RESPONSES TO FEEDBACK RECEIVED FROM THE PUBLIC CONSULTATION ON PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE AND EVIDENCE ACT

Background

1. On 24 July 2017, MinLaw released a public consultation paper on the proposed amendments to the Criminal Procedure Code ("CPC") and Evidence Act ("EA"). The public consultation exercise closed on 24 August 2017, and MinLaw received feedback from a wide variety of stakeholders. These included legal practitioners, the Courts, the Attorney-General's Chambers, the Law Society, various technology companies, civil society organisations, as well as other institutions, and members of the general public.

2. The respondents generally expressed support for the proposed amendments to the CPC and the EA. MinLaw has considered the feedback received; our responses to the following key proposals are set out below:

    a. Introducing video recording of interviews
    b. Introducing more computer-related powers of investigation
    c. Protecting legal professional privilege during investigations
    d. Enhancing protection for complainants of sexual and child abuse offences during the court process
    e. Establishing a Criminal Procedure Rules Committee
    f. Expanding the criminal case disclosure procedure to cover more offences
    g. Regulating psychiatric expert evidence
    h. Introducing new procedures to prevent abuse of court process in concluded criminal cases
    i. Extending the costs regime to the pre-trial stage

Feedback Received

(a) Introducing video recording of interviews

3. Generally, respondents welcomed the introduction of video recording of interviews ("VRIs") and had suggestions in relation to the procedural framework governing it. MinLaw recognises the need for safeguards to ensure the reliability and accuracy of VRIs. There will be procedures established to ensure that VRIs are reliable and accurate.

4. Some respondents were of the view that individuals should not be allowed to opt out of VRIs as it might lead to accusations that threat, inducement, promise, or oppression was exerted on the individual to not record the interview. MinLaw considers that in certain cases individuals may be willing to give a statement to the police, but only off-camera. The law should allow the investigators to take this willingness into account where an insistence on video-recording might undermine the investigation.

5. Some respondents were of the view that there should be a prohibition against the editing of a recording. Recordings may contain sensitive information involving national security or intelligence sources. As such information must be protected, editing of video-recorded interviews will be permitted. If necessary, the courts will be allowed to hear parties' arguments on the edited portions and decide whether or not to view and consider them.

6. Some respondents suggested that there should be sanctions for *any* non-compliance with the VRI procedural framework, including challenges to the admissibility of a VRI statement or asking for an adverse inference to be drawn against the Prosecution. MinLaw has not accepted this suggestion because non-compliance with the relevant procedure may be inadvertent or accidental. Such non-compliance does not in and of itself prove the presence of bad faith, coercion of the interviewee or anything else that might affect the reliability of the statement. As such, a VRI statement will not be inadmissible or the subject of an adverse inference merely by virtue of procedural non-compliance, e.g. where a statement was recorded in writing although VRI was mandatory in that case. However, the Defence is still free to argue that the non-compliance should be considered *with other evidence*, such that the court should find it inadmissible or give it less weight. Depending on the extent of the procedural irregularities, the court

will have the discretion to adjust the weight to be given to the statement or draw any inferences it thinks fit.

7. Some respondents gave feedback that copies of VRIs should be extended to defence counsel. We have maintained the position that copies of video-recorded interviews cannot be handed over to the Defence due to the risk of such recordings being misused. For example, they may be posted on the internet or even sold on the black market. However, an accused person or defence counsel may view the recording at an approved place any number of times, once the disclosure obligation arises. In addition, a copy of the transcript of the recording will also be extended to the accused and/or his counsel during the Criminal Case Disclosure process.

8. Some respondents suggested that there should be strong safeguards for witnesses' VRIs if they are used in place of examination-in-chief. Specifically, the use of leading questions should be prohibited. MinLaw has not accepted the suggestion to introduce such prohibitions. This is because at the stage of investigations, the aim is to find out the truth. Investigators should not be barred from asking leading questions if this assists investigations and the objective of finding out the truth. Importantly, judges can view the recording and come to a conclusion about reliability.

(b) Introducing more computer-related powers of investigation

9. The technology companies and financial institutions, in particular, expressed various concerns in relation to this proposal.

10. There were concerns that complying with stipulated formats or including authentication features might be too onerous and expensive. MinLaw is mindful of these concerns. Although the cost of compliance will be borne by the requested party, relevant stakeholder industries and sectors will be consulted in the development of reasonable standards, and time will be given to them to implement these requirements.

11. There were suggestions for safeguards to be introduced in respect of these powers so that they are not overly intrusive. To clarify, the purpose of this amendment is to enable law enforcement agencies to access documents

stored electronically. MinLaw does not intend to give special protection to electronically-stored documents compared to ordinary hard copy documents: they will be treated similarly for the purposes of criminal investigations.

12. There were also concerns that where a party is ordered to facilitate a law enforcement agency's direct access to a computer outside Singapore, compliance with this order may risk criminal or civil liability or adverse regulatory action in another jurisdiction. MinLaw appreciates that certain entities, such as hosting service providers, may face such risks. However, after assessing the facts of a case, law enforcement agencies may still require this kind of access in certain situations. Entities such as hosting service providers who have concerns over legal or regulatory consequences flowing from a certain order will be able to raise their concerns with the relevant law enforcement agency, who will take those concerns into account.

(c) Protecting legal professional privilege ("LPP") during investigations

13. Respondents expressed their reservations about this proposal, stating that its practical implementation would have the effect of undermining LPP. Having considered the feedback, MinLaw will not be introducing legislative amendments at this point in time. Instead, a Code of Practice will be agreed upon among the Attorney-General's Chambers, law enforcement agencies, and the Criminal Bar to deal with LPP issues in criminal investigations. The experience gathered will be used to inform legislation in the future.

(d) Enhancing protection for complainants of sexual and child abuse offences during the court process

14. There was strong and broad support for the use of physical screens, the requirement that the identity of victims be automatically protected from the time a complaint is reported, and the requirement that *in-camera* hearings be automatically held when the victim testifies.

15. One respondent suggested that further measures should be similarly introduced to prevent innocent persons, who may be falsely accused of sexual offences, from being named. MinLaw has not taken up this suggestion. Victims of sexual/child abuse offences are in a different position compared to those who are accused of committing such offences. Unlike accused persons, such victims are required to disclose very intimate details of the offences perpetrated against them. In addition, in the event that an alleged victim is discovered to have falsely accused an individual of a sexual offence and is convicted of an offence for doing so, his or her identity will no longer be protected. This will have the effect of making it clear that the initial accusation of a sexual offence was false.

16. On one hand, AWARE, a voluntary welfare organisation concerned with women's and victims' interests, expressed strong support for placing restrictions on the types of questions that may be posed to complainants of sexual offences or child abuse. On the other hand, some respondents were of the view that existing measures were sufficient and that there was no need for any further restrictions on cross-examination to be imposed. MinLaw's view is that there is a public interest in ensuring that victims are not deterred from reporting offences committed against them or fully participating in the criminal justice process. Therefore, MinLaw will be proceeding to introduce restrictions on cross-examination such that leave of court will be required before pursuing certain lines of questioning concerning sexual history. However, these restrictions will be placed in subsidiary legislation for ease of further refinement if necessary.

17. In relation to the proposed restrictions on cross-examination, some respondents were of the view that the "manifestly unjust" threshold for leave was too high and that further guidance was required as to what this constitutes. MinLaw has accepted this feedback. The threshold for leave will be amended from "manifestly unjust" to "in the interests of justice". The phrase "interests of justice" will be left for the court to interpret and apply based on the unique facts of each case.

18. One respondent suggested that unrepresented accused persons should be prohibited from cross-examining alleged victims. This suggestion has not

been accepted because measures to protect victims must be balanced against the need to ensure fairness to the accused person.

(e) Establishing a Criminal Procedure Rules Committee ("CPRC")

19. Some respondents were of the view that the Law Society should be able to appoint members to the CPRC, and that one of its members should be from the Law Society's Criminal Practice Committee. Additionally, it was queried why the Minister for Law has veto rights in relation to proposals put forth by the CPRC.

20. The Minister for Law has responsibility over policies relating to criminal justice and procedure. Currently, the Minister for Law is already empowered to make regulations for anything that is required, permitted or necessary for carrying out the purposes and provisions of the CPC. The rules promulgated by the CPRC relate to various aspects of the criminal justice process. It is hence imperative for the Minister for Law, having charge over such policy, to approve the rules. Lawyers will be represented on the CPRC because the Minister for Law also has the power to appoint lawyers to the CPRC. The relevant law in the United Kingdom (England and Wales), which our proposed CPRC is modelled after, also gives the Lord Chancellor (the equivalent of our Minister for Law) the power to appoint lawyers to the CPRC and veto powers over the rules proposed by the CPRC.

(f) Expanding the criminal case disclosure ("CCD") procedure to cover more offences

21. Several respondents welcomed this proposal but suggested that the Prevention of Corruption Act ("PCA") be included under the CCD regime. MinLaw has considered and accepted this feedback. The PCA will be included in the Second Schedule to the CPC, making it subject to the CCD regime.

(g) Regulating psychiatric expert evidence

22. Some respondents were of the view that the selection criteria should not be so strict such that there are insufficient psychiatrists on the panel, especially for *pro bono* cases. MinLaw is mindful of this concern. The selection criteria will be formulated such that there is a sufficient pool of psychiatrists available.

23. A number of respondents felt that psychiatrists may be deterred from voicing minority opinions, for fear of losing their place on the panel. MinLaw acknowledges these concerns. To be clear, the procedures sought to be introduced are to ensure that psychiatrists are objective and that their opinions are competently arrived at. Psychiatrists will not lose their place on the panel merely because they take a minority view or because the judge does not accept their opinion.

24. There were suggestions to introduce procedures to enable the calling of foreign expert psychiatrists to testify in certain cases. MinLaw has accepted the suggestion. There will be procedures allowing for the *ad hoc* admission of foreign psychiatrists.

25. One respondent suggested that there should be a panel of psychologists as well, as they may be more experienced in the field of mental health, compared to medical doctors who choose to specialise in psychiatry. MinLaw has not accepted this suggestion. Psychiatrists are able to testify on whether or not a person has a mental illness recognised by medical science, and the effect of that condition on their thought processes at various times. This is a critical issue for the purposes of conviction and sentencing in criminal proceedings.

(h) Introducing new procedures to prevent abuse of court process in concluded criminal cases

26. Some respondents were of the view that the test for re-opening a concluded criminal case is too restrictive. To clarify, this legal test was set out by the Court of Appeal in *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 to balance finality with the need to avoid miscarriages of justice. Some have also suggested that lawyers should not be required to give an undertaking on the merits of the application. Similarly, this requirement codifies a

safeguard endorsed by the Court of Appeal in *Prabagaran a/l Srivijayan v Public Prosecutor and other matter* [2016] SGCA 67 to deter frivolous and unmeritorious applications.

27. Some respondents suggested that the accused should be allowed more than one application to re-open a concluded criminal case, and to appeal against a denial of leave. MinLaw has not accepted these suggestions. This is already an exceptional procedure on top of the appeal process, and a balance has to be struck between finality in court processes and keeping the process open in the rare situation where new evidence might come to light.

(i) Extending the costs regime to the pre-trial stage

28. Several respondents, including some members of the Criminal Bar, expressed the view that extending the costs regime to the pre-trial stage would be too onerous for lawyers. Some respondents suggested that current measures, including the option of making complaints to the relevant disciplinary body, were sufficient. MinLaw has taken on board this feedback. As there are adequate measures available to address egregious conduct at the pre-trial stage, MinLaw will no longer be pursuing this proposal.

Conclusion

29. MinLaw would like to thank all respondents for taking the time to review and providing us their feedback on the proposed amendments to the CPC and the EA, many of which have helped us to review and refine our policies and proposals.

MINISTRY OF LAW
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