Preventing and remedying miscarriages of justice: Report on the Ministry of Law's proposed amendments to the Criminal Procedure Code

We Believe In Second Chances

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SUMMARY OF RECOMMENDATIONS

On the proposal to introduce video recording of interrogations

1. The law should specify that the entirety of all interviews and interrogations of suspects must be video recorded, subject only to certain strictly defined exceptions.

2. The law should also clearly specify that there should be at least three cameras in the interrogation room; one focussed on the suspect, one focussed on the interrogator, and one that shows the full extent of the space in the room.

3. The exceptions to the video recording requirement (in cases where it is mandatory) must be limited to those listed in Annex B, and the Prosecution must bear the burden of proving that those exceptions apply.

4. Judges should be given the discretion to exclude statements obtained as a result of significant and substantial breaches of legal procedures such that those statements would have an adverse effect on the fairness of proceedings.

5. Scheduled offences, for which video recording is mandatory, should include all offences that are ordinarily triable only in the High Court.

6. Video recording of interrogations should also be made mandatory for all interrogations involving juveniles, the elderly, the cognitively impaired, or psychologically disordered, regardless of the alleged offence.

7. Defence lawyers and accused persons should be given a copy of the video recording that they can view at their own convenience to properly present their case. But should this recommendation be rejected, then:

    a. defence lawyers should, at the very least, be entitled to as many screenings as they need to properly present their case,

    b. they should be allowed to bring along other persons who are reasonably connected with the case, such as experts and the accused themselves, and;

    c. screening of the videos should be done in absolute privacy to ensure that the lawyers can discuss all relevant matters with their clients or experts without fear of disclosing any prejudicial information to the police or other third parties.

8. Sufficient legislative safeguards to ensure that video equipment and recordings cannot be tampered with, including certain specific rules listed in our report.

9. Further reforms should be introduced to deal with the problem of false confessions in our criminal justice system.

On the proposal for a Criminal Procedure Rules Committee ("CPRC")

1. Only the Chief Justice's approval is required for rules recommended by the CPRC to become law. The Minister of Law's approval should not be required, nor should the Minister have a veto.

2. The CPRC should comprise mainly of members from, or who are appointees of, the judicial branch. But should the Ministry of Law reject this recommendation, then:

    a. The Law Society should be the body that nominates the two private practitioners on the CPRC.

    b. The Chief Justice be allowed to nominate two academics to serve on the CPRC.

On the proposal to require court accreditation of psychiatric experts

1. The status quo should be maintained, and the disciplining of errant practitioners should be left to the medical profession. But should the Ministry of Law reject this recommendation, then:

    a. The law should specify the eligibility criteria for those appointed to serve on the court-administered selection panel. It should consist of judges, psychiatrists, members of the defence bar, academics, and prosecutors.

    b. There should be an *ad hoc* admission scheme.

    c. There should be an appeals process for forensic psychiatrists whose applications are either rejected or who have been removed from the panel.

2. The Ministry of Law should also provide the public with the following information:

    a. The number of psychiatrists currently qualified to practice in the field of forensic psychiatry.

    b. The number of qualified forensic psychiatrists in private practice.

On the proposal to make the Case for the Defence admissible as evidence

1. Accused persons should be allowed to put the Prosecution to strict proof, and not be required to disclose their case or be bound by their disclosed cases.

On the proposal to require trial judges to state reasons why the death penalty should not be carried out

1. The report, along with the other materials listed in Art 22P(2) of the Constitution should be made available to the inmates.

On the proposals relating to the reopening of concluded criminal cases

1. There should be a right of appeal against all decisions to deny leave to commence such an application. At the very least, there should be a right of appeal for cases where the applicant has been sentenced to death.

2. The test for whether material is material that is admissible to re-open a concluded criminal case should be that which:-

    a. Has not been previously adduced in court;

    b. was not deliberately omitted by the applicant; and

i. could not have been adduced by a reasonably diligent applicant, or;

ii. was not previously adduced in court due to its significance not having been reasonably or actually apparent to the applicant;

3. The requirement for the material to be compelling be abolished because it is already subsumed under the substantive requirements.

4. There should be a provision granting the court the residual power to re-open concluded criminal cases so long as it is satisfied that there is a high probability that a miscarriage of justice has occurred, or that it is in the interests of justice to do so.

5. The court should be given the discretion to take into account other material in determining whether its previous decision is demonstrably wrong, instead of restricting it only to the material adduced by the applicant.

6. The law should specify that applicants have to show that they have a "reasonably arguable case" that the jurisdictional and substantive requirements.

7. The law should specify that the judge hearing the leave application should have the power to grant a stay of execution of the applicant's sentence.

8. Applicants should not be restricted to one application to reopen their concluded criminal case.

9. Solicitors should not be required to give an undertaking.

10. Further reforms should be introduced to enhance our system's ability to identify and correct miscarriages of justice.

WBSC'S SUBMISSIONS ON THE PROPOSED CHANGES TO THE CRIMINAL PROCEDURE CODE AND EVIDENCE ACT

INTRODUCTION

3. We Believe in Second Chances is a group campaigning for the abolition of capital punishment in Singapore. This is a report setting out our views on the Ministry of Law's proposed amendments to the Criminal Procedure Code and Evidence Act.

4. All references in this report should be construed as references to the serial number corresponding to the proposals set out in Annex B of the Ministry of Law's consultation document.

5. We would like to place on record our sincere gratitude to the Ministry of Law for granting us two extensions of deadlines to make these submissions. However, we would also urge the Ministry to increase the duration of time provided for public consultations, especially on reforms that will as significant an impact such as those proposed in Annex B.

VIDEO RECORDING OF STATEMENTS

6. We welcome the move to require the use of video recordings in the police interrogation process. Calls for such a change have been repeated over the years[1] and we hope that this change marks the start of a move in the right direction. We nevertheless have some concerns with Proposal 1, and we hope that these concerns can be addressed through amendments to the final Bill before it is brought before Parliament.

The problem of false confessions

7. In our view, one of the main purposes for requiring video recording in interrogations/interviews is to reduce the instances and likelihood of false confessions. For this to be effective, we need to understand the causes of false confessions, how video recording can reduce the problem of false confessions, and its inherent limitations.

8. We therefore think that it would be useful for us to preface our discussion on the video recording of interrogations with a discussion on false confessions in Singapore, and why it is an urgent problem that needs to be dealt with.

They increase the likelihood of miscarriages of justice

9. The first and biggest problem with false confessions is that they regularly lead to miscarriages of justice. One main explanation for this is that people intuitively, but sometimes wrongly, perceive confessions as being intrinsically more reliable. As Judge of Appeal V K Rajah noted in *Lee Chez Kee v Public Prosecutor*,[2]

> [a confession's] admissibility is premised on the fact that it is a statement made against the interest of the maker and hence inherently more reliable.

10. Similarly, the Privy Council, in *Pora v R*, also observed that:

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[1] See for example: Michael Hor, "The future of Singapore's criminal process" (2013) 25 *Singapore Academy of Law Journal* 847 (hereafter "Hor, *The future of Singapore's criminal process*") at [14].
[2] *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447; [2008] SGCA 20 at [102].

> The natural reaction to such an admission is that it is bound to be true. Why would someone confess to a dreadful crime if they were not guilty of it?

11. This line of thought, however, suffers from what is known as attribution error. This occurs because "most people believe that they would never falsely confess to crimes that they did not commit" and they intuitively attribute the same attitude to others.[3] As the Privy Council went on to note in the *Pora* case:

> …experience has shown that false confessions, even to the most serious offences are often made. The intuitive response to the fact of the crime is, inevitably, that it must be right but that intuitive reaction may be very dangerous.

12. Studies have shown that a false confession, even if found to be involuntarily given, has an extremely prejudicial effect on the accused at trial, and significantly increases the chances of a conviction once it is seen by the fact-finder.[4] Steven Drizin and Richard Leo have described confessions as "inherently prejudicial and highly damaging to a defendant, even if it is the product of coercive interrogation, even if it is supported by no other evidence, and even if it is ultimately proven false beyond any reasonable doubt".[5] Others have argued that false confessions create "a virtually irrebuttable presumption of guilt".[6] Indeed, our Court of Appeal has also noted that statements recorded by the police are "often given more weight by finders of fact as compared to most other kinds of evidence".[7] This, in the Court's view, is due to the "aura of reliability that comes from their being taken… in accordance with a set of strict procedures strictly observed by a trustworthy officer well trained in investigative techniques".[8] More worryingly, Singapore law allows confessions to form the *sole* basis of a conviction without any corroborating or supporting evidence.[9]

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[3] Saul M. Kassin, "The social psychology of false confessions" (2015) 9 *Social Issues and Policy Review* 25 (thereafter "Kassin, *The social psychology of false confessions*") at 38.

[4] Bruce McFarlane QC, a very senior former prosecutor from Canada, has been as saying: "judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime": *Pora v R* [2015] UKPC 9 at [57]. See also: Kassin, *The social psychology of false confessions* at 37-41; Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, "Police-induced confessions: Risk factors and recommendations" (2010) 34 *Law and Human Behavior* 3 (thereafter "Kassin, et al, *Police-induced confessions*") at 23-25 (available at: http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf).

[5] Steven A. Drizin & Richard A. Leo, "The problem of false confessions in the post-DNA world" (2004) 82 *North Carolina Law Review* 891 at 959.

[6] Richard J. Ofshe & Richard A. Leo, "The social psychology of police interrogation: The theory and classification of true and false confessions" (1997) 16 *Studies in Law, Politics and Society* 189 (hereafter "Ofshe & Leo, *The social psychology of police interrogation*") at 193 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1141368).

[7] *Muhammad bin Kadar and anor v Public Prosecutor* [2011] 3 SLR 1205; [2011] SGCA 32 at [58].

[8] *Muhammad bin Kadar* at [58].

[9] *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR(R) 319; [2005] SGCA 50, *Ismail bin U K Abdul Rahman v Public Prosecutor* [1974-76] SLR(R) 91; 1974 SGCA 3. See also: Michael Hor, "The Death Penalty in Singapore and International Law" (2004) 8 *Singapore Yearbook of International Law* 105 (hereafter "Hor, *The death penalty in Singapore and International Law*") at 114.

13. Additionally, false confessions have also been found to induce errors from other witnesses and actors, such as scientific experts or eyewitnesses.[10] For example, a study in the United States revealed that additional errors in evidence were present in 78% of the sampled cases involving false confessions.[11]

14. Finally, false confessions also increase the likelihood of innocent persons pleading guilty to charges as a result of what they perceive to be the overwhelming weight of incriminating evidence against them.[12] Indeed, some observe that defence lawyers may simply encourage clients who have confessed to "accept a plea bargain and concede guilt solely because of the enormous risk of a harsh sentence after being found guilty at trial".[13] We would add that the stakes in such situations become much higher in capital cases because the risk is not merely a harsher sentence, but also an irreversible one.

They waste valuable resources

15. A second and equally important problem caused by false confessions is that they may either waste police resources by providing false leads, or cause the police to conclude investigations when the real criminal is still at large.[14]

The types of false confessions

16. False confessions come in various forms and have been classified into three categories: voluntary, compliant, and internalised.[15]

17. Voluntary false confessions occur when innocent persons claim "responsibility for crimes that they did not commit without prompting or pressure".[16] This may happen for a variety of reasons, but the most frequent causes include mental illness or the desire to protect the real perpetrator from the law.[17]

18. Compliant false confessions are those procured by coercion or pressure, which causes the suspect to acquiesce "to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward".[18]

19. Internalised false confessions are those given by those who have developed "a profound distrust of their own memory that they become vulnerable to influence from external sources".[19] This occurs, for example, when suspects confess to a crime that they did not

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[10] Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, "The forensic confirmation bias: Problems, perspectives and proposed solutions" (2013) 2 *Journal of Applied Research in Memory and Cognition* 42 at 45-47, and Kassin, *The social psychology of false confessions*, fn 3 above, at 39-40.
[11] Saul M. Kassin, Daniel Bogart & Jacqueline Kerner, "Confessions that corrupt: Evidence from the DNA exoneration case files" (2012) 23 *Psychological Science* 41.
[12] Kassin, *The social psychology of false confessions*, fn 3 above, at 40-41.
[13] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 193.
[14] Kassin, et al, *Police-induced confessions*, fn 4 above, at 23.
[15] Kassin, et al, *Police-induced confessions*, fn 4 above, at 14-15.
[16] Kassin, et al, *Police-induced confessions*, fn 4 above, at 14.
[17] Kassin, et al, *Police-induced confessions*, fn 4 above, at 14.
[18] Kassin, et al, *Police-induced confessions*, fn 4 above, at 14.
[19] Kassin, et al, *Police-induced confessions*, fn 4 above, at 15.

commit after being presented with apparently compelling – but false – evidence of their guilt.[20]

20. We shall focus mainly on the latter two categories of false confessions in this report. For convenience, we shall refer to these two types of false confessions as "coerced false confessions".

Risk factors that increase the likelihood of false confessions

21. The literature on the subject highlights various systemic factors that enhance the likelihood of coerced false confessions, some of which are known to be present in our criminal process.

22. We should state at the outset that it is not feasible for us to accurately gauge the incidence[21] and prevalence[22] of false confessions for the following reasons. First, because of the lack of transparency surrounding the interrogation process, which prevents us from knowing what actually goes on in the interrogation room. Second, because we are not aware of any publicly available records or statistics which detail the number or frequency of confessions obtained by the police, including false confessions.[23] Third, even if there were numbers, many cases of false confessions would naturally go unreported.[24] Fourth, because we do not have access (understandably) to police investigation files such that we can conduct a meaningful survey of the cases. We therefore hope that the relevant Ministries will work towards releasing relevant information on this subject, where possible, in order for us to have a more robust discussion on it.

23. Nevertheless, there are other sources of evidence which suggest that false confessions occur regularly.[25] First, studies have established that the false confessions problem plagues most criminal justice systems, no matter how developed.[26] Singapore is no different. Cases of false confessions have been documented fairly recently here,[27] and these cases are likely to be the

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[20] Kassin, et al, *Police-induced confessions*, fn 4 above, at 15 and Steven A. Drizin & Beth A. Colgan, "Tales from the juvenile confession front: A guide to how standard police interrogation tactics can produce coerced and false confessions from juvenile suspects" in *Interrogations, Confessions and Entrapment* (Daniel Lassiter ed.) (Springer, 2004).

[21] The number of false confessions that have occurred over a given time period, a definition which is taken from Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at fn 3.

[22] The number of false confessions as a proportion of those interviewed or interrogated, over a given time period.

[23] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 191.

[24] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 191.

[25] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 191.

[26] Especially before the problem is meaningfully discussed in society. Kassin, *et al*, for example, note that: "proven false confessions have been documented in countries all over the world – including Canada, Norway, Finland, Germany, Iceland, Ireland, Australia, New Zealand, China, and Japan": Kassin, et al, *Police-induced confessions*, fn 4 above, at 5.

[27] *Public Prosecutor v Ismil bin Kadar and Another* [2009] SGHC 84 at [72]-[73], [84] and *Muhammad bin Kadar and Another v Public Prosecutor* [2011] 3 SLR 1205, *Public Prosecutor v Azman bin Mohamed Sanwan and Others* [2010] SGHC 196 at [51] and *Azman bin Mohamed Sanwan v Public Prosecutor* [2012] 2 SLR 733; [2012] SGCA 19. See also: Chen Siyuan & Eunice Chua, "Wrongful Convictions in Singapore: A General Survey of Risk Factors" (2010) 28 Sing. L. Rev. 98.

"tip of the iceberg".[28] Second, we can look to the risk factors present which are known to increase the likelihood of false confessions. Third, we can also look towards scientific research on this subject.

Physical custody and isolation of suspects during interrogations

24. The first risk factor that contributes to false confessions is the overwhelming stress caused by physical custody and isolation of suspects during interrogations. As Professors Paul Roberts and Adrian Zuckerman ("**Roberts and Zuckerman**") have noted, custodial interrogation is "inherently coercive" and therefore provides investigators with "the opportunity to break down the accused's natural inhibitions against making a confession".[29] Likewise, Richard Ofshe and Richard Leo ("**Ofshe and Leo**") also observe that:[30]

> Interrogation is stressful by design. The multiple stressors built into the interrogation environment are present because they exert pressure on the suspect to comply with the interrogator's demand for confession. The suspect is confined in an unfamiliar setting, isolated from any social support, and perceives himself to be under the physical control of the interrogator. He exercises little or no control over the timing, duration or the emotional intensity of the interrogation, the outcome of which remains uncertain. In extreme cases, fatigue, hunger and cold may function to additionally stress the suspect.

25. Experts on false confessions have further observed that "prolonged isolation from significant others in this situation constitutes a form of deprivation that can heighten a suspect's distress and incentive to remove himself or herself from the situation".[31]

26. The local practice of isolating suspects in custody during interrogations is well known. This is aptly demonstrated by the police practice of denying a suspect access to counsel during investigations. Professor Michael Hor has noted that the principal reason for doing so "is to enable the police to extract incriminatory statements from the accused undisturbed by any advice to the contrary by his or her lawyer".[32] Other senior legal practitioners have also echoed this view.[33] Indeed, the investigating officer in *Public Prosecutor v Leong Siew Chor* testified that he had objected to allowing the accused access to counsel at the second court mention because "he did not want to take a chance with external parties impeding the investigations and resulting in the accused shutting up".[34] This was *despite* the defence counsel's willingness to see his client in the presence of the investigating officer and the deputy public prosecutor.[35] In that case, Leong was denied of his right to counsel for 19

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[28] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 191.
[29] Paul Roberts & Adrian Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd Ed, 2010) (hereafter "Roberts & Zuckerman, *Criminal Evidence*") at 516.
[30] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 211.
[31] Kassin, et al, *Police-induced confessions*, fn 4 above, at 16.
[32] Hor, *The death penalty in Singapore and International Law*, fn 9 above, at 114.
[33] "Men behind the bar", *Inter Se* (Singapore Academy of Law, 2009) at p 12 (available at: http://journalsonline.academypublishing.org.sg/Journals/Inter-Se/e-Archive/ctl/eFirstSALPDFJournalView/mid/534/ArticleId/1084/Citation/JournalsOnlinePDF) (accessed 23 August 2017).
[34] *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [61].
[35] *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [61].

days.[36] Although the High Court did, in *James Raj s/o Aroikasamy v Public Prosecutor*,[37] observe that the police or prosecution must prove that granting access to counsel would impede police investigations,[38] it is not clear whether this has actually reduced the length of time that an accused is isolated in police custody.

27. Additionally, long interrogation sessions are a common phenomenon in Singapore. Professor Ho Hock Lai has highlighted multiple examples of this in a recent article,[39] including instances where accused persons were interrogated for some 52 hours over four days,[40] for 18 hours with only an hour's break,[41] or without food and drink for at least 9 hours.[42] Mr Michael Hwang SC, former President of the Law Society, has also remarked that:[43]

> …I have acted for enough clients in criminal matters over the years to have had experience of my clients being *subjected to long and trying investigations by Government agencies*. One recent example was a client who was interviewed by a Government agency for 36 hours with virtually no break and certainly no extended period of rest as recommended by the English and New South Wales protocols. The effect of such prolonged interrogation was that the interviewee *ended up making statements which were questionable as to whether they reflected his true feelings* or recollections people who are extremely tired and have been subjected to repeated stress without the opportunity to consult an independent lawyer tend to say things which are often the suggested words of the interviewer rather than their own, and have to be regarded with caution, if not suspicion. [Emphasis added]

28. As the Court of Appeal observed in *Muhammad bin Kadar and anor v Public Prosecutor*, Singapore law provides "police officers with great freedom and latitude to exercise their comprehensive and potent powers of interrogation in the course of investigations".[44]

Use of accusatory questioning

29. The use of accusatory questioning during interrogations can also place added pressure on suspects to falsely confess. Ofshe and Leo point out that "the routine tactics of an accusatory interrogation are inherently distressing even when an interrogator actively works to minimize the punishing aspects of interrogation".[45] They add that:[46]

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[36] *Public Prosecutor v Leong Siew Chor* [2006] 3 SLR(R) 290 at [87].
[37] [2014] 2 SLR 307; [2014] SGHC 10.
[38] *James Raj s/o Aroikasamy v Public Prosecutor* [2014] 2 SLR 307; [2014] SGHC 10 at [12].
[39] Ho Hock Lai, "On the obtaining and admissibility of incriminating statements" [2016] *Singapore Journal of Legal Studies* 249 (hereafter "Ho, *Obtaining and admissibility of incriminating statements*") at 253-262.
[40] *Public Prosecutor v Oh Laye Koh* [1994] SGHC 20.
[41] *Public Prosecutor v Lim Kian Tat* [1990] 1 SLR(R) 273; [1990] SGHC 22.
[42] *Public Prosecutor v Tan Boon Tat* [1990] 1 SLR(R) 287; [1990] SGHC 124. Professor Ho Hock Lai postulates that the time for which the accused was deprived of food and drink could possibly extend to 11 hours: Ho, *Obtaining and admissibility of incriminating statements*, fn 39 above, at 257.
[43] Michael Hwang SC, "A protocol for police interviews of witnesses and suspects", *Law Gazette* (June 2010) <http://www.lawgazette.com.sg/2010-06/president.htm> (accessed 30 August 2017).
[44] [2011] 3 SLR 1205 at [57].
[45] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 211.
[46] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 212.

> Any normal individual facing an accusatory interrogation will conclude that he is being accused of a serious crime, his future is uncertain and may well involve prison. No matter how "soft" the interrogator's style, the interrogation experience will inevitably be distressing and anxiety-provoking to a significant degree.
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> …Confronted by an aggressive, demanding, overbearing interrogator who refuses to take no for an answer, a suspect may reason that telling the interrogator what he wants to hear – confessing to the crime – is the only way to escape from the physical confinement, fatigue and distress of continuous questioning.

30. Anecdotal evidence suggests that our law enforcement officials have employed accusatory questioning during interactions with suspects. For example, in *Syed Yaseer Arafat bin Shaik Mohamed v Public Prosecutor*,[47] the Court of Appeal observed that:[48]

> The appellant was also once pulled aside by a tall Malay officer and *was told that he had better admit and cooperate since he was caught with the drug*. He also questioned the appellant in a firm tone about the drug. Again, this was an official interrogation preceding a confession. Again, we regarded it as robust, but not anywhere near a valid challenge on the issue of voluntariness. [Emphasis added]

31. In fact, the Court gave a "green light" to such methods of interrogation by affirming[49] its earlier decision in *Seow Choon Meng*, where it was held that:[50]

> Robust interrogation is, in our opinion, an essential and integral aspect of police investigation.

Use of maximisation, minimisation techniques and inducements

32. Another risk factor of false confessions is the use of maximisation and minimisation techniques. Minimisation is the process where "moral justifications" or "face-saving excuses" or promises of leniency are offered by interrogators to suspects, thereby making the giving of a confession appear as "an expedient means of escape".[51] In contrast, maximisation is the process where harsh outcomes are emphasised.[52] These techniques do not require the interrogator to make explicit promises or warnings.[53] In reality, communication often takes place "between the lines", with the same effect as an explicit statement.[54] The use of these techniques influences a suspect's "rational calculation" by giving them "a strong incentive to

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[47] [2000] 2 SLR(R) 977; [2000] SGCA 46.
[48] *Syed Yaseer Arafat bin Shaik Mohamed v Public Prosecutor* [2000] 2 SLR(R) 977; [2000] SGCA 46 at [31].
[49] *Syed Yaseer Arafat bin Shaik Mohamed v Public Prosecutor* [2000] 2 SLR(R) 977; [2000] SGCA 46 at [30].
[50] *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR(R) 338.
[51] Kassin, et al, *Police-induced confessions*, fn 4 above, at 18.
[52] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 192.
[53] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 192.
[54] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 192.

confess and/or a strong disincentive to remain silent.[55] This has been shown to cause suspects to both falsely confess and *also* falsely implicate others in the process. In the famous Central Park Jogger case, five boys were found to have falsely confessed to a crime that they did not commit. And in their confessions, every one of them tried to minimise their own involvement in the crime whilst placing the other four co-accused "centre stage".[56] The severity of this problem cannot be underestimated for it is the law in Singapore that a co-accused can be convicted based solely on an incriminating statement made by another co-accused.[57]

33. Due to the lack of transparency surrounding our interrogation process, it is unclear how often our police resort to minimisation techniques during interrogations. We would note however that allegations of such nature are not uncommon and have been made by accused persons whose statements have been excluded from evidence as a result of doubts over their voluntariness.[58] In Azman bin Mohd Sanwan's case[59] for example, the investigating officer was alleged to have threatened to implicate the accused's wife if he did not co-operate (maximisation),[60] and also told him that he would be spared the death penalty if he cooperated (minimisation).[61]

34. We would also add that in capital cases, the pressure on the accused to try and secure leniency through a confession is extremely high.[62] When facing the death penalty, accused persons might not find it a viable option to "let truth and justice prevail" and instead take every opportunity to try and save their own lives. As our Court of Appeal observed in *Public Prosecutor v Chum Tat Suan*:[63]

> Before the recent amendments to the MDA, an accused person already had to elect whether or not to give evidence and, if so, what evidence to give. He also had to elect whether or not to cooperate and come clean with the authorities by providing information. If he did, he might persuade the Prosecution not to press a capital charge against him.

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[55] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 192.
[56] Kassin, et al, *Police-induced confessions*, fn 4 above, at 18.
[57] *Norasharee bin Gous v Public Prosecutor and Another* [2017] 1 SLR 820; [2017] SGCA 17 at [54]-[60] and *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566; [1993] SGCA 87. See also: Michael Hor, "The Confession of a Co-Accused" (1994) 6 *Singapore Academy of Law Journal* 366.
[58] See for example: *Public Prosecutor v Ismil bin Kadar and Another* [2009] SGHC 84 (hereafter "*Ismil bin Kadar (HC)*") at [72]-[73], [84] and *Muhammad bin Kadar and Another v Public Prosecutor* [2011] 3 SLR 1205; [2011] SGCA 32 (hereafter "*Muhammad bin Kadar Kadar (CA)*"), *Public Prosecutor v Azman bin Mohamed Sanwan and Others* [2010] SGHC 196 (hereafter "*Azman bin Mohamed Sanwan (HC)*") at [51] and *Azman bin Mohamed Sanwan v Public Prosecutor* [2012] 2 SLR 733; [2012] SGCA 19 (hereafter "*Azman bin Mohamed Sanwan (CA)*").
[59] *Azman bin Mohamed Sanwan (HC)* and *Azman bin Mohamed Sanwan (CA)*.
[60] *Azman bin Mohamed Sanwan (HC)* at [54] and *Azman bin Mohamed Sanwan (CA)* at [9].
[61] *Azman bin Mohamed Sanwan (HC)* at [54] and *Azman bin Mohamed Sanwan (CA)* at [9].
[62] Indeed, in both the *Ismil bin Kadar* and *Azman bin Mohamed Sanwan* cases, the accused persons whose confessions were excluded were facing capital charges.
[63] [2015] 1 SLR 834; [2014] SGCA 59 at [80].

35. This state of affairs gives the police more leeway to employ maximisation and minimisation techniques. It also makes it easier for suspects to misinterpret the messages sent by interrogators.[64]

Presentations of false evidence or misinformation

36. The presentation of false evidence or misinformation by investigators has been known to cause people to falsely confess to crimes that they did not commit. Investigators in other jurisdictions, for example, have been known to lie to the suspects that they have evidence proving their guilt, even when no such evidence exists.[65] Investigators might tell the suspect, that their DNA has been found at the crime scene, or that all the other accomplices have overwhelmingly identified the suspect as the main culprit in their statements. Scientific research has revealed that "misinformation renders people vulnerable to manipulation".[66] In the context of interrogations, the presentation of false evidence can cause suspects to see their conviction as inevitable, and therefore lead them to view confession as the only way out.[67]

37. Like most other risk factors examined here, we do not have any concrete evidence that such practices are regularly employed. Nevertheless, we do have anecdotal evidence that investigators have employed similar tactics. In the *Ismil Kadar* case, an officer had asked Ismil, "what if his fingerprints were found in the deceased's flat",[68] to which Ismil responded by admitting (falsely, as it was later shown) to stabbing the deceased.[69] While the officer's question was not an explicit presentation of false evidence, Ismil clearly interpreted that way. The trial judge's finding was that Ismil "confessed because he thought that his fingerprints were found at the deceased's flat".[70] His Honour made that finding because he thought "if Ismil had never been inside and SSI Zainal nevertheless said that his fingerprints were found therein, Ismil would have known that SSI Zainal was saying something untrue." Unfortunately, that was not the case because it was subsequently shown that Ismil was not at the murder scene when the offence was committed.[71]

The lack of safeguards for vulnerable groups

38. The third risk factor is the relative lack of safeguards for juveniles or the mentally ill. These are often individuals whose ability to "resist the stresses of interrogation" are lower than ordinary adults for whom the interrogation process was designed for. Richard Ofshe and Richard Leo point out that the "mentally handicapped are unusually responsive to pressure to submit to and comply with the demands of authorities".[72] And as a result:[73]

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[64] This is because "pragmatic inferences can change the meaning of a communication, leading listeners to infer something that is "neither expressly stated nor necessarily implied": Kassin, et al, *Police-induced confessions*, fn 4 above, at 18.
[65] Kassin, et al, *Police-induced confessions*, fn 4 above, at 17.
[66] Kassin, et al, *Police-induced confessions*, fn 4 above, at 17.
[67] Kassin, et al, *Police-induced confessions*, fn 4 above, at 17.
[68] *Ismil bin Kadar (HC)*, fn 58 above, at [151].
[69] *Ismil bin Kadar (HC)*, fn 58 above, at [151].
[70] *Ismil bin Kadar (HC)*, fn 58 above, at [151].
[71] *Muhammad bin Kadar (CA)*, fn 58 above, at [138] and [191].
[72] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 212.
[73] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 213. Mr Lok Vi Ming SC, a former Law Society President has also noted that: "If unaccompanied at the police station [a person with intellectual disability] might end up admitting to offences that he did not commit, providing inaccurate information to the Police, or otherwise incriminating himself due to his

> The psychological pressures and demand characteristics of even routine accusatorial interrogation can lead mentally handicapped suspects to confess – whether truthfully or falsely – in order to placate a police officer and avoid what for a normal individual would be a tolerable level of psychological stress.

39. We note that the government has recently introduced Appropriate Adult schemes for both individuals with mental disabilities[74] as well as for persons under the age of 16.[75] However, there are nevertheless doubts over whether such measures are indeed adequate and sufficient to protect individuals from these vulnerable groups as highlighted below at paragraphs [81] to [82].

Video recording of interrogations as a means of reducing false confessions

40. However beneficial video recording may be, we think that the main purpose for its introduction into the criminal process must be to reduce the instances of false confessions. This is especially important, given how confessions (and indeed the statements of a co-accused) can form the *sole* basis of a conviction without further corroborating evidence.[76] And as highlighted above, there are also various risk factors present in our criminal process that enhances the likelihood of false confessions being given.

41. Experts have overwhelmingly recommended the use of video recording as a method of reducing the instances and likelihood of false confessions. In its White Paper,[77] the American Psychology-Law Society had this to say about measures to reduce the likelihood of false confessions:[78]

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inability to effectively communicate with the Investigation Officer": Lok Vi Ming SC, "When the Incredible Lawyer isn't an Appropriate Adult", *Law Gazette* (March 2013), available at: <http://www.lawgazette.com.sg/2013-03/694.htm> (accessed 23 August 2017).

[74] Amir Hussain, "New scheme to help persons with developmental disabilities during police investigations", *The Straits Times* (31 March 2015) <http://www.straitstimes.com/singapore/courts-crime/new-scheme-to-help-persons-with-developmental-disabilities-during-police> (accessed 30 August 2017) and Walter Sim, "Parliament: New police scheme to help vulnerable suspects sees 41 cases in six months", *The Straits Times* (14 July 2015) <http://www.straitstimes.com/singapore/parliament-new-police-scheme-to-help-vulnerable-suspects-sees-41-cases-in-six-months> (accessed 30 August 2017).

[75] See: http://probono.lawsociety.org.sg/Pages/Appropriate-Adult-AA-Scheme.aspx and Valerie Koh & Jeong Hongbin, "Young suspects to be accompanied by trained volunteers to police interviews" *TODAY* (6 January 2017) <http://www.todayonline.com/singapore/volunteers-accompany-young-suspects-under-investigation-april-mha> (accessed 30 August 2017).

[76] For confessions, see: *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR(R) 319; [2005] SGCA 50, *Ismail bin U K Abdul Rahman v Public Prosecutor* [1974-76] SLR(R) 91; 1974 SGCA 3. See also: Michael Hor, "The Death Penalty in Singapore and International Law" (2004) 8 *Singapore Yearbook of International Law* 105 at 114. For co-accused statements, see the material cited at fn 57 above.

[77] Only the second such paper to have been authorized and approved by the AP-LS in its 42 year history up the time the paper was published: William C. Thompson, "An American Psychology-Law Scientific Review Paper on police interrogation and confession" (2010) 34 *Law and Human Behavior* 1 at 1.

[78] Kassin, et al, *Police-induced confessions*, fn 4 above, at 25.

> Without equivocation, our most essential recommendation is to lift the veil of secrecy from the interrogation process in favour of the principle of transparency. Specifically, *all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator*. [Emphasis in original]

42. For this reason, we welcome the Ministry of Law's proposal to mandate video recording of interrogations for cases involving scheduled offences, and to make the option available to officers in cases involving non-scheduled offences. The reasons for adopting video recordings of interrogations are multi-fold: the presence of a camera serves as a valuable deterrent against investigators using the most egregious forms of coercion,[79] video recordings also deter false claims of involuntariness,[80] provides an immediate replay of the interrogation that might subsequently reveal incriminating information,[81] allows officers to focus on questioning the suspect rather than transcribing the interrogation,[82] and also increases public trust in the police.[83] More importantly, video recordings can assist our judges in assessing the voluntariness and accuracy of statements made in custody.[84] As the Court of Appeal in *Muhammad Kadar* observed:[85]

> All that is required for a miscarriage of justice to occur is for [an overzealous] police officer to record the statement with embellishments, adding nothing more than a few carefully-chosen words to the suspect's own account… Alternatively, a police officer might simply be indolent, leaving the recording of the statement to well after the examination. His memory of the interview having faded, such an officer might fill in the gaps based on his own views about the suspect's guilt. Such questionable statements could, standing alone, form the basis for wrongful convictions even for capital offences if an accused, disadvantaged by the lapse of time and memory, is unable to convince the court that he did not say what appears in writing to be his words.

43. We are encouraged to note that in most jurisdictions, police approval for the video recording of interrogations has increased after its implementation.[86] The words of a former police

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[79] Kassin, et al, *Police-induced confessions*, fn 4 above, at 26.
[80] Kassin, et al, *Police-induced confessions*, fn 4 above, at 26.
[81] Kassin, et al, *Police-induced confessions*, fn 4 above, at 27.
[82] Thomas P. Sullivan, "Police experiences with recording custodial interrogations", *Northwestern University School of Law, Centre on Wrongful Convictions* (2004), available at: http://mcadams.posc.mu.edu/Recording_Interrogations.pdf (accessed 23 August 2017)
[83] Kassin, et al, *Police-induced confessions*, fn 4 above, at 27.
[84] Kassin, et al, *Police-induced confessions*, fn 4 above, at 26.
[85] *Muhammad bin Kadar (CA)*, fn 58 above, at [59].
[86] For Australia, see: David Dixon, "Videotaping police interrogation" [2008] 28 *UNSW Law Research Series* (hereafter "Dixon, *Videotaping police interrogation*") (available at: http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/UNSWLRS/2008/28.html). For the United States of America, see: Thomas P. Sullivan, "Police experiences with recording custodial interrogations", *Northwestern University School of Law, Centre on Wrongful Convictions* (2004), Kassin, et al, *Police-induced confessions* at 26 and Jim Trainum, "I took a false confession so don't tell me it doesn't happen", *Seeing the Forest* (20 September 2007) <http://seeingtheforest.com/i-took-a-false-confession-so-dont-tell-me-it-doesnt-happen/> (accessed 23 August 2017) (hereafter "Tranium, *I took a false confession*").

officer with 24 years of experience in the Washington D.C. Metropolitan Department of Police offers us a glimmer of hope:[87]

> When videotaping was first forced upon us by the D.C. City Council, we fought it tooth and nail. Now, in the words of a top commander, we would not do it any other way.

We hold the same hope for Singapore, and also hope that further steps will be taken towards the more extensive use of video recordings in our criminal process. We also hope that this is a first step towards a broader policy of enhancing safeguards against false confessions in our criminal justice system.

44. While there is cause for optimism in the use of video recordings, we must also be aware that it may have ill effects on accused persons if proper safeguards are not put in place. In order to know what safeguards are necessary, we need to first understand the inherent limitations and the potential pitfalls of video recording.

45. To begin with, video recording will only serve to reduce instances of false confessions if, and only if, it captures an accurate record of the *entirety* of interactions between interrogator and suspects, including those that take place pre-interrogation. Otherwise, it can easily become prejudicial to suspects. Professor Michael McConville astutely observes that:[88]

> Positive judgments about the reliability of video recordings are also based on the premise that no such unseen pre-interrogation exchanges have occurred. However, official video recordings of interrogations which have been preceded by improper police treatment of suspects make it *impossible* to distinguish between the ethical and unethical, the unpressured and coerced interview – indeed, their objective is to make such discrimination impossible. Since this is so, *their persuasive character is potentially so dangerous for suspects*. [Emphasis added]

46. Thus, it is absolutely critical that the police do not engage in unrecorded pre-interrogation exchanges with the suspect except where absolutely necessary. This point will be dealt with in greater detail below.

47. Further, there is the more fundamental question of whether visual recordings of interrogations would actually enhance our system's ability to detect false confessions in the first place. This in turn depends on whether the right actors – judges, prosecutors and defence lawyers – are able to arrive at the right conclusions by watching the video footage. As Daniel Lassiter points out, "[j]ust because fact finders will see and hear all that transpired in an interrogation does not guarantee that the conclusions they draw will be correct".[89]

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[87] Tranium, *I took a false confession*, above.

[88] Michael McConville, "Videotaping interrogations: Police behavior on and off camera" [1992] *Criminal law Review* 532 (hereafter "McConville, *Police behavior on and off camera*") at 548.

[89] Daniel Lassiter, "Videotaped interrogations and confessions: What's obvious in hindsight may not be in foresight" (2010) 34 *Law and Human Behaviour* 41 at 41.

48. With the introduction of video recordings, there is a higher likelihood that accusations of involuntariness will originate from alleged "non assaultive psychological manipulation".[90] Signs of false confessions originating from such pressures, however, may not be immediately obvious or apparent in video recordings[91] because such methods are more "subtle, sophisticated and differentiated".[92] This is likely to cause the relevant actors to fall back on visual cues or judgments about demeanour to determine if a statement was voluntarily made.[93] For example, in response to a questionnaire conducted by David Dixon, a majority of judges and prosecutors surveyed indicated their belief that "demeanour is an indicator of veracity".[94] Likewise, Annex C assumes that "video recording will enable the court to quickly determine voluntariness and weight by showing the flow of the interview and the demeanour of the interviewer and interviewee".[95] Unfortunately, science has established that "whatever a highly trained psychologist may be able to do in detecting deception, a judge (or indeed prosecutor, jury or police officer) cannot do so accurately".[96] In Daniel Lassiter's words:[97]

> The consensus among researchers who study the detection of falsehoods is that people generally do little better than chance when it comes to separating lies from the truth. Even those who receive special training purported to increase lie-detection skills seldom show significant improvement; alarmingly they sometimes perform worse after training than before.
>
> An especially disturbing implication of the literature on lie detection for the video-recording practice is that people perform relatively worse when they rely primarily on visual cues, particularly those emanating from a person's face, when trying to make veracity judgments.

49. He further adds that:[98]

> …the verbal content of a suspect's detailed account of their "guilt" is likely to be a more reliable source for differentiating true from false confessions, and

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[90] Daniel Lassiter, Jennifer J. Ratcliff, Lezlee J. Ware, & Clinton R. Irvin, "Videotaped confessions: Panacea or Pandora's Box?" (2006) 28 *Law & Policy* 192 (hereafter "Lassiter, *et al*, *Panacea or Pandora's box?*") at 195.

[91] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 195.

[92] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 190.

[93] Daniel Lassiter, for example, observes that "[p]eople tend to believe that they can tell from closely observing another person's face whether he or she is speaking untruths": Daniel Lassiter & Matthew J. Lindberg, "Video recording custodial interrogations: Implications of psychological science for policy and practice" (2010) 38 *The Journal of Psychiatry & Law* 177 (hereafter "Lassiter & Lindberg, *Video recording custodial interrogations*") at 185 and Daniel Lassiter & Matthew J. Lindberg, "Video recording custodial interrogations: The devil's in the details" (2009) 1 *Open Access Journal of Forensic Psychiatry* E3 at E5-E6 (available at: https://www.oajfp.com/interrogations).

[94] Dixon, *Videotaping police interrogation*, fn 86 above.

[95] Annex C, "Fact Sheet on Key Proposed Legislative Changes to the Criminal Procedure Code ("CPC") and the Evidence Act", *Ministry of Law* <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/AnnexC.pdf> (accessed 30 August 2017).

[96] Dixon, *Videotaping police interrogation*, fn 86 above.

[97] Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 184.

[98] Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 185, citing Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above.

> consumers of video-recorded interrogations should avoid the temptation to be distracted by a suspect's nondiagnostic "body language" that unfortunately may stand out due to the visual nature of the medium.

50. These are issues that all actors in the criminal process must appreciate in order to ensure that video recordings do not turn into a one-sided shield that protects investigators to the detriment of accused persons. It would also ensure that the Court, and all other stakeholders in the criminal justice system enjoy the maximum benefit that video recordings can bring. As Kassin*, et al* observe:[99]

> Triers of fact may benefit from recorded interrogations only to the extent that they know what to look for, on their own or with assistance from lawyers and expert witnesses.

51. Video recording of interrogations is an important advancement, if done rightly. Nevertheless, it is not a panacea to the problem of false confessions and it must be accompanied by other reforms to the criminal process as well.

The Ministry of Law's proposals and our suggestions

52. In this section, we will deal with our concerns with Proposal 1 in detail.

Video recording of the entire interrogation

53. It is not clear from the wording of Proposal 1 if there is a specific requirement for the entire interrogation process to be recorded on video.[100] In order to reduce the risks of false confessions, the law should specify that the entirety of all interviews and interrogations of suspects must be video recorded,[101] subject only to certain strictly defined exceptions (which we shall discuss below). As highlighted above, the failure to do so may potentially be dangerous for the suspect, and thus have the opposite effect of protecting police officers at the expense of suspects' rights.[102]

54. As Professor Michael Hor rightly points out, "the purpose of such a scheme is defeated if the whole interrogation process spans across hours but only a portion of the statement or confession was recorded on tape".[103] The American Psychology-Law Society and various other experts have also made this recommendation.[104]

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[99] Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gilsi H. Gudjonsson, Richard A. Leo & Alison D. Redlich, "Police-induced confessions, risk factors, recommendations: Looking ahead" (2010) 34 *Law and Human Behavior* 41 at 50.

[100] Although we note that in Annex C, it is stated that: "video recording will enable the court to quickly determine voluntariness and weight by showing the flow of the interview and the demeanour of the interviewer and interviewee: Annex C, fn 95 above.

[101] Kassin, et al, *Police-induced confessions*, fn 4 above, at 25.

[102] McConville, *Police behavior on and off camera*, fn 88 above, at 548.

[103] Chan Jian Da & Rebecca Koh, "Exclusive interview with Dean, Faculty of Law, University of Hong Kong, Professor Michael Hor", *Innocence Project Singapore* (5 November 2015) <https://sginnocenceproject.com/2015/11/05/exclusive-interview-with-dean-faculty-of-law-university-of-hong-kong-professor-michael-hor/> (accessed 23 August 2017).

[104] Kassin, et al, *Police-induced confessions*, fn 4 above, at 25, Dixon, *Videotaping police interrogation*, fn 86 above, Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 181 & 186.

55. Firstly, this ensures that the suspect will not be able to exploit such gaps in the recording to make spurious allegations against the police for off-camera threats, inducements, promises, or oppression ("**T/I/P/O**").

56. Secondly, and more importantly, it also ensures that the video recording scheme does not offer a misrepresented version of the situation. This could occur as a result of off-camera threats, inducements, promises, or oppression, or other interactions with interrogators such as multiple rounds of prior questioning. Where off-camera T/I/P/O results in a suspect's false confession, the suspect's ability to prove that the confession was given involuntarily would be gravely weakened by the video recording "because of its apparent ability to capture reality".[105] Professor Mike McConville, for example, has documented how police officers in England managed to present a video recording of an interrogation that provided "no indication of the unrecorded misconduct in 'interviews' which preceded them".[106] Likewise, Roberts and Zuckerman have also observed that there was some evidence of suspects being more frequently "conveyed to police stations 'via the scenic route', leading to unregulated, but supposedly spontaneous confessions in police vans and the like" after the introduction of stricter interrogation safeguards in the UK.[107] In such situations, the video recording would give "a misleading account of what occurred in a way that would have been convincing had not an unofficial record been available".[108] Saul Kassin has also pointed out how "recap" interviews might portray the suspect in a prejudicial light should they be recorded after multiple rounds of prior questioning.[109] Under such conditions, suspects might appear to express different emotions from when the information was previously given off-camera. This might make suspects "appear far more callous and unremorseful than is in fact the case",[110] which may bias the fact-finder against them. "Recap" interviews are not unusual and have been flagged up in major surveys of actual police practices overseas.[111]

57. <u>There should be clear rules specifying that the police should not conduct unrecorded interviews with suspects except in exigent circumstances</u>**.** For example, the New South Wales Police Force's Code of Practice for Custody, Rights, Investigation, Management and Evidence ("**NSW COP**") states:[112]

> Do not conduct lengthy preliminary interviews with a suspect before a formal electronically recorded interview at a recognised interviewing facility.

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[105] Mike McConville, "Video taping Interrogations" (1992) 11 *New Law Journal* 960 at 962.
[106] Dixon, *Videotaping police interrogation*, fn 86 above. See also: McConville, *Police behavior on and off camera*, fn 88 above.
[107] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 207.
[108] Dixon, *Videotaping police interrogation*, fn 86 above.
[109] Saul M. Kassin, "The psychology of confession evidence" (1997) 52 *American Psychologist* 221 at 230.
[110] Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 181.
[111] Thomas P. Sullivan, "Police experiences with recording custodial interrogations", *Northwestern University School of Law, Centre on Wrongful Convictions* (2004), Dixon, *Videotaping police interrogation*, fn 86 above, and William A. Geller, *A Report to the National Institute of Justice* (Police Executive Research Forum, 1992) available at: <https://www.ncjrs.gov/pdffiles1/Digitization/139584NCJRS.pdf> (accessed 23 August 2017).
[112] New South Wales Police Force, 2015 at p 74 (available at: http://www.police.nsw.gov.au/__data/assets/pdf_file/0007/108808/Code_of_Practice_for_Crime.pdf) (accessed 23 August 2017).

> Preliminary questioning, other than at a recognised interviewing facility, should be conducted only for the purpose of clearing up any doubt and/or ambiguity, unless delay would be likely to: interfere with or physically harm other people; lead to interference with evidence connected with an offence; lead to the alerting of people suspected of having committed an offence but not yet arrested; hinder the recovery of property.
>
> Once the risk has been averted or questions have been put to attempt to avert the risk stop interviewing.

58. We would recommend that such rules be included in primary legislation, as opposed to subsidiary legislation or codes of practices. Further, we would strongly suggest that local legislation should also prohibit preliminary interviews, subject to the exceptions stated above, something that the NSW COP does not expressly deal with.[113]

59. Likewise, interactions between suspect and interrogators during breaks should also be minimised, save for minor administrative matters, to protect the accused from unrecorded T/I/P/O, and to protect the police from baseless allegations.[114] David Dixon, for example, notes how a suspect denied being offered any inducement in a manner that "was clearly the result of discussion between the suspect and police (or perhaps the suspect's mother) during an interview break". The suspect subsequently claimed that during the break, the police had told him 'If you help us, we will help you", but the official video record provided no assistance as to whether the denial of inducement was indeed given voluntarily.[115]

60. Ultimately, the Court must also be alive to the fact that improper pressure might have been put on the suspect outside and/or before the recording, especially when suspects are asked a great deal of leading or closed questions (such as those beginning with "do you agree…").

Footage must provide equal focus on both suspect and interrogator

61. In order for the Court to be properly assisted by video recording, the footage must have an "equal focus" on both suspect and interrogator(s) to provide the judge with sufficient context to assess the suspect's voluntariness when giving the statement.[116] The American Psychology-Law Society has not only endorsed this recommendation,[117] but also states that this is necessary to ensure that suspects are not unduly prejudiced.[118] Numerous other experts also concur.[119]

62. The law should also clearly specify that there should be at least three cameras in the interrogation room; one focussed on the suspect, one focussed on the interrogator, and one

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[113] Dixon, *Videotaping police interrogation*, fn 86 above.
[114] Dixon, *Videotaping police interrogation*, fn 86 above.
[115] Dixon, *Videotaping police interrogation*, fn 86 above.
[116] Kassin, *The social psychology of false confessions*, fn 3 above, at 43-44. See also: Kassin, et al, *Police-induced confessions*, fn 4 above, at 25, Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 205-206, Dixon, *Videotaping police interrogation*, fn 86 above.
[117] Kassin, et al, *Police-induced confessions*, fn 4 above, at 25.
[118] Kassin, et al, *Police-induced confessions*, fn 4 above, at 26.
[119] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above,at 195-200, Daniel Lassiter, Lezlee J Ware, Jennifer J. Ratcliff & Clinton R. Irvin, "Evidence of the camera perspective bias in authentic videotaped interrogations: Implications for emerging reform in the criminal justice system" (2009) 14 *Legal and Criminal Psychology* 157 at 158-160.

that shows the full extent of the space in the room.[120] Failing to do so would not only undermine the scheme's purpose, but would also prejudice either the accused or the police because it would affect the judge's ability to accurately determine if a statement was given voluntarily.[121]

63. Numerous studies have demonstrated that focussing the camera primarily on the suspect has "the effect of impressing upon viewers the notion that the suspects' statements are more likely freely and intentionally given and not the result of some form of coercion".[122] A camera focussed on the suspect, therefore, would significantly increase the likelihood of fact finders assessing that the statement was voluntarily given, even where it was not.[123] Experts term this the "camera perspective bias",[124] or "point-of-view bias".[125] It is in turn caused by what is known as "illusory causation", which occurs when "people ascribe unwanted causality to a stimulus simply because it is more noticeable or salient than other available stimuli".[126] Studies have also shown that judges are no exception to these biases, even those "who had the most prior experience dealing with confession evidence".[127] In the words of Daniel Lassiter, *et al*:[128]

> Considerable empirical data now exist indicating that [camera perspective bias] is not simply a possibility; it is a reality.

64. Where it comes to video footage therefore, "context is everything",[129] just as it is in law. It is absolutely *critical* that trial judges are shown the full context in which statements were made. David Dixon, for example, cites a case where the close-up footage of an interrogation shows a suspect appearing "somewhat shifty" while giving his statement as he "moved his eyes from side to side".[130] Yet, a wider-angle shot revealed that the suspect was merely trying to maintain eye contact with the two interviewers who did not appear in the close-up footage.[131]

65. This example, coupled with his finding that a majority of judges and prosecutors saw demeanour as an indicator of veracity,[132] demonstrates how different camera angles can give an inaccurate or incomplete representation of reality that prejudices the suspect.

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[120] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 206.
[121] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 195.
[122] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 204.
[123] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 195-196, Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 185-186, Kassin, et al, *Police-induced confessions*, fn 4 above, at 27.
[124] Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 185-186.
[125] Saul M. Kassin, "The psychology of confession evidence" (1997) 52 *American Psychologist* 221 at 230.
[126] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 194.
[127] Referring to judges who "had previous experience as prosecutors, criminal defense attorneys, and trial court judges hearing criminal cases": Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 200.
[128] Lassiter, *et al*, *Panacea or Pandora's box?*, fn 90 above, at 196.
[129] *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352; [2012] SGCA 26 at [46], citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 *per* Lord Steyn at [28]; *Stack v Dowden* [2007] 2 AC 432 *per* Baroness Hale at [69].
[130] Dixon, *Videotaping police interrogation*, fn 86 above.
[131] Dixon, *Videotaping police interrogation*, fn 86 above.
[132] Dixon, *Videotaping police interrogation*, fn 86 above.

Proposed exceptions to video recording and sanctions for non-compliance

66. Proposal 1 lists out various exceptions to the video recording requirement. It also specifies that written statements taken without video recording will not be deemed inadmissible merely because of a failure to record, or be subject to an adverse inference as to its truth or accuracy.

The exceptions to video recording

67. If the video recording scheme is meant to assist judges in deciding on voluntariness, then there needs to be clear rules to help judges make their decision. The exceptions must also be defined clearly and exhaustively. They must not afford too much discretion to police officers. Our position is that the exceptions listed in Proposal 1 should also be exhaustive.

68. It should be made clear in the legislation that it is for the Prosecution to prove that the exceptions to the video recording requirement are applicable in each case.[133]

Effect of non-compliance

69. We propose that judges be given the discretion to exclude statements obtained as a result of significant and substantial breaches of legal procedures such that those statements would have an adverse effect on the fairness of proceedings. This mirrors the exclusionary discretion given to UK judges under s 78(1) of the Police and Criminal Evidence Act 1984. It would expressly give our court the discretion to exclude statements on the grounds of procedural impropriety, as contrasted with our court's current residual discretion to exclude evidence on the grounds of reliability.[134] Our proposal's broad nature also allows judges to undertake a contextual and fact-based approach that engages with both the "moral and practical complexities of improperly obtained evidence".[135] Such an approach is desirable because, as Roberts and Zuckerman point out, "the merits of admitting or excluding improperly obtained evidence are frankly too complex, circumstantial and uncertain to be reduced to any simple, algorithmic, all-purpose rule".[136]

70. We agree, in principle, with the Ministry of Law's position that a blanket exclusionary rule against statements obtained in breach of the video recording requirements would be disproportionate in cases where the breaches were minor or merely technical. Proposal 1, however, does not specify whether judges would be empowered with the discretion to exclude statements obtained through deliberate, reckless, or flagrant violations,[137] their reliability notwithstanding. We think that judges should have such discretion in cases where the breaches are significant and substantial enough to affect the fairness of the trial.

71. The question of whether a breach was significant and substantial will depend on the facts. It will clearly include breaches that are deliberate, reckless, or flagrant, regardless of the officer's good faith in committing those breaches. Whether a significant and substantial breach will compromise the fairness of the trial will depend on the facts and, as mentioned

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[133] Thomas P. Sullivan, "Electronic recording of custodial interrogations: Everybody wins" (2005) 95 *The Journal of Criminal Law & Criminology* 1127 (herafter "Sullivan, *Electronic recording of custodial interrogations*") at 1136.
[134] *Muhammad bin Kadar (CA)*, fn 58 above, at [53] and [60]-[62]
[135] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 191.
[136] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 190.
[137] Adopting the terms used by the Court of Appeal in *Muhammad bin Kadar (CA)*, fn 58 above, at [62].

above, we would prefer to give judges the room to undertake a fact-sensitive approach in each case. In our view, minor or mere technical breaches will ordinarily be insufficient.[138] Additionally, we also think that considerations of cogency should feature less where the breaches were deliberate, reckless or flagrant. This is in line with the astute observations of Justices Stephen and Aicken in *Bunning v Cross*:[139]

> To treat cogency of evidence as a factor favouring admission, *where the illegality in obtaining it has been either deliberate or reckless*, *may serve to foster the quite erroneous view that if such evidence be damning enough that will of itself suffice to atone for the illegality involved in procuring it*. For this reason, cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example, where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.
>
> Where…the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. [Emphasis added]

72. We recognise that there is a need to ensure that our judges have access to relevant and reliable evidence, and that criminals should not be let off on a "mere technicality".[140] But it is also equally important that we protect the individual's constitutional right to a fair trial[141] and the integrity of our criminal process. Issues of police impropriety cannot be "divorced from the fairness of the trial and the admissibility of evidence".[142] As Lord Hoffman noted in *A and Others v Secretary of State for the Home Department*:[143]

> …the courts will not shut their eyes to the way the accused was brought before the court or the evidence of his guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained or the evidence admitted.

73. Improperly obtained confessions, specifically those obtained through deliberate, reckless or flagrant breaches of the law, will inevitably compromise the fairness of the trial because of its

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[138] As Justices Stephen and Aickin observed in *Bunning v Cross* (1978) 141 CLR 54 at 77-8: "…it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no over defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is upholding the law".

[139] (1978) 141 CLR 54 at 79.

[140] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 190.

[141] *Haw Tua Tau v Public Prosecutor* [1981-1982] SLR(R) 133; [1981] SGPC 1 at [14] and *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129; [2015] SGCA 11 at [64]. See also: Michael Hor, "The privilege against self-incrimination and fairness to the accused" [1993] *Singapore Journal of Legal Studies* 35 at 45 and Gregory Gan, "The crippled accused: Miranda Rights in Singapore" (2010) 28 *Singapore Law Review* 123 at 142.

[142] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 193

[143] [2006] 2 AC 221; [2005] UKHL 71 at [87].

prejudicial effect on the accused.[144] The failure to exclude such evidence would also taint the verdict delivered at the end of that process, which may in turn erode public trust in the system.[145]

74. There will also be a risk that our judges may be perceived as condoning police impropriety should such evidence be admitted.[146] As Justices Stephen and Aickin observed in *Bunning v Cross*:[147]

> …the courts should not be seen to acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law.

75. Further, if the introduction of video recording was meant to provide an "even-handed ally" to both the state and the accused (as alluded to in Proposal 1), then the police's failure to abide by those procedures would effectively undermine its purpose. Providing courts with the discretion to exclude statements obtained through significant and substantial breaches of legal procedure thus represents a suitable compromise between the two objectives stated above. As Mr Justice Hodgson observed in *R v Keenan*:[148]

> …[I]f the breaches are 'significant and substantial', we think it makes good sense to exclude them…If the rest of the evidence is strong, then it may make no difference to the eventual result if [the trial judge] excludes the evidence. In cases where the rest of the evidence is weak or non-existent, that is just the situation where the temptation to do what the provisions are aimed to prevent is the greatest, and the protection of the rules is most needed.

76. An exclusionary discretion would also serve the additional purpose of providing law enforcement officers with an incentive for compliance and disincentive for non-compliance.[149]

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[144] Richard Ofshe and Richard Leo also describes the unfairness created by a false confession as such: "Because of the weight given to confession evidence, false confession is at least as prejudicial to a defendant's right to a fair trial as any type of erroneous, incriminating evidence. Confession creates a virtually irrebuttable presumption of guilt among criminal justice functionaries, who…rarely question the veracity of self-incriminating statements. As a result, once a confession is introduced in court, any attempt to refute it is likely to be futile.": Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above.

[145] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 188-190. See also, the Privy Council's decision in *Lam Chi-ming v R* [1991] 2 AC 212, where their Lordships stated, at 220, that: "[t]he rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and *upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody*".

[146] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 190, Andrew L-T Choo & Susan Nash, "Improperly obtained evidence in the Commonwealth: Lessons for England and Wales?" (2007) 11 *International Journal of Evidence and Proof* 75 at 97.

[147] (1978) 141 CLR 54 at 77-78.

[148] [1990] 2 QB 54 at 69.

[149] As Jim Trainum, a former police officer with the Washington D.C Metropolitan Department of Police puts it: "Recording interrogations needs to be mandatory, with rules and sanctions. If sanctions are not in place then public confidence is undermined by the few unscrupulous among us": Tranium, *I took a false confession*, fn 86 above. See also: Sullivan, *Electronic recording of custodial interrogations*, fn 113 above, at 1136.

77. For the purposes of this paper, we confine our proposals to improperly obtained statements, though we think that the discretion should also extend to all other types of improperly obtained evidence.

Video recordings should be made mandatory for all offences punishable with death or life imprisonment

78. While Proposal 1 states that video recording will be made compulsory for "scheduled offences", it does not specify which offences will be placed in the schedule.

79. We propose that as a starting point, scheduled offences should include all offences that are ordinarily triable only in the High Court.[150] Specifically, offences that are punishable with death or imprisonment for more than 10 years. And we hope that over time, the list of scheduled offences would expand to include all offences that are punishable with imprisonment.

80. At the very least, scheduled offences should include all offences punishable with death or life imprisonment.

Video recordings should made mandatory for all vulnerable suspects

81. Video recording of interrogations should also be made mandatory for all interrogations involving juveniles, the elderly, the cognitively impaired, or psychologically disordered, regardless of the alleged offence.[151] For convenience, we shall refer to these individuals as "vulnerable suspects".

82. Experts concur that vulnerable suspects are exceptionally susceptible to giving false confessions, whether voluntarily or involuntarily.[152] They should therefore be given special protection in the investigative process, and the video-recording recording of interrogations is one such protection. We would also take this opportunity to call for the mandatory presence of a lawyer, who is trained to perform such a role, for all interrogations/interviews of vulnerable suspects. In its White Paper, the AP-LS has observed that Appropriate Adults ("**AA**") are not suitable substitutes for trained legal professionals, as AAs tend to be passive and often urge youths to cooperate with the police.[153] Additionally, the AP-LS also recommends that police officers who interview or interrogate vulnerable suspects should receive special training, especially "on the added risks to individuals who are young, immature, mentally retarded, psychologically disordered or in other ways vulnerable to manipulation".[154]

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[150] This refers to offences that are punishable with death or imprisonment for more than 10 years, see: Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 7(1) and 8(1) read with Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 15(1). See also: http://www.supremecourt.gov.sg/about-us/the-supreme-court/supreme-court-jurisdiction

[151] Kassin, et al, *Police-induced confessions*, fn 4 above, at 30.

[152] Kassin, et al, *Police-induced confessions*, fn 4 above, at 19-22.

[153] Kassin, et al, *Police-induced confessions*, fn 4 above, at 30.

[154] Kassin, et al, *Police-induced confessions*, fn 4 above, at 30.

Defence's access to video recordings

83. Under Proposal 1, defence lawyers will only be allowed to view video recordings of interrogations at approved locations. It also proposes to make the unauthorised copying, use or distribution of the video a criminal offence. The Ministry argues that this is necessary to prevent "video-recorded statements from being misused by being posted on the Internet or even sold on the black market". Unfortunately, no examples have been cited in support of this and we hope that the Ministry would do so to provide us with a better understanding of the problem. Specifically, we hope that the Ministry will clarify why video recordings should be treated differently from other types of evidence, such as crime scene photos or police statements, which are not subject to any similar access restrictions. We also hope that the Ministry will clarify why criminalising the unauthorised copying, use or distribution of the video recordings alone would not be a sufficient deterrent against the problems that it has cited.

84. Nevertheless, our position on this issue is that defence lawyers and accused persons should be given a copy of the video recording that they can view at their own convenience to properly present their case. This gives them equal access to the video recordings as the prosecution, and ensures that the playing field is not further skewed in the prosecution's favour. This is contrasted with the current proposal, where one side would have what appears to be almost unrestricted access to the videos[155] while the other would have to experience inconvenience to access the same.

85. Restricting access to approved places would affect, and likely jeopardise, defence lawyers' ability to prepare their case properly, thus affecting the overall fairness of the process to the accused. It would potentially require lawyers to spend hours inside a police station to properly review footage of their client's interrogation. Reviewing video footage, especially those with long interrogations, would require a great deal of time. One would expect competent and dedicated lawyers to go through the video recording with a fine-toothed comb to determine whether their clients were under undue pressure during interrogations. Even more time would be required should experts need to view the footage. This would place an immense burden on defence lawyers, *especially* if they are diligent, dedicated and competent. We must also not forget that dedicated pro bono lawyers also represent a significant proportion of criminal defendants. While it is the solemn duty of defence lawyers to always do their best for their clients, the reality of practice is that lawyers will also have multiple other matters to tend to, each equally important as the other. As a matter of procedural fairness therefore, we think that the restrictions should not be put in place given its potential detriment to accused persons.

86. Notwithstanding our disagreements, we hope that defence lawyers would, at the very least, be entitled to as many screenings as they need to properly present their case, should the Ministry of Law decide to go ahead with its proposal. They should be allowed to bring along other persons who are reasonably connected with the case, such as experts and the accused themselves. Screening of the videos should be done in absolute privacy to ensure that the lawyers can discuss all relevant matters with their clients or experts without fear of disclosing any prejudicial information to the police or other third parties. This is imperative to ensure a fairer process.

[155] Annex B does not seem to indicate that there will be any restrictions on access to the video footages for prosecutors.

Ensuring the authenticity and integrity of footage

87. To ensure that disputes over the authenticity of video recordings are minimised, we call on the Ministry to introduce sufficient legislative safeguards to ensure that video equipment and recordings cannot be tampered with. This should include (but not be limited to) rules specifying that:

    a. There should be more than one recording medium used to store the footage at any one time, and one copy must be sealed in the presence of the suspect or interviewee before it leaves his or her presence.[156] The other copy of the footage shall be used as a working copy.[157]

    b. The date and time of the interrogation, in hours, minutes, and seconds, must be superimposed on the footage automatically and cannot be removed.[158]

    c. The video recording equipment must also clearly indicate to the officers and suspects whether footage is being recorded.

    d. When the suspect is brought into the interview room, the officer shall immediately unwrap the recording medium in front of the suspect, load the recording equipment in front of the suspect and commence recording.[159]

    e. Once recording has commenced, the police officer conducting the interrogation shall:[160]

        i. State the date, and time of commencement of the interview.

        ii. Explain that the session is being recorded, the steps that the officer will have to take to ensure integrity of the footage, and ask if the suspect consents to the recording.

        iii. State the name and rank of the police officers within the interrogation room, unless they reasonably believes that such disclosure would put them or their colleagues in danger.[161] In which case the officer that would be endangered by such disclosure shall be identified by his or her warrant card number.[162]

Concluding words on video recordings

88. Video recording is not a panacea to the false confessions problem. In the wise words of Daniel Lassiter:[163]

> Video recording custodial interrogations is indeed a wise thing to do, but it alone will not solve the problem of false confessions occurring nor will it

[156] Police and Criminal Evidence Act 1984, Code F, para 2.4 and note 2C (available at: https://www.gov.uk/government/publications/pace-code-f-2013).
[157] Police and Criminal Evidence Act 1984, Code F, para 2.4.
[158] Police and Criminal Evidence Act 1984, Code F, para 2.3 and note 2B.
[159] Police and Criminal Evidence Act 1984, Code F, paras 4.3 and 4.4.
[160] Police and Criminal Evidence Act 1984, Code F, para 4.4.
[161] Police and Criminal Evidence Act 1984, Code F, paras 2.5, 2.6 and note 2E.
[162] Police and Criminal Evidence Act 1984, Code F, paras 2.5, 2.6 and note 2E.
[163] Lassiter & Lindberg, *Video recording custodial interrogations*, fn 93 above, at 188.

> ensure that false confessions will be detected before an innocent life is ruined. More needs to be done with regard to reforming how police go about interviewing/interrogating suspects in the first place.

89. It should therefore be a part of a bigger strategy for dealing with the false confessions problem. This would include reform of pre-trial investigation processes and practices, as well as reforms to the substantive legal rules governing statements and confession evidence in court.

90. At the pre-trial stage, rules should be put in place to deal with the various risk factors highlighted above. Suggested reforms include allowing immediate access to counsel,[164] providing the defence with full disclosure,[165] and placing robust safeguards on police interrogations.[166] Additionally, interrogators should refrain from using leading questions as far as possible, as it has been observed that:[167]

> Research demonstrates that police interrogators all too frequently come to believe that a suspect is providing them with key details of the crime that only the perpetrator could know when, in fact, an innocent suspect is merely regurgitating information that the police fed to him in the first place, inferring what the interrogators suggested through leading questions, or making guesses that will later be proven wrong.

91. With regards to substantive legal rules, we would strongly urge that the rules of evidence allowing a person to be convicted based *solely* on his or her own confessions[168] or the statements of a co-accused, be abolished.[169] Confessions and statements should only be used as a means of corroborating the Prosecution's case, and not as the only means by which the Prosecution proves its case.[170]

92. We would also like to take this opportunity to call on our judges to adopt a more attuned approach towards the causes of false confessions. In this regard, we would note that there has been a move towards strengthening the due process safeguards for accused persons.[171] We warmly welcome this. At the same time, we hope that our courts will adopt a more sensitive approach when adjudicating on the voluntariness or veracity of statements given to the police. As Professor Ho Hock Lai wisely observed, "[j]udges may be overly influenced by confession evidence if they are not adequately aware of the many possible causes of false confessions".[172] We would therefore strongly commend the various scientific articles cited in our report, and hope that the material would be as valuable to our judges as they were to us.

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[164] Ho, *Obtaining and admissibility of incriminating statements*, fn 39 above at 261-262.
[165] "Men behind the bar", *Inter Se* (Singapore Academy of Law, 2009) fn 33 above, at 11.
[166] Ho, *Obtaining and admissibility of incriminating statements*, fn 39 above at 261-262.
[167] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 238.
[168] Hor, *The death penalty in Singapore and International Law*, fn 9 above, at 114.
[169] *Norasharee bin Gous v Public Prosecutor and Another* [2017] 1 SLR 820; [2017] SGCA 17 at [54]-[60] and *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566; [1993] SGCA 87. See also: Michael Hor, "The Confession of a Co-Accused" (1994) 6 *Singapore Academy of Law Journal* 366.
[170] Ofshe & Leo, *The social psychology of police interrogation*, fn 6 above, at 238.
[171] Hor, *The future of Singapore's criminal process*, fn 1 above.
[172] Ho, *Obtaining and admissibility of incriminating statements*, fn 39 above at 266.

93. We hope to continue this conversation with the various stakeholders in our justice system, and we hope that this move would continue to reinforce the long overdue move towards ensuring that all accused persons receive a fair trial.

CRIMINAL PROCEDURE RULES COMMITTEE

94. Proposal 18 calls for the setting up of a Criminal Procedure Rules Committee ("**CPRC**") to regulate the criminal process by prescribing court-related procedural rules. This is intended to ensure that the court process is kept "nimble and up-to-date".

95. We do not have any opposition to the principle of setting up a CPRC, or its stated aims. However, we take the position that, as far as possible, the Court should be allowed to regulate its own procedures. In this regard, there are a number of features that raise cause for concern.

96. First, we do not see why the Minister should have a say in the approval of rules proposed by the CPRC. This can be contrasted with power given to the Rules Committee ("**RC**") under s 80 of the Supreme Court of Judicature Act ("**SCJA**"),[173] which allows the RC to make Rules of Court regulating the procedure and practice of the courts in civil cases without executive interference. We think that the position should be the same for the CPRC, and that the Chief Justice should be the only individual whose approval is required.

97. Second, we have grave concerns over the composition of the CPRC. Specifically, we think that the committee should comprise mainly of members from, or appointed by, the judiciary rather than the executive. Proposal 18 states that the CPRC would comprise of 13 members, who are:

    a. The Chief Justice (who is also the Chairperson);
    b. 2 judges of the Supreme Court to be appointed by the Chief Justice;
    c. The Presiding Judge of the State Courts;
    d. The Registrar of the Supreme Court;
    e. 1 District Judge to be appointed by the Chief Justice;
    f. The Public Prosecutor ("**PP**") and 2 persons appointed by the PP, or 3 persons appointed by the PP;
    g. 2 practising advocates and solicitors to be appointed by the Minister for Law; and
    h. 2 representatives from the Government to be appointed by the Minister for Home Affairs.

98. There will thus be a total of six representatives from the judiciary, and seven individuals either from or appointed by the executive branch. This is, in our view, undesirable. Again, a contrast may be drawn with the RC under s 80 of the SCJA, which is dominated by representatives from or appointees of the judiciary. S 80(3) of the SCJA specifies that the committee be made up of:

    a. The Chief Justice, who shall be the Chairman of the Committee;
    b. The Attorney-General;
    c. Not more than 5 judges of the Supreme Court (excluding the Presiding judge of the State Courts) to be appointed by the Chief Justice for such period as he may specify in writing;
    d. The Presiding Judge of the State Courts;

[173] Cap 322, 2007 Rev Ed.

e. A District Judge to be appointed by the Chief Justice for such period as he may specify in writing; and
f. 2 practising advocates and solicitors to be appointed by the Chief Justice for such period as he may specify in writing.

99. We think that there is no good reason why the practice between civil and commercial cases should differ so greatly, and that the CPRC should comprise mainly of members from or who are appointees of the judicial branch.

100. Notwithstanding our objections, we would suggest that the Law Society be the body that nominates the two practising advocates and solicitors on the CPRC, should the Ministry of Law decide to proceed with Proposal 18. Just as Proposal 18 gives the Prosecution representation on the CPRC, the defence bar should also be represented and the appropriate body to nominate these representatives is the Law Society. Additionally, the CPRC should also include two academics nominated by the Chief Justice.

REGULATION OF PSYCHIATRIC WITNESSES

101. Proposal 28 sets out a regime for the regulation of psychiatric expert evidence in criminal cases. Most significantly, it proposes that psychiatrists may only give evidence in court if they are on a court-administered panel of psychiatrists and fulfil certain criteria. According to the Ministry of Law, the objective behind Proposal 28 is to ensure that "evidence given by psychiatrists in court is competently arrived at and objective". We have a number of concerns with Proposal 28.

102. We would propose that the status quo be preserved. Under the current system, errant psychiatrists can be dealt with through disciplinary proceedings instituted by the medical profession. This would also ensure that we do not shrink the pool of private psychiatrists available to accused persons as expert witnesses.

Effects on psychiatrists' objectivity in court

103. First, we are concerned that Proposal 28 would negatively affect the ability of psychiatrists to provide objective evidence in court. The desire to be selected by and remain on the panel has the potential to create perverse incentives that would influence the behaviour of psychiatrists in a negative way, regardless of the intended outcome. In Professor Jeffrey Pinsler's view, the threat of being removed from the panel might cause psychiatrists to shy away from "stating his honest but controversial view for fear that he may appear to lack objectivity and lose his place on the panel".[174] Professor Pinsler further cautions that this could lead to miscarriages of justice.[175] We respectfully agree with his views.

104. More significantly, we note that the Law Commission of England and Wales undertook a review on measures to improve the reliability of expert evidence in 2011 and did not recommend a similar regime proposed by the Ministry of Law. Instead, the Law Commission recommended that trial judges be given a statutory power to refuse the admission of expert

[174] Ng Huiwen, "Proposal to regulate psychiatric expert evidence raises concern", *The Straits Times* (30 July 2017) <http://www.straitstimes.com/singapore/proposal-to-regulate-psychiatric-expert-evidence-raises-concern> (accessed 23 August 2017) (hereafter "Ng, *Proposal to regulate psychiatric expert evidence raises concern*").
[175] See fn 174 above.

evidence should it fail to meet a reliability test.[176] It also recommended that trial judges be given the power to appoint an independent expert to assist them in "determining whether a party's proffered expert opinion evidence is sufficiently reliable to be admitted".[177] Although the Commission was alive to the problem of "fraudulent" expert witnesses,[178] it did not go so far as to propose that only a selected group of experts may give evidence in court.[179] Professor Michael Hor has proposed that the Court be allowed to appoint a "neutral" expert to "balance" as a balance to the "partisan" opinions of both prosecution and defence witnesses.[180] We think that on balance, the alternatives proposed by the UK Law Commission or by Professor Hor are preferable to Proposal 28.

105. These alternative proposals may be paired with other independent regulatory institutions that has the power to investigate or sanction any serious breach of standards by psychiatrists in order to ensure that psychiatrists are not deterred in stating honest but controversial views.

Effects on the pool of private forensic psychiatric practitioners available to accused persons

106. Second, we are concerned that Proposal 28 would cause forensic psychiatrists in private practice to shy away from practicing in this area, and hence shrink the pool of forensic psychiatrists available to accused persons. This is a concern shared by some practicing psychiatrists. For example, one psychiatrist has questioned whether the regime would cause young psychiatrists "to turn away from forensic work, thus narrowing the pool if the criteria are too stringent".[181] It is imperative that we guard against a shrinking of the pool of private forensic psychiatrists to prevent prejudice to accused persons. From our understanding, the number of private practitioners who specialise in forensic psychiatry is already relatively small. We hope that the Ministry of Law can provide us with the relevant figures to provide some clarity on this issue,[182] as well as the reasons why it thinks that Proposal 28 will not risk a shrinking of the forensic psychiatrist pool.

Selection process and composition of selection committee

107. The selection process under such a regime would inevitably be contentious, even if undertaken by the court.[183] Judges themselves would not be in a position to decide who

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[176] United Kingdom Law Commission, *Expert Evidence in Criminal Proceedings In England and Wales* (Law Com No. 325, 2011) (hereafter "UK Law Comm Report, *Expert Evidence in Criminal Proceedings*") at [3.36] & [5.17].
[177] UK Law Comm Report, *Expert Evidence in Criminal Proceedings*, above, at [6.78]-[6.80].
[178] United Kingdom Law Commission, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales* (Consultation Paper No. 190) (hereafter, UK Law Comm Consultation Paper, *Admissibility of Expert Evidence in Criminal Proceedings*") at footnote 20.
[179] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 505. The Law Commission did raise the idea of expert witness accreditation in its Consultation Paper, but that recommendation did not make it into the Commission's final report, see: UK Law Comm Consultation Paper, *Admissibility of Expert Evidence in Criminal Proceedings* above, at [1.16].
[180] Michael Hor, "When experts disagree" [2000] *Singapore Journal of Legal Studies* 242 at 259-262.
[181] Ng, *Proposal to regulate psychiatric expert evidence raises concern*, fn 174 above.
[182] The Straits Times reports that there are 228 psychiatrists as of December 2016, citing statistics from the Singapore Medical Council: Ng, *Proposal to regulate psychiatric expert evidence raises concern*, fn 174 above. It is unclear how many of these psychiatrists would meet the proposed selection criteria, or practice in the area of forensic psychiatry.
[183] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 505.

should be on the panel, and they would ultimately have to rely on other psychiatrists for advice.[184] But the question then arises as to who the court should look to for advice on the selection process. It is unclear whether fellow practitioners are in a position to pass judgment on their peer's competence, some of whom might be business competitors, or "arch-rivals promoting competing scientific theories".[185] Further, as Roberts and Zuckerman note:[186]

> Even the most well-qualified and experienced medical and scientific experts sometimes disagree with one another, nor are they completely immune form the personal vanities, jealousies, and old boys' networks that operate in all the established professions.

108. Thus, we think that the regime proposed by the Ministry of Law would lead to greater problems on balance.

109. But should the Ministry of Law decide to press on with its current proposal, we would echo calls for the selection panel to be made of up individuals from diverse backgrounds to ensure fairness in the selection/removal process.[187] While control over the selection process is rightfully vested in the judiciary, we think that it is preferable for the statute to specify the criteria of individuals who may be appointed to serve. Ideally, the panel should consist of judges, psychiatrists, members of the defence bar, academics, and prosecutors.

***Ad hoc* admissions**

110. Fourth, and notwithstanding our objection to the proposal, we would call for an *ad hoc* admission scheme to be included in the proposed regime, should the Ministry of Law decide to go ahead with its implementation. This would allow qualified and competent psychiatrists, who might not be able to fulfil the qualifying criteria for legitimate reasons, to assist the court on psychiatric issues on an *ad hoc* basis. Such reasons may include the fact that they do not ordinarily practice in Singapore, and are hence unable to obtain two character references from senior members of the Academy of Medicine. We should not assume that only psychiatrists who have two character references from senior members of the Academy of Medicine are able to provide competent and objective expert evidence. There are indeed plenty of highly qualified and competent psychiatrists who may not fulfil the criteria set down in Proposal 28. Further, an *ad hoc* admissions process also helps to mitigate the problems caused by the relatively small pool of forensic psychiatrists in Singapore, albeit on a very limited scale. At the very least, accused persons would be able to look beyond our own shores in search of psychiatric experts.

Appeals process

111. Finally, and notwithstanding our objections, we would also recommend that there be an appeals process for forensic psychiatrists whose applications are either rejected or who have been removed from the panel.

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[184] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 505.
[185] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 505.
[186] Roberts & Zuckerman, *Criminal Evidence*, fn 29 above, at 505.
[187] Ng, *Proposal to regulate psychiatric expert evidence raises concern*, fn 174 above.

ADMISSIBILITY OF THE CASE FOR THE DEFENCE

112. Proposal 30 of Annex B suggests amendments to allow the contents of any Case for the Defence, filed in court and served on the Prosecution under Division 2 of Part IX of the CPC,[188] to be admitted into evidence at the accused's trial, including during the Prosecution's case. In contrast, the Proposal does not suggest allowing the Case for the Prosecution to be admissible in evidence, but instead allows for reference to be made to it during the trial as though it was part of the Prosecution's opening statement.

113. Currently, s 169 of the CPC allows the court to draw any inference it thinks fit if:

    a. either the prosecution or defence fails to serve their respective cases on their other side,

    b. the cases served fail to include the items specified in ss 162 or 165(1), or;

    c. the prosecution or defence puts forward a case at trial that differs or is inconsistent with the respective cases filed.

114. In the first place, it is unclear why the Case for the Defence should be admissible as evidence in court. Further, it is unclear why there should be a disparity in the admissibility of the Case for the Prosecution and the Case for the Defence as evidence at trial.

115. As a matter of principle, we would like to state our objection to the requirement that the Defence must serve their case on the Prosecution, or be bound by the stated case as the law currently requires.[189] All accused persons have a constitutional right to be presumed innocent until proven guilty. This right includes the accused's right to put the Prosecution to strict proof in all criminal trials. Requiring the accused to notify the prosecution of his case and be bound by it goes against this hallowed principle. At present, the State already stands in an advantageous position vis-à-vis the accused. It commands the police's vast investigative resources and powers. It is also often given an upper hand through legal processes that places accused persons in a disadvantageous position, such as the denial of immediate access to counsel. <u>While accused persons should be encouraged to state their cases upfront for the purposes of administrative efficiency, they should not be bound by their respective cases if the presumption of innocence is to be preserved</u>.

TRIAL JUDGE'S REPORT IN RESPECT OF DEATH SENTENCES

116. Proposal 37 of Annex B sets out to amend s 313(c) of the Criminal Procedure Code[190] to require trial judges to state why a death sentence should *not* be carried out on individuals who they have sentenced to death.

117. Under the current s 313(c) of the CPC, trial judges are required to produce a report stating why the death sentence should be carried out. In principle, this suggests that the presumption is that a death sentence should not be carried out unless there are sufficient reasons to do so. Proposal 37 appears to reverse that presumption. It also does not provide any reasons why this change is necessary.

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[188] Cap 68, 2012 Rev Ed.
[189] Criminal Procedure Code (Cap 68, 2012 Rev Ed), s 169(1)(c).
[190] Cap 68, 2012 Rev Ed.

118. This report appears to be for the purposes of the clemency process. If so, the report should be made available to the whole cabinet, and not just the Minister for Law, since the decision to advise the President to reject clemency is a collective decision undertaken by Cabinet.

119. We would also take this opportunity to reiterate the need for greater transparency in the Clemency process, including the need to make the various documents stipulated in Art 22P(2) of the Constitution[191] available to the inmate.

RE-OPENING CONCLUDED CRIMINAL CASES

> *The ability and willingness of the criminal justice system in any country to confront miscarriages of justice and wrongful convictions is a fundamental test of its humanity, decency and fairness. Justice demands no less*.
>
> – Graham Zellick, former Chair of the UK Criminal Case Review Commission.[192]

120. The starting point of regimes for re-opening concluded criminal cases has generally been the prevention of wrongful convictions or other errors in the criminal justice system. It is now almost universally accepted that mistakes and miscarriages of justice are inevitable in a criminal process subject to human fallibility. Singapore's system is no different, and the same considerations must apply to any discussions on mechanisms for re-opening concluded criminal cases. Our Court of Appeal has recognises this too. With commendable candour in the *Kho Jabing* case, it stated that:

> [A]ll human institutions are fallible, and any finding made by any court on a contested fact may be imperfect and may not necessarily arrive at the truth.[193]

121. Indeed, Proposal 38 implicitly recognises the possibility that miscarriages of justice can occur in our system; otherwise there would be no need for any mechanism to re-open concluded criminal cases. That however, does not appear to be the only principle that underpins proposal 38. The desire to filter our unmeritorious cases as early as possible, and the respect for finality also feature significantly, as can be seen from the proposals to allow for a summary dismissal of applications, and the limit of one application per individual. While these principles are important, they must be seen in their proper context. Miscarriages of justice are a stain on any criminal justice system. But what is worse is the system's inability to recognise and correct its own errors. This is especially so for capital cases, for the wrongful execution of an individual is irreversible. The bar must not be set so high that it obstructs the presentation of valid claims. In our view, Proposal 38 has indeed set the bar too high and/or presents too many obstacles for reasons that we shall elaborate on below.

Summary disposal of leave application by a single judge without a right of appeal

122. Proposal 38 (a) to (d) requires applicants to obtain the court's leave before being allowed to pursue their application further. It further states that the leave application would be heard by a single judge, who may summarily refuse or grant leave to re-open the concluded case after

[191] Constitution of the Republic of Singapore (1999 Reprint).
[192] Graham Zellick, "Facing up to Miscarriages of Justice" (2005-2006) 31 *Manitoba Law Journal* 555.
[193] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [46].

having only considered the arguments of the party adversely affected by the summary decision.

123. This aspect of Proposal 38 appears to be a mechanism for keeping out the "flood" of unmeritorious cases. While we appreciate the need to prevent the court from being inundated with unmeritorious cases, we must also ensure that remedies to miscarriages of justice remain accessible to those who have been wrongly convicted or sentence. As the Court of Appeal wisely observed in *Yong Vui Kong v Public Prosecutor,*

> [t]he floodgates argument should not be allowed to wash away both the guilty and the innocent.[194]

124. We believe that Proposal 38 does not provide enough safeguards for the rights of a person who has been wrongfully convicted or sentenced and we think that there should be a right of appeal against all decisions to deny leave.

125. Firstly, that person's ability to obtain relief from the law is subject to the view of a single judge whose decision may not be appealed. Judges hearing applications at first instance may make errors of law or fact. Hence the need for an "avenue for error correction" through an appeals process.[195] Needless to say, an appeals mechanism is most important in the context of criminal cases, where the individual's life or liberty is at stake. Errors aside, two different judges looking at the same facts may also arrive at very different, albeit error-free, conclusions. This is an inherent feature of any judicial system. An appeals process thus serves the additional function of promoting greater consistency between cases and ensuring that any decision is not the mere result of fortune or misfortune in getting a particular judge. As such, we think that it is crucial for applicants to have a right of appeal against a leave decision made by a single judge.

126. The need for a right of appeal is demonstrated in Adrian Drummond's case in South Australia. Mr Drummond was convicted of attempted kidnapping and his first appeal against that conviction was dismissed. He brought an application for a second appeal (in effect, an application to reopen his concluded case), and under the South Australian regime he had to obtain the Court's leave first. A single judge heard and denied his initial application for leave.[196] Fortunately for Mr Drummond, the judge's decision was reversed on appeal.[197] More significantly, the appellate Court *also* found that there was a miscarriage of justice in his case, and allowed his substantive appeal.[198] That miscarriage of justice would not have been exposed and corrected if Mr Drummond did not have a right of appeal against the single judge's decision to deny him leave.

127. In its *Kho Jabing* decision, the Court of Appeal referred to the practice of Hong Kong and England and Wales as examples of how leave applications to re-open concluded criminal cases are heard and disposed of summarily and on paper.[199] Proposal 38 appears to have

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[194] [2010] 2 SLR 192; [2009] SGCA 64 at [15].
[195] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [49].
[196] *R v Drummond* [2013] SASCFC 135.
[197] *R v Drummond (No 2)* [2015] SASCFC 82.
[198] Bibi Sangha, "The statutory right to second or subsequent criminal appeals in South Australia and Tasmania" (2015) 17 *Flinders Law Journal* 471 (hereafter "Sangha, *The statutory right to second or subsequent appeals*") at 490 (available at: http://netk.net.au/SA/SA16.pdf).
[199] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [131]-[134]. The Court of Appeal referred to the procedure and practice of both Hong Kong and England and Wales.

adopted the Court's suggestions. We would respectfully point out, however, that there are significant differences in the practice of both jurisdictions and that set out in Proposal 38.

128. In relation to Hong Kong, and specifically the *Habib Ahmed* case, the leave application was summarily dismissed on paper by *five* judges of the Court of Final Appeal, as opposed to a single judge. Although an English High Court judge disposes of applications in the same manner as set out in Proposal 38, the critical difference is that there are alternative avenues available to a wrongfully convicted individual. In England and Wales, the Criminal Cases Review Commission ("**CCRC**") has the main responsibility for investigating and bringing applications to correct miscarriages of justice. The CCRC is granted certain investigative powers, and has the right to refer concluded criminal cases to the Court of Appeal without requiring leave. Given that the CCRC is meant to be the main mechanism for detecting and correcting miscarriages of justice, it is no surprise to find a more stringent procedure for cases brought by individuals. The impact of that more stringent procedure is ameliorated by the CCRC's ability to bring references. Because there is no equivalent institution in Singapore, we think that the English procedures cannot be adopted wholesale without significant prejudice to the wrongfully convicted or sentenced. Most significantly, both Hong Kong and England no longer retain the death penalty, and the issue of judicial error at the leave stage will not have as drastic an impact as it would in Singapore.

    Thus, we think that there should be a right of appeal against all decisions to deny leave. <u>At the very least, there should be a right of appeal for cases where the applicant has been sentenced to death</u>.

The requirement of "fresh" and "compelling" material

129. Proposal 38 also requires there to be "fresh"[200] and compelling evidence before a court may re-open a concluded criminal case. Both requirements appear to adopt the tests and standards that our Court of Appeal laid down in the *Kho Jabing* case. Those tests and standards, in turn, appear to be based on the wording of s 353A of the South Australian *Criminal Law Consolidation Act 1935*.[201]

130. Bearing in mind that Proposal 38 will be enshrined in legislation and therefore have no flexibility of being modified, developed, or extended to cover new situations, we think that a broader test than that laid down in *Kho Jabing* should be adopted.

131. It is important to note that the requirements of "fresh" and "compelling" evidence requirements in the South Australian legislation were actually concepts borrowed from legislative exceptions to the double jeopardy rule.[202] This means that the terms were *intended*

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[200] We note that Proposal 38 does not use the term "fresh", and instead refers to such material as: "material to be put forward that was not adduced before any court in the concluded criminal proceeding, and that could not have been so adduced even with reasonable diligence." For convenience, we will refer to such material as "fresh" material.

[201] While the Court of Appeal did not expressly mention that it was adopting the language of the South Australian statute, the similarities in phrasing strongly suggest that this was the case. Indeed, the Court did refer to the relevant South Australian provisions earlier in its judgment and took note of the concepts used by those provisions, and their wording: *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [37]-[39].

[202] David Hammer, "Wrongful convictions, appeals and the finality principle: The need for a Criminal Cases Review Commission" (2014) 37 *University of New South Wales Law Journal* 270

to be very narrowly and strictly defined, as they were meant to provide for very drastic exceptions to "the conclusive effect of a verdict of acquittal" and a person's constitutional right against double jeopardy.[203]

132. Applying the same requirements to applicants seeking to demonstrate the occurrence of a miscarriage of justice would be a "product of faulty reasoning".[204] The two situations are just wholly different.[205] Bringing a double jeopardy prosecution involves an incursion on a constitutional right,[206] whereas correcting a possible miscarriage of justice involves the *protection* of a constitutional right.[207] Furthermore, in the double jeopardy prosecution situation, the party bringing the case is the state, with all its might and resources. In stark contrast, applicants seeking to demonstrate that a miscarriage of justice has occurred are mostly persons from disadvantaged groups who lack skills, resources, legal support, and are almost always doing it from the strict confines of prison.[208] The narrowness of the South Australian provisions have led David Hammer to note:[209]

> The finality principle dictates that there must be some restriction on the opportunities for defendants to challenge and overturn convictions. However, as they currently function, the opportunities open to defendants are so tightly constrained as to be illusionary. Given the searing injustice of wrongful convictions, it must be asked whether the current law has the balance wrong.

133. In any case, a lower threshold would be compensated for by the new leave procedure, which allows the court to weed out unmeritorious applications at an early stage.

134. As Bibi Sangha, *et al* point out:[210]

> …the suggestion that a higher threshold is necessary in order to *deter* unmeritorious appeal applications is incorrect. Unmeritorious applicants can apply whatever the test…There can be no doubt that unmeritorious applications should be identified and dismissed by the most economical method available. However, *increasing the threshold* for access to the appeal court will only ensure that otherwise meritorious applications will be denied.

Definition of "fresh" material

135. Proposal 38 requires an applicant to put forward sufficient material "that was not adduced before any court in the concluded criminal proceeding, and that could not have been so

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(hereafter "Hammer, *Wrongful convictions, appeals and the finality principle*") at 298. Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 510-511.

[203] Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 510-511.

[204] Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 510-511.

[205] Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 510-511.

[206] Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 510-511. In Singapore, a person's right against double jeopardy is protected under Article 11(2) of the Constitution of the Republic of Singapore (1999 Reprint).

[207] In Singapore, this would be the right to life and personal liberty under Article 9(1) of the Constitution of the Republic of Singapore (1999 Reprint).

[208] Hammer, *Wrongful convictions, appeals and the finality principle*, fn 202 above, at 297.

Hammer, *Wrongful convictions, appeals and the finality principle*, fn 202 above, at 298.

[210] Sangha, Moles and Economides, *The new statutory right of appeal in South Australian criminal law* at 158.

adduced even with reasonable diligence". Fresh evidence is to be contrasted with material that was not available earlier but which could have been obtained with reasonable diligence. We shall refer to this as the "fresh material" requirement in our report.

136. Fresh material is not limited to fresh evidence. Proposal 38 also defines it to includes new legal arguments that have arisen due to a change in the law since the case was concluded. Presumably, this adopts the Court's decision in *Kho Jabing*, and is a welcome inclusion in the definition of fresh material. This is to be welcomed. However, we would suggest that Parliament should not confine the definition of fresh legal arguments to those that only arise subsequently due to a change in the law. In this regard, the wording of Proposal 38 departs from the Court's decision in *Kho Jabing*. In *Kho Jabing*, the Court only went as far as to say that the "criterion of "non-availability" will *ordinarily* be satisfied only if the legal arguments concerned are made following a change in the law".[211] It did not rule out other situations where new legal arguments would also constitute fresh evidence. We would therefore suggest that the Court's approach be adopted instead of one that expressly rules out the possibility that new legal arguments may arise without a change in the law. Indeed, the requirement that the argument could not have been made, even with reasonable diligence, would be a sufficient filter mechanism in such situations.

The appropriate test to be used

137. More fundamentally, we think that a more appropriate test for whether material is material that is admissible to re-open a concluded criminal case should be that which:-

    a. Has not been previously adduced in court;

    b. was not deliberately omitted by the applicant; and

        i. could not have been adduced by a reasonably diligent applicant, or;

        ii. was not previously adduced in court due to its significance not having been reasonably or actually apparent to the applicant;

138. This test echoes the Court of Appeal's decision in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* ("***Ilechukwu v PP***").[212] In that case, the Court held that the rationale behind the requirement that "new" material be that which could not have been adduced even with reasonable diligence was to prevent litigants from "introducing their evidence in a piecemeal and haphazard fashion".[213] Thus, despite the fact that Ilechukwu could, in reality, have asked for a psychiatric report from the Institute of Mental Health at a much earlier point in time, he could still satisfy the "new" material requirement.[214] Indeed, the Court rejected the Prosecution's submission that Ilechukwu should "be made to bear the attendant consequences".[215] This is because Ilechukwu could not be said to have been "intentionally drip-feeding" his evidence.[216]

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[211] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [58].
[212] [2017] SGCA 44.
[213] *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* [2017] SGCA 44 (hereafter "*Ilechukwu Ucheckukwu (CA)*") at [26].
[214] *Ilechukwu Ucheckukwu (CA)* at [26].
[215] *Ilechukwu Ucheckukwu (CA)* at [25].
[216] *Ilechukwu Ucheckukwu (CA)* at [26].

139. Under Proposal 38, material may only be considered as "fresh" if it was not adduced before and could not have been adduced even with reasonable diligence. We think that this sets the standard too high for victims of miscarriages of justice. As Bibi Sangha, *et al*, observe: "there is no particular nexus between the existence of such legal or procedural errors and those based upon the existence of fresh evidence".[217]

140. And while it is true that an accused person should generally "bear the consequences of his decision", we should also appreciate that accused persons are not always in a position to make fully informed choices. Their decisions may be strongly influenced by the legal advice given to them, especially on the question of what legal arguments should be run. Lawyers can, and often do, disagree, reasonably, on the correct course of action in particular cases. Lawyers may also make mistakes. In Cindy Fairburn's case,[218] her counsel at trial (who was also a Queen's Counsel!) had proceeded to trial on "untenable defence" and had also overlooked the need to call scientific evidence to support her client's case.[219] Fortunately for Ms Fairburn, the New Zealand Supreme Court subsequently allowed her to adduce scientific evidence in support of her application to have her concluded case reopened. The Court thought that it would have been "contrary to the interests of justice to rule out the evidence on the ground that it did not qualify as "fresh".[220] This was despite the fact that the evidence could have been obtained before the trial. The Court eventually quashed her conviction and ordered a retrial.[221] Ms Fairburn's case is only one of the many examples where a lawyer's mistake cost the client dearly.[222] It will not be the last.

141. Suppose, for example, Mr X gets charged with a capital offence. He is assigned Lawyer A, who advises him that a particular line of argument (Line 1) is unwise or futile, and advises Mr X to pursue a different line argument (Line 2) instead. Mr X defers to Lawyer A's advice, for it is his first time in court and he naturally thinks that Lawyer A has more experience than him and is thus likely to get it right. They fail to pursue any leads relating to Line 1. Unfortunately, the judge finds Mr X's case unconvincing. He is found guilty, gets sentenced to death and also has his appeal against conviction and sentence dismissed. Mr X then engages Lawyer B, who thinks that there is merit in pursuing the very line of argument that Lawyer A advised against, and it turns out that had that line of argument been pursued, it would have secured Mr X's acquittal. However, the material necessary to mount that argument was available to Mr X at the time of trial, or at least could have been procured had he wanted to do so, and hence Mr X could not bring "fresh" material in support of his

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[217] Bibi Sangha, Robert Moles & Kim Economides, "The new statutory right of appeal in South Australian Criminal Law: Problems facing an applicant – unanticipated interpretive difficulties" (2014) 16 *Flinders Law Journal* 145 at 164 (hereafter "Sangha, *et al*, *The new statutory right of appeal in South Australia*") at 179 (available at: http://netk.net.au/CrimJustice/Criminal4.pdf).

[218] *Cindy Marcia Fairburn v The Queen* [2010] NZSC 1579; [2010] 2 NZLR 63, available at: <http://www.nzlii.org/nz/cases/NZSC/2010/1579.html> (accessed 30 August 2017).

[219] *Cindy Marcia Fairburn v The Queen*, above, at [33].

[220] *Cindy Marcia Fairburn v The Queen*, above, at [33].

[221] At the conclusion of the retrial, Cindy Fairburn was found guilty of manslaughter, and was sentenced to 4 years imprisonment: Lyn Humphreys, "Justice done in Fairburn case – lawyer", *Stuff* (31 January 2012) <http://www.stuff.co.nz/national/crime/6345098/Justice-done-in-Fairburn-case-lawyer> (accessed 30 August 2017).

[222] For more examples, see: Maslen Merchant, "Poor defence" in *Wrongly accused: Who is responsible for investigating miscarriages of justice?* (Solicitors Journal, The Justice Gap, 2012), available at: <http://thejusticegap.com/SJ_Miscarriages_of_Justice_LOW_RES.pdf> (accessed 30 August 2017).

application to reopen his case. Should Mr X be held strictly to the "consequences of his decision"? We do not think so.

142. Similarly, accused persons might also be (mis)guided by their misperceptions of the criminal process such that they should not be so strictly penalised for making the wrong judgment call. For example, in *Yong Vui Kong v Public Prosecutor*, Yong decided not to appeal against his conviction for drug trafficking because he thought that an appeal would require him to lie to the court about his guilt.[223] He did not appreciate the fact that he could appeal on purely legal grounds until much later, when he engaged a new lawyer.

143. Therefore, we think that our proposed test provides a broader and more flexible appropriate to balance the principle of finality with the realities of the criminal process.

Definition of "compelling" material

144. Proposal 38 also requires the fresh evidence to be "compelling", which it defines to mean material that is "reliable, substantial, powerfully probative and capable of showing almost conclusively that there has been a miscarriage of justice".

145. As a technical matter, the requirement that compelling material be capable of "showing almost conclusively that there has been a miscarriage of justice" is unnecessary at this stage. This requirement can be easily subsumed under the limb requiring the applicant to demonstrate that a miscarriage of justice has occurred. Inserting this requirement at this stage of the test will render the latter limb requiring otiose as the latter limb would almost always be fulfilled so long as the applicant can adduce compelling material as defined in Proposal 38.

146. Indeed, this overlap is demonstrated by the Court of Appeal's analysis in *Ilechukwu v PP*,[224] where the Court undertook the same analysis in respect of both the compelling material test as well as the miscarriage of justice test.[225]

147. Because of the overlap between both requirements, our criticisms laid out at paragraphs [160] to [164] apply here as well.

Court should have a residual discretion to remedy miscarriages of justice to fall outside of the statutory definition

148. We would strongly recommend that there be a residual provision granting the court the power to re-open concluded criminal cases so long as it is satisfied that there is a high probability that a miscarriage of justice has occurred, or that it is in the interests of justice to do so.

149. While miscarriages of justice are often exposed through fresh and compelling evidence, the lack of fresh and compelling evidence does not, by itself, mean that a miscarriage of justice has not occurred. The fresh and compelling evidence requirement assumes that judges have got the decision right based on what was before the court when the decision was made. But that need not always be the case.[226] There may be situations where the court can arrive at a

[223] *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192; [2009] SGCA 64 at [25].
[224] [2017] SGCA 44.
[225] *Ilechukwu Ucheckukwu (CA)* fn 214 above, at [28] and [45].
[226] Indeed, Bibi Sangha, *et al*, have observed that under such a regime: "The irony is that, upon the substantive hearing of the appeal, the appeal court might well find that the evidence is not actually 'fresh' or 'compelling', but that it does nevertheless indicate that there has been a substantial

wrong decision based on the material before it.[227] This is because, as The Hon. Michael Kirby, a former Justice of the Australian High Court puts it:[228]

> The lawyer assigned to the case may have been incompetent, inexperienced, or overworked…The appeal bench may have been so overwhelmed with cases that the judges did not have the time to notice a basic flaw in the evidence. These facts may have made the judges over-dependent on lawyers who themselves lacked the time or imagination to consider the enormous detail about which the prisoner was endlessly protesting.

150. Thus, Dr Bibi Sangha points out that:[229]

> The real issue is what the court should do where there is real evidence to indicate a possible wrongful conviction, but the indications are that the accused person, or their legal advisers could have done more to identify it at the time of the trial.

151. There might be no fresh or compelling evidence available to demonstrate a miscarriage of justice in such cases. The *Mallard* case is a perfect example.[230] As Michael Kirby notes, the *pro bono* counsel in the application to have the case reopened demonstrated that Mr Mallard "could not have been at the murder scene at the time of the homicide" through a "fastidious analysis of the evidence produced at the trial".[231]

152. Should we leave victims of miscarriages of justice without a remedy simply because they cannot produce any new material? While it is true that the accused should "accept the consequences of his decision as to the calling and treatment of evidence",[232] the reality is that the accused's' decisions, especially those on how to conduct their defence, would be based *heavily* on the lawyer advising them. The legal advice given will, in turn, depend not only on the lawyer's "store of knowledge"[233] or "talents and discernment",[234] but also "their

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miscarriage of justice and the appeal could be allowed.": Sangha, *et al*, *The new statutory right of appeal in South Australia*, fn 218 above, at 164.

[227] Bibi Sangha, for example, refers to concerns about how the requirement for fresh evidence "will exclude appeals where it is discovered that there had been an error at trial": Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 512.

[228] Michael Kirby, "Foreword", in Bibi Sangha & Robert Moles, *Miscarriages of Justice: Criminal Appeals and The Rule of Law* (LexisNexis Butterworths, 2015), available at: <https://www.michaelkirby.com.au/sites/default/files/content/2796%20-%20FOREWORD%20-%20MISCARRIAGES%20OF%20JUSTICE%20-%20CRIMINAL%20APPEALS%20AND%20THE%20RULE%20OF%20LAW.pdf> (accessed 23 August 2017) at 2.

[229] Sangha, *The statutory right to second or subsequent appeals*, fn 198 above, at 495.

[230] *Mallard v The Queen* (2005) 224 CLR 125.

[231] Michael Kirby, "Foreword", at fn 229 above.

[232] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [56], citing *Ratten v The Queen* (1974) 131 CLR 510 at 517-518 *per* Barwick CJ.

[233] Chief Justice Sundaresh Menon, "23rd Gordon Arthur Ransome Oration – Law and Medicine: Professions of Honour, Service and Excellence", *Annals, Academy of Medicine Singapore* (21 July 2017) (hereafter "CJ Menon, *Professions of Honour, Service and Excellence*") available at: <http://www.annals.edu.sg/pdf/OnlineFirst/OR_CJ_2.pdf> (accessed 30 August 2017).

[234] Michael Kirby, "Foreword", in Bibi Sangha, Kent Roach, Julie Goulding & Robert M. Moles, *Forensic investigations and miscarriages of justice: The rhetoric meets the reality* (Irwin Law,

individual judgements with which other members of the professions might reasonably disagree".[235] Should the individual be prejudiced for following the advice of a person much more experienced than himself/herself in the conduct of a criminal case, particularly when a miscarriage of justice has occurred? We think not.

153. It is therefore undesirable to limit an individual's ability to seek relief for a miscarriage of justice, and the Court's jurisdiction to grant that relief, to an unduly narrow standard.

154. As such, we would recommend that there be a residual provision granting the court the power to re-open concluded criminal cases so long as it is satisfied that there is a high probability that a miscarriage of justice has occurred, or that it is in the interests of justice to do so. This will be a decision at the court's discretion, as compared to when fresh and compelling evidence has been brought (court must reopen in those situations). It is similar to the position taken by the High Court of Australia in *Ratten v The Queen*.[236] In that case, the Court held that if it were satisfied that the applicant was innocent or that there was reasonable doubt as to guilt, it would quash the conviction, even if the evidence could have been procured with reasonable diligence.[237]

155. Likewise, in *Lundy v R*,[238] the Privy Council approved of Justice Tipping's decision in *R v Bain*,[239] where it was held that:[240]

> …the Court cannot overlook the fact that sometimes, for whatever reasons, significant evidence is not called when it might have been. The stronger the further evidence is from the appellant's point of view, and thus the greater the risk of a miscarriage of justice if it is not admitted, the more the Court may be inclined to accept that it is sufficiently fresh, or not insist on that criterion being fulfilled.

156. Thus, the Privy Council held that:

> If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

157. It should be noted that the Privy Council was concerned with the requirement that an appellant had to bring fresh evidence in order to invoke the Court's appellate jurisdiction. While we agree with the Board's decision in *Lundy*, we think that it would be better for the court to be given a residual discretion to achieve that outcome, instead of bypassing an express statutory requirement altogether.

2010) available at: <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2009%2B/2369.Foreword_-_Forensic_Investigations_%26_Miscarriages_Of_Justice,_June_2009.pdf> (accessed 30 August 2017).

[235] CJ Menon, *Professions of Honour, Service and Excellence*, fn 234 above.

[236] (1974) 131 CLR 510.

[237] *Ratten v The Queen* (1974) 131 CLR 510 at 517-518 *per* Barwick CJ.

[238] [2013] UKPC 28.

[239] [2004] 1 NZLR 638 (CA).

[240] [2004] 1 NZLR 638 (CA) at [22]. The same principle was also upheld by the New Zealand Supreme Court in *Fairburn v R*, fn 219 above, at [22].

158. With such discretion the court would also have the ability to deal with the "bad science" type of cases, *i.e.,* where the conviction (or indeed sentence) was based on flawed, but usually unchallenged, scientific evidence. As Malcolm McClusker QC points out, "[t]here are some tragic cases where an expert has given an unchallenged opinion, which in reality lacks any science, and resulting in a miscarriage of justice".[241] In such cases, one generally finds that a proper challenge could have been, but was not, mounted against the "bad" scientific evidence. But it also cannot be the case that a wrongfully convicted individual who fails to bring fresh material in such cases is denied justice. Thus, the Privy Council in *Lundy v R*, held that:

> ...where a case against an accused rested exclusively or principally on scientific evidence, when on an appeal, application is made to have admitted new scientific material which presents a significant challenge to that evidence, the court should not be astute to exclude the new material solely because it might have been obtained before the trial.

159. While we recognise that a measure of finality has to be accorded, the principle of finality should not be applied too strictly in criminal cases, as our Court of Appeal wisely observed in *Yong Vui Kong v Public Prosecutor*.[242] And in Michael Kirby's words, "[t]here is no merit in the finality of the conviction of the innocent or legal indifference to their plight".[243]

The substantive test for demonstrating that there has been a miscarriage of justice

160. Proposal 38(iii) sets out the substantive test for granting relief. There are two ways that an applicant can fulfil this test:

    a. The applicant can show that his/her conviction or sentence is "demonstrably wrong"; or

    b. The applicant can show that the court's decision "was tainted by fraud or a breach of natural justice", which compromises the "integrity of the judicial process".

The definition of "demonstrably wrong"

161. Proposal 38(iii) also sets out certain specific requirements for challenges relating to convictions and sentences. To show that a conviction is "demonstrably wrong", an applicant must be able to demonstrate that there is a "powerful probability" that the decision is wrong on the basis of evidence tendered in support of the application alone. This presumably rules out any further inquiry based on the evidence adduced; the evidence must stand or falls on its own. Presumably, this adopts the principles laid down by the Court of Appeal in *Kho Jabing*.[244]

162. In our view, this standard sets the bar too high because it excludes situations where the evidence, although not strong enough to stand on its own, nevertheless points towards the need for a further inquiry into whether a miscarriage of justice has indeed occurred. Such a situation arose in *Ilechukwu Uchechukwu Chukwudi v Public Prosecutor* ("***Illechukwu v***

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[241] Malcolm McCusker QC, "Miscarriages of Justice": Address to the Anglo-Australasian Law Society (Western Australia) (24 June 2015) <http://netk.net.au/MOJGeneral/MOJ4.pdf> (accessed 30 August 2017).
[242] [2010] 2 SLR 192; [2009] SGCA 64 at [15].
[243] Michael Kirby, "Foreword", at fn 229 above.
[244] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21 at [65].

PP"),[245] a recent decision concerning the reopening of a concluded criminal case. In that case, the Court of Appeal held that the Applicant had, *prima facie*, demonstrated a "powerful probability" that its previous decision on his conviction was wrong even though he could not fulfil the "miscarriage of justice" test laid down in *Kho Jabing*.[246] Although the Court's decision was confined to the "unique turn of events" in that case, the possibility that such exceptional cases might arise in the future cannot be dismissed. The fact that the Court had to apply the *Kho Jabing* principles "in a slightly modified form"[247] demonstrates that there are meritorious cases that fall below the threshold set in Proposal 38(iii).

163. Accordingly, Proposal 38(iii) should be modified to allow the court the discretion to take into account other material in determining whether its previous decision is demonstrably wrong. Although fresh and compelling material might be insufficient, on their own, to demonstrate a "powerful probability" of a miscarriage of justice, they might nevertheless alter the "evidentiary landscape" upon which the conviction was based. Thus, the focus should be on the *cumulative effect* of all the material, whether fresh or not.[248] For example, a medical report that could have been procured with reasonable diligence but was not may thereafter assume a new significance in light of the fresh and compelling material put forward.[249] As the majority of the High Court of Australia observed in *Mallard v The Queen*:[250]

> It is elementary that some matters may assume an entirely different complexion in the light of other matter and facts either ignored or previously unknown.

164. Likewise, Lord Phillips of Worth Matravers PSC observed, in *R (Adams) v Secretary of State for Justice*:

> The new evidence that leads to the quashing of a conviction is very often not primary evidence that bears directly on whether the defendant committed the crime of which he was convicted, but evidence that bears on the credibility of those who provided the primary evidence on which he was convicted.

165. This is also the practice in South Australia, whose regime Proposal 38 is based on.[251] There, it is open to the court to receive fresh evidence, with certain restrictions, once its jurisdiction to re-open a concluded criminal case has been established.[252]

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[245] [2017] SGCA 44.
[246] *Ilechukwu Ucheckukwu (CA)* fn 214 above, at [28], [45] and [48].
[247] *Ilechukwu Ucheckukwu (CA)* fn 214 above, at [48].
[248] Bibi Sangha, *et al*, argue that: "The implications to arise from that fresh evidence could well case a new light on much of the other evidence which had been led at trial. That being the case, it would be inappropriate to deal with any fresh and compelling evidence issues in isolation. Although there may be no necessary correlation between a fresh evidence issue and any other type of error that may have occurred at trial, it would clearly be prudent to consider them together, and to evaluate their cumulative effect.": Sangha, *et al*, *The new statutory right of appeal in South Australia*, fn 218 above, at 164.
[249] *R v Keogh (No 2)* [2014] SASCFC 136 at [141].
[250] *Mallard v The Queen* (2005) 224 CLR 125 at [13].
[251] *Criminal Law Consolidation Act* 1935 (SA), s 353A (available at: http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol_act/clca1935262/).
[252] *R v Keogh (No 2)*, fn 250 above, at [143].

Standard of proof at the leave stage

166. Proposal 38 does not specify the standard of proof that applicants have to satisfy at the leave stage. In *R v Keogh (No 2)*, the Supreme Court of South Australia held that at the leave stage, applicants merely have to show a "reasonably arguable case" that the jurisdictional and substantive requirements are met.[253] We think that this is an appropriate threshold for the leave stage. Applied to Proposal 38 (and notwithstanding our objections to the various requirements as set out above), this means that an applicant must put forward a reasonably arguable case that:

    c. there is fresh and compelling evidence; and

    d. there has been a miscarriage of justice in the concluded criminal case.

Power of judge hearing leave application to grant a stay of execution

167. Proposal 38 does not indicate whether a judge hearing a leave application under would have the power to grant a stay of execution pending determination of the leave application, as well as the substantive application if leave were granted.

168. It is our position that the judge hearing the leave application should have this power, and that this should be stated clearly in the amended statute.

Restricting each inmate to one application to re-open a concluded criminal case

169. Most worryingly, Proposal 38(i) restricts each person to one application to re-open a concluded criminal case. We think that this restriction should not be imposed because it can become an insurmountable impediment to the identification and correction of miscarriages of justice. The mere fact that applicants fail to meet the substantive legal requirements on their first attempt does not mean that they will not be able to show that a miscarriage of justice has occurred in subsequent attempts. We also cannot rule out cases where victims of miscarriages of justice only succeed in proving their case after multiple appeals.

170. Indeed, even though the Court went to some lengths to deal with the problem of unmeritorious applications in *Kho Jabing*, it did not go so far as to say that each applicant should be limited to one and one opportunity only to persuade the court that a miscarriage of justice had occurred. The Court of Appeal did not recommend this in either the initial petition to reopen the case,[254] or in the two subsequent unsuccessful applications brought by Kho Jabing.[255] It is also significant to note that this requirement is not found in s 353A of South Australia's *Criminal Law Consolidation Act 1935*.[256]

171. Fundamentally, applicants should not be prohibited from bringing further applications to reopen their case if further fresh and compelling evidence become available, especially since unmeritorious applications can already be filtered out at the leave stage.

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[253] *R v Keogh (No 2)*, fn 250 above, at [87].
[254] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; [2016] SGCA 21.
[255] *Kho Jabing v Public Prosecutor* [2016] 3 SLR 1259; [2016] SGCA 36 and *Kho Jabing v Public Prosecutor* [2016] 3 SLR 1273; [2016] SGCA 37.
[256] Fn 252 above.

172. Indeed, there is an inherent contradiction in Proposal 38. On the one hand, it permits the Courts to review its own decisions in concluded criminal cases if there is fresh and compelling evidence demonstrating a powerful probability that a miscarriage of justice has occurred. On the other hand, it prohibits a case from being reopened a second time even though that standard is met. Essentially, the proposal assumes that subsequent discoveries of fresh and compelling evidence will not be meritorious enough to warrant the court's attention, even if it fulfils the exacting legal standard that it lays down. In our view, there is no justification for such an assumption.

173. So far as this measure is meant to keep the "floodgates" shut and to preserve the principle of finality, we would again repeat the wise words of our Court of Appeal in *Yong Vui Kong* and Michael Kirby which we cited above at paragraphs [123] and [158].

Solicitor's undertaking

174. Proposal 38(iv) requires solicitors making an application to reopen a concluded criminal case to give a solicitor's undertaking stating:

    a. that they genuinely believe the application to be of merit,

    b. what the material is that could not have been adduced during earlier proceedings,

    c. why the reopening of a concluded criminal case is necessary.

    d. that they are satisfied that the arguments raised are new and were not previously dismissed by the court in earlier proceedings,

    e. that there are good arguments as to why the arguments were not raised previously and what these reasons are, and;

    f. that they are aware of the consequences of making a false undertaking.

175. The consequences of making a false undertaking and/or failing to honour an undertaking is a breach of the legal profession's professional rules and renders the lawyer liable to disciplinary sanctions. In addition to disciplinary sanctions, the lawyer's standing before the court and amongst his or her peers would also be affected. That is why, from our understanding, lawyers will ordinarily refrain from giving a solicitor's undertaking, because it requires them to take on the risk of heavy disciplinary sanctions. This is especially so on matters over which the lawyer cannot be absolutely certain.

176. Proposal 38(iv)'s requirement that any solicitor bringing an application to reopen a concluded criminal case effectively requires solicitors to take on this risk. We think that lawyers would refrain from giving this undertaking, more often than not, and therefore reduce the ability of the wrongly convicted or sentenced individual to obtain justice. <u>We therefore strongly urge that Proposal 38(iv) not be included in the Bill put before Parliament.</u>

177. Lawyers have a duty to advance their clients' interests to the best of their abilities,[257] and our adversarial system relies on lawyers doing their best to put their client's best case forward.[258] As former Chief Justice Chan Sek Keong said:[259]

[257] Legal Profession (Professional Conduct) Rules 2015 (S 706/2015), rr 5(2)(c) and (j).

> The Criminal Bar plays a crucial role in keeping an eye on the proper administration of criminal justice through their steadfast defence of their clients and their legal rights. They have a crucial responsibility when defending their clients against the forensic might of the Attorney-General's team of DPPs, supported by the investigative muscle of the Home Team.

178. In order to ensure that miscarriages of justice are exposed and corrected by the system, those who are wrongly convicted or sentenced must be able to obtain effective assistance from lawyers. In turn, it is imperative that lawyers are willing to represent clients in such cases. Unfortunately, Proposal 38(iv) will restrict access to justice for the wrongly convicted or sentenced.

179. Furthermore, it is also not clear why there should be a difference in treatment between a solicitor bringing a civil application to reopen criminal proceedings and one who brings a criminal application to reopen a concluded criminal case. Applications to reopen concluded civil cases are not uncommon, and the court has also found that some of these cases constitute abuses of process. Indeed, Chief Justice Chan Sek Keong (as he then was) observed in *Law Society of Singapore v Tan Guat Neo Phyllis* that:[260]

> By the nature of the proceedings, *the civil process is more susceptible to abuse, especially arising out of the misuse of procedural rules, than the criminal process*. Hence, the plea of abuse of process is invoked much more frequently in civil proceedings than in criminal proceedings. [Emphasis added]

180. If the objective of Proposal 38(iv) is to prevent an abuse of the court's process, then that principle should apply regardless of whether the application concerns a criminal or civil case. Indeed, the threshold should not be set as high for criminal matters, given the more significant consequences involved.

181. While there may be unmeritorious applicants seeking to reopen concluded criminal cases, there will also be applicants with meritorious cases. Again, we fear that Proposal 38(iv) would have a chilling effect on the ability of victims of miscarriages of justice to seek the court's aid in righting the wrong. We therefore recommend that Proposal 38(iv) be excluded from the Bill that will be put before Parliament.

The need for more robust mechanisms to identify and correct miscarriages of justice

182. Proposal 38 must also be accompanied by a broader examination of our mechanisms for identifying and correcting miscarriages of justice, for the proposal *alone* would not be

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[258] Cheah Wui Ling, "Developing a people-centered justice in Singapore: In support of pro bono and innocence work" (2012) 80 *University of Cincinnati Law Review* 1429 at 1443 and 1445-1446 and Amy Breglio, "Let him be heard: The right to effective assistance of counsel on post-conviction appeal in capital cases" (2011) 18 *Georgetown Journal on Poverty Law and Policy* 264.

[259] "Response of Chief Justice Chan Sek Keong at the Opening of the Legal Year 2011", *Supreme Court of Singapore* (7 January 2011), available at: <http://www.supremecourt.gov.sg/news/speeches/response-of-chief-justice-chan-sek-keong-at-the-opening-of-the-legal-year-2011> (accessed 31 August 2017).

[260] *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239; [2007] SGHC 207 at [131].

sufficient for ensuring that miscarriages of justice are identified and corrected. As Graham Zellick, former Chair of the UK's Criminal Cases Review Commission has said:[261]

> No criminal justice system, however good it is or is thought to be, will be immune from error. That, of course, is acknowledged in all developed systems by the process of appeal, but not all errors can be detected at that stage. Evidence may emerge only later, there may be developments in law and practice, there may be later evidence of impropriety, error or irregularity. Thus, in every system, however good and whatever its trial and appellate arrangements, there will be wrongful convictions or miscarriages of justice.
>
> Most developed systems regard the reopening of convictions once the normal appellate processes have been exhausted as fairly rare and extraordinary. A power is usually vested in some person or body with appropriate authority, but it is typically immensely difficult to disturb a conviction or even persuade the relevant authority to reopen the matter for further investigation. These arrangements cannot be said to provide an adequate system for dealing with the inevitability of wrongful convictions. That is why it is essential to have standing machinery of some kind to deal with these issues.

183. Thus, we would also recommend the setting up of mechanisms similar to the Criminal Cases Review Commission in Singapore.

184. Again, we would reiterate our keen interest in engaging all the relevant stakeholders in a discussion on this issue.

CONCLUSION

185. In closing, we would like to sincerely thank the Ministry of Law for this opportunity to submit our views on the proposed changes to the Criminal Procedure Code. We are willing to discuss our abovementioned views in greater detail, should the Ministry require our further assistance. We also look forward to joining other stakeholders in the collective effort to refine and improve our criminal justice system.

[261] Graham Zellick, "Facing up to Miscarriages of Justice" (2005-2006) 31 *Manitoba Law Journal* 555.