make available any consolidated database for DPAs that have been entered into.[112] In the UK, after the court approves a DPA, the prosecutor is obliged to publish the DPA, the initial judicial declaration, the court's reasons for granting it and the court's final decision to approve it. This is presently done through the website of the Serious Fraud Office, which also includes a summary of financial statistical information. DPAs are also available to the Crown Prosecution Service but none have been entered into as at time of writing.

35 There are quite a number of new CPC provisions on DPAs that are too substantial to be reproduced here, but relevant for our purposes are the following points about Singapore's framework:

> (a) DPAs can be entered into before or after charges are preferred, but not once the trial begins.[113]

111 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties* (Sweet & Maxwell, 2015) at p 81.

112 Private entities and academics have filled this gap by publishing their own collection of information, for example, Gibson Dunn's updates on non-prosecution agreements and deferred prosecution agreements at https://www.gibsondunn.com/2017-mid-year-update-on-corporate-non-prosecution-agreements-npas-and-deferred-prosecution-agreements-dpas/ (accessed July 2018).

113 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149B to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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(b) While a DPA is in force, any existing charge against the subject is deemed to be discharged but does not amount to an acquittal, the subject cannot be charged for offences covered by the DPA, and any limitation period or time limit for civil penalties or remedies applicable on conviction will not run.[114]

(c) DPAs do not apply to individuals and can only be entered with a body corporate, a limited liability partnership, a partnership or an unincorporated association.[115]

(d) DPAs must contain: (i) a charge or draft charge and a statement of facts relating to the alleged offence; (ii) a date on which the DPA ceases to have effect if it is not terminated for breach; and (iii) the requirements that the DPA will impose, which may include a financial penalty, compensation to victims, donating money to a third party, implementing a compliance programme, appointing a monitor, co-operation in investigations, and payment of reasonable costs of the prosecution.[116]

(e) DPAs must be approved by the court, with the court determining that the DPA "is in the interests of justice" and "the terms of the DPA are fair, reasonable and proportionate". The court hearing will be *in camera* but upon the court's approval, the Public Prosecutor will give public notice of the DPA, the court's declaration and any reasons given by the court for its decision, unless prohibited from doing so by law or court order.[117]

(f) If the Prosecution believes that there has been a breach of the DPA, he may apply to the court for a determination of whether the subject has failed to comply with the terms of the DPA and, if so, to terminate the DPA. The Prosecution is obligated to give public notice of the decision of the court and any reasons given for that decision, unless prohibited from doing so by law or court order.[118]

(g) At any time when a DPA is in force, the Prosecution and the subject may agree to vary the terms of the DPA. Any

114 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149C to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
115 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149D to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
116 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149E to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
117 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149F to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).
118 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149G to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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variation requires court approval in the same manner that a DPA is approved.[119]

(h) After a DPA has expired, the Prosecution must give written notice to the High Court that it does not intend to prosecute the subject and give public notice of this, unless prohibited from doing so by law or court order. However, he may initiate new criminal proceedings against the subject in respect of the alleged offence in the DPA where the subject provided inaccurate, misleading or incomplete information, and the subject knew or ought to have known that the information was inaccurate, misleading or incomplete.[120]

(i) The High Court may postpone the giving of public notice where required for such period it considers necessary "to avoid substantial risk of prejudice to the administration of justice" in any legal proceedings, any investigation under the CPC, or any criminal investigation under any other written law. The High Court may also, if satisfied that "it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason", order that any information be removed or redacted, or that no person is to publish any information or do any act that is likely to lead to the publication of such information.[121]

(j) Where a DPA is approved, the statement of facts contained in the DPA may be treated as an admission by the subject in any criminal proceedings brought against the subject for the alleged offence. Where a DPA is not approved, material that shows that the subject entered into negotiations for a DPA and material that was created solely for the purpose of preparing the DPA or statement of facts may be used in evidence against the subject only on a prosecution for an offence consisting of provision of inaccurate, misleading or incomplete information, or on a prosecution for some other offence if in giving evidence the subject makes a statement that is not consistent with the material, and evidence relating to the material is adduced or a question relating to the material is asked by or on behalf of the subject in the proceedings arising out of the prosecution. Notwithstanding the above, the Public Prosecutor is free to use any material or information obtained in

119 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149H to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

120 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149I to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

121 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149J to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

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the course of negotiations for a DPA or related proceedings, if they are determined to be admissible in evidence, against the subject or any other person in any criminal proceedings for any offence.[122]

(k) The following decisions of the High Court are appealable: (i) a decision not to approve a DPA; (ii) a decision that the subject has failed to comply with the terms of the DPA; (iii) a decision that the subject did not fail to comply with the terms of the DPA; and (iv) a decision not to approve a variation of the terms of a DPA. Only the Prosecution may appeal against (i) and (iv).[123]

36 During the second reading of the Reform Bill, the Senior Minister of State for Law stated that there would be no code of practice for the use of DPAs unlike in the UK. This was because it would be inconsistent with Singapore's general position that prosecutorial guidelines should not be published to prevent them from becoming "a tool for criminals to refer to in manipulating the criminal justice system to escape punishment".[124] The Singapore framework lies somewhere between the UK and US for the most part, save for the matter of making the exercise of prosecutorial discretion more transparent where the Singapore position is, unlike the US and UK, completely opaque. Judicial supervision in Singapore is closer to the UK model than the US, with legislatively provided involvement of the court to approve the DPA and any subsequent variation, as well as to supervise performance. However, it does not go so far in certain respects. For example, there is no need in Singapore as there is in the UK for in principle approval from the court after DPA negotiations have commenced. The test for the court to apply in approving the DPAs borrows from the UK – that the DPA is in the "interests of justice" and its terms are "fair, reasonable and proportionate" – making certain that the court's supervision is a substantive one.

37 In relation to publication of information, Singapore also lies between the UK and US. Unlike the UK, which permits some aspect of the DPA approval hearings to take place in open court, the hearings in Singapore all take place *in camera*. This has been explained as being based on the same underlying philosophy that applies to "without prejudice" negotiations – if DPA approval proceedings were held in the

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122 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149K to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

123 Clause 35 of the Criminal Justice Reform Bill (Bill 14 of 2018) adding s 149L to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

124 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

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public view, and if the DPA did not eventually come into force, the company negotiating the DPA could be prejudiced in any future criminal proceedings based on the same facts.[125] Should companies have reason to fear that their willingness to negotiate a DPA may prejudice their defence later on, they may be less willing to volunteer information and to co-operate with investigations, defeating one of the key purposes of the DPA regime. This rationale is an important one and is also recognised in jurisdictions like the UK, where although primary legislation allows the approval hearing to be in private or public, the Code of Practice states that it is "likely to be almost always necessary" that the hearing is private due to the uncertainty as to whether the court will grant the declaration to approve the DPA.[126] It is only where the court is granting the declaration to approve the DPA that this will be done in open court and oral reasons given there.[127]

38 One may also observe that there is no statutory requirement for the court to give reasons for its decisions in relation to DPA proceedings. This contrasts with the system in the UK where the Crown Court must give reasons for whether a DPA is in the interests of justice and whether its terms are fair, reasonable and proportionate.[128] The Senior Minister of State for Law explained the Singapore position as follows:[129]

> [T]he general thinking is this: the DPA is not a judgment. So, it does not have a binding effect; *stare decisis* does not apply. It does not set a precedent for other DPAs. Every situation will be highly fact-specific. The approval will only be granted if the DPA is in the interests of justice, and its terms are fair, reasonable and proportionate.

She also observed that this would be consistent with the current position that places no compulsion on the High Court to publish grounds of decision unless there is an appeal.

39 Nevertheless, other MPs have pointed out that allowing a corporation to avoid criminal prosecution for a serious offence is a "big deal" and it may instil confidence to require the court to give

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125 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

126 Serious Fraud Office, "Deferred Prosecution Agreements Code of Practice – Crime and Courts Act 2013" at p 17 https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (accessed July 2018).

127 *Cf* Michael Bisgrove & Mark Weekes, "Deferred Prosecution Agreements: A Practical Consideration" [2014] Crim LR 416 at 435–436, which argues that the provision allowing the court to hold the final hearing in private should be used sparingly in order to gain public confidence.

128 Crime and Courts Act 2013 (c 22) (UK) Sch 17, para 8(4).

129 *Singapore Parliamentary Debates, Official Report* (19 March 2018) vol 94 (Indranee Rajah, Senior Minister of State for Finance and Law).

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reasons for approving or not approving a DPA. Although the DPA has no binding effect, the same cannot be said of the court's decision on whether to approve DPAs, including its interpretation and application of what is "in the interests of justice" and the standard of "fair, reasonable and proportionate", which would have important precedential value and would also aid in public education. If there is a concern of prejudice to the subject of the DPA should the DPA not be approved, the grounds of decision of the court can be redacted to remove any identifying information without much difficulty. One could also argue that even if the Legislature did not wish to compel the High Court to publish grounds of decision, contrary to existing practice, there were other options that would address the concerns raised in Parliament such as requiring oral reasons to be given by the court, which the Prosecution could reproduce in its public notice. Notwithstanding the absence of any obligation to give reasons, one can still be optimistic that the courts will still do so as the Singapore courts have recognised the common law judicial duty to give reasoned decisions in both civil and criminal cases.[130] Although this judicial duty does not arise in all cases,[131] the approval, variation or determination of breach in relation to DPAs would probably not constitute "very clear cases" "in relation to specific and straightforward factual or legal issues" that may constitute exceptions,[132] particularly in the initial cases and in view of the public significance of the court's decisions.

40 Apart from having the court give reasons for its decisions in relation to DPA proceedings, there is also another aspect to transparency centring around the prosecutor's exercise of discretion concerning DPAs, including how companies are chosen for DPA negotiations, the conditions for imposing certain terms, the approved methods for monitoring for compliance and prosecutorial policy towards individual prosecution.[133] Although the Senior of Minister of State for Law has said that no prosecutorial guidelines will be published, this does not preclude media statements, public speeches and other communication channels to allow the Prosecution to shed some light on the approach of the prosecution in individual cases.[134] One can only

130 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [15].

131 A prime example of an exception are routine interlocutory applications: *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2015] 5 SLR 438 at [47].

132 *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [32].

133 For example, prosecution policy could require that individual prosecution should always follow the entry into deferred prosecution agreements so that wrongdoers can be taken to task and to avoid the perception of letting companies off the hook easily.

134 For example, Attorney-General Lucien Wong's speech at the 2017 Singapore Law Review Lecture explaining the exercise of prosecutorial discretion, edited excerpts of which were published in Lucien Wong, "The Complex Challenge of Prosecution in the Public Interest" *The Straits Times* (21 October 2017).

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hope that the Prosecution assesses that the fear that releasing information on the exercise of prosecutorial discretion would allow criminals to play the system does not apply to the context of corporate crimes, and chooses to use these other avenues to communicate with the public.

41 However, even if there is such communication, this is still not an officially published guideline or code and it is unclear whether the court can rely on these statements in determining whether a DPA is in the public interest or assessing the fairness, reasonableness and proportionality of its terms. If the Prosecution argues that a DPA is in the public interest, the courts may not be in a position to disagree absent objective guides of what would generally be appropriate. In justifying the DPA and its terms in the three UK cases that have come before the UK court,[135] the Prosecution has consistently relied on the terms of the Code of Practice, amongst other official documents, to identify the factors which augur in favour of the DPA being in the interests of justice and which factors do not.

42 Nevertheless, given that the tests in both jurisdictions are identical, it is possible for the Singapore courts to draw from the factors enumerated in the UK cases, some of which have also been alluded during the parliamentary debates. These are: (a) the seriousness of the predicate offence(s); (b) the importance of incentivising the exposure and self-reporting of corporate wrongdoing;[136] (c) the history (or otherwise) of similar conduct; (d) the attention paid to corporate compliance prior to, at the time of and subsequent to the offending; (e) the extent to which the entity has changed both in its culture and in relation to relevant personnel; and (f) the impact of prosecution on employees and others innocent of any misconduct.[137]

43 The same observation may be made regarding the "fair, reasonable and proportionate" test for the terms of the DPA. Although there is statutory guidance in the UK, US and Singapore in relation to the terms and conditions that may be imposed via a DPA, there is still much scope for diversity in the combinations of these conditions and also a range of severity. In the UK, the court has likewise found the

135 *SFO v Standard Bank* [2016] Lloyd's Rep FC 102; *SFO v XYZ* [2016] Lloyd's Rep FC 509; *SFO v Rolls Royce* [2017] Lloyd's Rep FC 249.

136 In *SFO v Rolls Royce* [2017] Lloyd's Rep FC 249, although there was no self-reporting, the court considered the extraordinary level of co-operation rendered by Rolls Royce, which included voluntarily waiving legal professional privilege over internal memoranda, and co-operating with the Prosecution's request to conduct investigations. Rita Cheung, "Deferred Prosecution Agreements: Cooperation and Confession" (2018) 77(1) Camb LJ 12 at 13.

137 *SFO v XYZ* [2016] Lloyd's Rep FC 509 at [15].

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Code of Practice useful[138] as it recommends three conditions that should usually be imposed: (a) a financial penalty; (b) recovery of reasonable costs incurred by prosecution; and (c) party co-operation with the investigation related to the alleged offence.[139] The UK court has also referred to sentencing guidelines in gauging the appropriateness of any financial penalty.[140] These may also be a source of guidance for future cases in Singapore.

44 In conclusion, the amendments to introduce VRIs, regulate psychiatric expert testimony and permit DPAs for corporate crimes represent concrete responses to perceived areas for improvement in Singapore's current criminal procedure framework. However, the implementation of these amendments will not be easy and this comment outlines some possible issues and makes suggestions to ameliorate them.

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138 See references to the Code of Practice in *SFO v Standard Bank* [2016] Lloyd's Rep FC 102 at [39] and *SFO v XYZ* [2016] Lloyd's Rep FC 509 at [40].

139 Simon Bronitt, "Regulatory Bargaining in the Shadows of Preventive Justice: Deferred Prosecution Agreements" in *Regulating Preventive Justice: Principle, Policy and Paradox* (Tamara Tulich *et al* eds) (Routledge, 2017) at p 214.

140 *SFO v Standard Bank* [2016] Lloyd's Rep FC 102 at [57]; *SFO v XYZ* [2016] Lloyd's Rep FC 509 at [57].

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