FROM ADVERSARIAL TO COLLABORATIVE TRUTH SEEKING

The Past, Present and Future of Criminal Disclosure in Singapore

Singapore's criminal disclosure regime has undergone significant changes over the past 15 years. Often, the focus has been on the greater obligations placed on the Prosecution to disclose material to the Defence. These changes have been viewed as "levelling the playing field" and shifting Singapore's criminal justice system from a model primarily based on crime control to one embracing aspects of due process. These analytical approaches view the developments in criminal disclosure as a "zero-sum" tug of war between rules which tend to favour either the Prosecution or the Defence. This article adopts a different lens – by surveying the evolution of criminal disclosure in Singapore, including past developments and the present position as reflected in the Criminal Procedure (Miscellaneous Amendments) Act 2024, it is argued that the shift which has taken place is more fundamental in nature, and is one which affects *all* parties involved in criminal litigation. Singapore has steadily moved away from a strictly adversarial model, which focuses on the parties' narrow self-interests, to a collaborative model where there is a shared search for the truth based on mutual disclosure and reciprocity. The collaborative model promotes fairness as well as efficient and accurate outcomes. Therefore, the shift away from a strictly adversarial model in criminal disclosure is a wholly welcome development which is anticipated to continue into the future.

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1 The opinions expressed in this article are those of its authors and do not represent the views or positions of the institutions that they are affiliated with.

I. Introduction

1 A survey of Singapore's criminal disclosure regime is timely given the recent enactment of the Criminal Procedure (Miscellaneous Amendments) Act 2024[2] (the "CPMAA 2024"). The CPMAA 2024 is the culmination of almost a decade and a half of significant changes in the criminal disclosure regime. Over this period, no other area of criminal litigation has been transformed more dramatically. For most of Singapore's history, pre-trial disclosure in criminal matters was minimal and largely voluntary – leading to a "cry for criminal discovery".[3] Academics and practitioners alike called for reform and the introduction of a meaningful pre-trial criminal disclosure regime.[4]

2 In the early 2010s, these calls were answered through two seismic developments. First, Parliament introduced a statutory pre-trial criminal case disclosure ("CCD") regime through the Criminal Procedure Code 2010[5] ("CPC"). The CCD regime applied to most offences of a serious nature.[6] It obliged the Prosecution and the Defence to mutually disclose information about their cases prior to trial, in a sequential manner, with the Prosecution first disclosing its case before the Defence. In addition, the Prosecution was required to disclose copies of the documentary exhibits which it intended to rely on, and all relevant statements recorded from the accused person during investigations. However, the Defence could elect not to disclose its case prior to trial in cases tried in the General Division of the High Court.[7] It could also opt out of the CCD regime altogether in the State Courts.

3 The second development was the landmark decision of the Court of Appeal in *Muhammad bin Kadar v Public Prosecutor*[8] ("*Kadar*"), arguably the most famous decision on criminal procedure in Singapore's

2 Act 5 of 2024, passed by Parliament on 5 February 2024.

3 "A Cry for Criminal Discovery" was the title of a seminar organised by the Law Society of Singapore on 22 July 2005.

4 See, *eg*, Valentine S Winslow, "Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia" (1989) 31 Malaya L Rev 1; Amarjeet Singh SC, "Equality of Arms – The Need for Prosecutorial Discovery" *Singapore Law Gazette* (September 2005) <https://v1.lawgazette.com.sg/2005-9/> (accessed 1 December 2024); K S Rajah SC, "The Right to Discovery in Criminal Proceedings" *Singapore Law Gazette* (September 2005) <https://v1.lawgazette.com.sg/2005-9/> (accessed 1 December 2024); and Dennis Tan, "Discovering Rights" (2009) 5 *Pro Bono* 2.

5 Act 15 of 2010.

6 The list of offences is set out in the Second Schedule to the Criminal Procedure Code 2010.

7 Referred to as the "High Court" in the rest of this article for conciseness.

8 [2011] 3 SLR 1205.

legal history. The Court of Appeal in *Kadar*, in a break from precedent, recognised a common law obligation on the Prosecution to disclose any material which it does not intend to rely on at trial that tends to undermine the Prosecution's case or strengthen the Defence's case. In other words, the Prosecution was obliged to disclose evidence that is exculpatory in nature – even though such material may be unhelpful or even detrimental to the Prosecution's case.[9]

4 The years that followed brought further significant changes. In 2018, the CCD regime was broadened to cover a greater range of offences; and the obligation to disclose copies of documentary exhibits was extended to the Defence.[10] In 2020, the Court of Appeal further expanded the Prosecution's common law disclosure obligations in *Muhammad Nabill bin Mohd Fuad v Public Prosecutor*[11] ("*Nabill*"). *Nabill* required the Prosecution to disclose the statements of any potential witnesses that it did not intend to call to testify, but who may be expected to confirm or, conversely, contradict the accused person's defence. Unlike under *Kadar*, the obligation under *Nabill* applied regardless of whether the statements were exculpatory in nature.

5 The most recent development is the passing of the CPMAA 2024, which represents the present position. The CPMAA 2024 enhances participation in the CCD regime in two main ways: first, the Defence can no longer opt out of the regime in State Court cases; second, it is now compulsory for the Defence to file its case prior to trial in High Court cases. In addition, the CPMAA 2024 codifies the common law disclosure obligations set out in *Kadar* and *Nabill*, with certain modifications – the main change being to provide that *Nabill* disclosure only needs to be effected after the Defence files its case. This is an issue of timing; otherwise, the substance of *Kadar* and *Nabill* has been preserved in the legislation.

A. Question of analytical approach

6 The rest of this article delves deeper into the evolution of criminal disclosure in Singapore, as briefly summarised above. It also aims to provide a tentative glimpse into the future. But first, there is the question of analytical approach. Commentators have typically analysed the rules of criminal disclosure in "zero-sum" terms as favouring either the Prosecution or the Defence to differing extents. A common framework adopted is Herbert Packer's two models of Crime Control and Due

9 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [109].
10 Criminal Justice Reform Act 2018 (Act 19 of 2018).
11 [2020] 1 SLR 984.

Process.[12] The Crime Control Model is "based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process".[13] To achieve this purpose, the model prioritises "the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions".[14] The Due Process Model, on the other hand, gives primacy to the rights of the individual and rejects the premise, which underpins the Crime Control Model, that the findings by investigative and prosecutorial officers can be regarded as "tolerably accurate". Instead, it stresses the possibility of human error in investigative processes and insists on a "formal, adjudicative, adversar[ial] factfinding process in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him".[15] As Packer succinctly put it: "If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course."[16]

7 The analysis that is often proffered, based on Packer's models, is that the rules in Singapore have traditionally reflected a preference for crime control and hence favour the Prosecution.[17] When that lens is applied to criminal disclosure, the spotlight is typically fixed on the greater obligations that have been placed *on the Prosecution* to disclose material through the CCD regime and at common law. These changes are viewed as signs of "an ascendancy of due process components"[18] or a "discernible overall shift along the spectrum between the Crime Control

12 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1. See also Chan Sek Keong, "The Criminal Process – The Singapore Model" (1996) Sing L Rev 431; Chief Justice Chan Sek Keong, Supreme Court of Singapore, "From Justice Model to Crime Control Model", speech at the International Conference on "Criminal Justice under Stress: Transnational Perspectives", Golden Jubilee Celebrations of the Indian Law Institute (24 November 2006); and Keith Jieren Thirumaran, "The Evolution of the Singapore Criminal Justice Process" (2019) 31 SAcLJ 1042.

13 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 9.

14 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 10.

15 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 14.

16 Herbert Packer, "Two Models of the Criminal Process" (1964–1965) 113 U Pa L Rev 1 at 13.

17 See Wong Siew Ming Audrey, "Criminal Justice for All? Wrongful Convictions and Poverty in Singapore" (2010) 28 Sing L Rev 67.

18 Wong Siew Ming Audrey, "Criminal Justice for All? Wrongful Convictions and Poverty in Singapore" (2010) 28 Sing L Rev 67 at 83.

and Due Process models in Singapore".[19] One senior practitioner has written that "[t]he pendulum has swung towards reinforcing legitimacy of the process instead of giving paramount importance to crime control outcomes".[20] Others have described the changes as "levelling the playing field between the prosecution and defence".[21] These analyses view the development of the criminal disclosure regime as a tug of war between rules which tend to benefit either the Prosecution (*ie*, crime control) or the Defence (*ie*, due process).

8 However, as one writer has observed, Packer's binary paradigm is incomplete as the relationship between the State and individual interests, rather than being "'mutually exclusive' opposites … is more fluid and complex".[22] To cite: "rather than being exclusively a 'zero-sum game', the criminal process also encompasses within its domain instances of 'win-win' or 'win-no lose' permutations".[23] Specifically, the characterisation of criminal disclosure rules as necessarily advantaging the Prosecution or the Defence overlooks "the broader – and *mutually beneficial* – effects which pre-trial disclosure can have on the overall standards of criminal justice"[24] [emphasis added]. These benefits include: promoting more informed pre-trial negotiations, which may lead to the earlier resolution of cases; reducing the likelihood of surprise tactics distorting the outcome of criminal trials; and enhancing the accuracy and reliability of the trial process.[25] In this way, both crime control and due process aims are promoted.

19 Keith Jieren Thirumaran, "The Evolution of the Singapore Criminal Justice Process" (2019) 31 SAcLJ 1042 at para 63; Chen Siyuan, "Disclosure in Criminal Proceedings: Developments and Issues Ahead" (2022) 34 SAcLJ 51.

20 Narayanan Sreenivasan SC, "Selected Aspects of Criminal Advocacy" in *Modern Advocacy: More Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy gen eds) (Academy Publishing, 2019) ch 7, at para 07.015.

21 Mervyn Cheong & Chooi Jing Yen, "Disclosure of a Prosecution Witness's Prior Statements" *Singapore Law Gazette* (April 2022) <https://lawgazette.com.sg/feature/disclosure-of-a-prosecution-witnesss-prior-statements/> (accessed 1 December 2024).

22 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at para 11.

23 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at para 15.

24 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at para 37.

25 Melanie Chng, "Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010" (2011) 23 SAcLJ 23 at paras 37–38.

B. Adversarial and collaborative models of criminal litigation

9 This article therefore adopts a different analytical approach. The thesis that is put forward is that the shift which has taken place in Singapore's criminal disclosure landscape is more fundamental in nature, and is one which affects *all parties* involved in criminal litigation. Singapore has steadily moved away from a strictly adversarial model, which focuses on the parties' narrow self-interest, to a collaborative model where there is a shared search for the truth based on mutual disclosure and reciprocity. These models are worth exploring in more detail.

10 The traditional adversarial model is premised on the assumption that "the truth of a controversy will best be arrived at by granting the competing parties, with the help of an advocate, an opportunity to fight as hard as possible".[26] It has been stated that "[f]ew systems rely more on the self-interests of the participants".[27] In this paradigm, it is "heresy" for one party to be compelled to help the other in proving its case.[28] In particular, within a purely adversarial criminal system, there is no obligation on the accused person to actively participate in the process.[29] Instead, the Defence is entitled to put the Prosecution to strict proof and adopt a purely passive stance. There is also no duty on the Prosecution to assist the Defence.

11 However, this model has been subject to criticism. For one, it compromises the search for the truth by incentivising parties to act in their narrow self-interest, engage in tactical gamesmanship and conceal facts which do not suit their case.[30] As one commentator noted, the "general rule" is that "as far as possible, each party to a criminal trial will attempt to maximise the element of surprise".[31] It also "encourages late preparation of cases and the holding back of information until the last possible minute".[32] This has aptly been described as trial by ambush. It

26 Robert G Johnston & Sara Lufrano, "The Adversary System as a Means of Seeking Truth and Justice" (2002) 35 John Marshall L Rev 147 at 147.

27 Robert G Johnston & Sara Lufrano, "The Adversary System as a Means of Seeking Truth and Justice" (2002) 35 John Marshall L Rev 147 at 147.

28 Michael Hor, "Prior Inconsistent Statements: Fairness, Statutory Interpretation and the Future of Adversarial Justice" (2002) 14 SAcLJ 248 at para 39.

29 Abenaa Owusu-Bempah, "Defence Participation Through Pre-trial Disclosure: Issues and Implications" (2013) 17(2) *International Journal of Evidence & Proof* 183 at 185.

30 Jenny McEwan, "Truth, Efficiency, and Cooperation in Model Criminal Justice" (2013) 66(1) *Current Legal Problems* 203 at 204.

31 Valentine S Winslow, "Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia" (1989) 31 Malaya L Rev 1 at 5.

32 United Kingdom, The Royal Commission on Criminal Justice, *Report* (Cmnd 2263, 1993) at para 64 (Chairman: Viscount Runciman of Doxford).

is a criticism that has been levelled against both the Prosecution and the Defence. Defence practitioners have bemoaned that the system "has an unhealthy surprise element as a weapon in the prosecution's arsenal to be used against the defence at the trial, which can contribute to errors or a miscarriage of justice".[33] Similarly, those calling for greater disclosure by the Defence have noted that "defence by ambush" can also lead to unjust outcomes.[34] To quote one academic, "[i]t does not serve pursuit of the truth if the defence are allowed to conceal the nature of their case, effectively wrong-foot a prosecution who have not prepared appropriately, and secure an acquittal based on a distorted or inadequate representation of the facts".[35]

12 The traditional adversarial model, in which the accused person need not disclose his or her defence until trial, can result in inefficiencies and a wastage of public resources. The Prosecution "must prepare itself for every conceivable defence" including "obscure, undisclosed" defences that may turn out to be "overcautious and unnecessary" and "phantom defences that were never contemplated".[36] From the accused person's perspective, a purely adversarial approach in which each party is expected to fend for itself, without any assistance from the other, also ignores the reality that, unlike in civil disputes between private parties of broadly equal means, there is an inherent degree of imbalance between the State and the individual. In particular, the Prosecution can generally be expected to have "informational and tactical advantages over the Defence".[37]

13 The collaborative model (which has also been termed the co-operative or participatory model in the literature)[38] serves to mitigate these issues. It is based on the principle that the discovery of the truth, which is the fundamental aim of the criminal process, is best promoted by "a culture of transparency and cooperation in pre-trial processes".[39] A key

33 Amarjeet Singh SC, "Equality of Arms – The Need for Prosecutorial Discovery" *Singapore Law Gazette* (September 2005) <https://v1.lawgazette.com.sg/2005-9/> (accessed 1 December 2024).

34 Victor Smith, "Defence by Ambush" (2004) 168 *Justice of the Peace Notes* 24.

35 Jenny McEwan, "Truth, Efficiency, and Cooperation in Model Criminal Justice" (2013) 66(1) *Current Legal Problems* 203 at 209.

36 Victor Smith, "Defence by Ambush" (2004) 168 *Justice of the Peace Notes* 24.

37 Denise Wong, "Discovering the Right to Criminal Disclosure" (2013) 25(2) SAcLJ 548 at para 29.

38 See Jenny McEwan, "Truth, Efficiency, and Cooperation in Model Criminal Justice" (2013) 66(1) *Current Legal Problems* 203; Abenaa Owusu-Bempah, "Defence Participation Through Pre-Trial Disclosure: Issues and Implications" (2013) 17(2) *International Journal of Evidence & Proof* 183.

39 Jenny McEwan, "Truth, Efficiency, and Cooperation in Model Criminal Justice" (2013) 66(1) *Current Legal Problems* 203 at 205.

feature of the model is disclosure by the Prosecution of material which may assist the Defence – even if it is detrimental to the Prosecution's case – to address the informational asymmetry between the State and the accused person. However, disclosure under the collaborative model is *mutual and reciprocal*. The accused person is also expected to disclose his or her defence in advance to reduce the tactical gamesmanship and inefficiencies which result from a purely adversarial approach, as outlined above. This ensures that the criminal trial is "a serious inquiry … [as to] guilt and innocence" and not a "game or sporting contest".[40] To quote the English Court of Appeal in *R v Gleeson*:[41]

> To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.

14 Advance disclosure of the defence may also benefit the accused person.[42] If the defence is meritorious, the Prosecution may decide to revise its position to the benefit of the accused person by either discontinuing the prosecution or reducing the charges. Alternatively, the disclosure of the defence may prompt further investigations and result in further disclosure of material by the Prosecution which may reveal that the disclosed defence is not feasible. This may result in either a plea of guilt (and a corresponding reduction in sentence)[43] or a narrower, and more focused, trial that would save costs and reduce the trauma for all parties involved, including the accused person and his or her family. Fundamentally, the collaborative model aims to encourage and build an ethos of mutual trust and reciprocity – where the Prosecution and the Defence engage with each other on "a reasoned and open basis" to

40 Glanville Williams, "Advance Notice of the Defence" [1959] Criminal L Rev 548 at 554.

41 [2003] EWCA Crim 3357 at [36], *per* Auld LJ, citing *Review of the Criminal Courts of England and Wales* (October 2001) ch 10, at para 154.

42 Jenny McEwan, "Truth, Efficiency, and Cooperation in Model Criminal Justice" (2013) 66(1) *Current Legal Problems* 203 at 209.

43 See Sentencing Advisory Panel of Singapore, *Guidelines on Reduction in Sentences for Guilty Pleas* (15 August 2023).

"create a balanced and fair procedure that provides a system for arriving at the truth".[44]

II. The past

15 The next two sections of this article analyse the development of Singapore's criminal disclosure regime, including the significant changes since 2010, through the prism of the adversarial and collaborative models of criminal litigation.

A. Pre-2010

16 Prior to 2010, the position in Singapore reflected the traditional adversarial model. The Prosecution had no legal obligation to disclose any material to the Defence in advance of the trial, with the exception of cases to be tried in the High Court where the Prosecution had to provide the Defence with the "conditioned" witness statements[45] and exhibits it intends to rely on at trial as part of the committal proceedings by way of a preliminary inquiry.[46] This obligation was a very limited one: only a small minority of offences were tried in the High Court,[47] and the disclosure required at a preliminary inquiry did not extend to unused material that the Prosecution did not intend to rely on as part of its case. As matters stood, the Prosecution could elect to hold back the disclosure of material for strategic reasons to maximise the chances of securing a conviction. There was also no obligation on the Prosecution to disclose any exculpatory material in its possession which might assist the Defence.

17 There was similarly no obligation on the Defence to proactively participate in the criminal process or to divulge the accused person's defence in advance, save for the duty to give notice of an alibi defence[48] and a limited provision which permitted for an adverse inference to be drawn by the court if the accused person failed to state his defence on formally being charged.[49] However, the accused person was not compelled

44 *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 at [26].
45 Recorded under s 141 of the Criminal Procedure Code (1985 Rev Ed). See also s 264 of the Criminal Procedure Code 2010 (Act 15 of 2010).
46 Criminal Procedure Code (1985 Rev Ed) Chapter XVII.
47 These are primarily offences which carry life imprisonment or the death penalty, as well as serious sexual offences such as rape which fall outside the criminal jurisdiction of the State Courts: see Pt 2 of the Criminal Procedure Code 2010 (Act 15 of 2010).
48 Criminal Procedure Code (1985 Rev Ed) s 155, which is now s 278 of the Criminal Procedure Code 2010 (2020 Rev Ed).
49 Criminal Procedure Code (1985 Rev Ed) s 123, which was introduced through the Criminal Procedure Code (Amendment) Act 1976 (Act 10 of 1976).

to make a statement, and was not liable to punishment if he elected not to give one.[50] Therefore, the Defence could generally choose to sit back and put the Prosecution to strict proof.

18 There were attempts to impose greater disclosure obligations on parties through the common law. However, they were rejected by the courts on the basis that such reform was best left to Parliament. The litigation generally centred around access to investigative statements. In *Kulwant v Public Prosecutor*[51] ("*Kulwant*"), the High Court dismissed an application by the accused person for his investigative statements to be disclosed ahead of his preliminary inquiry. The court observed that allowing the application would be "tantamount to introducing, as against the Public Prosecutor but not, be it noted, against an accused, the civil procedure process of discovery", which had "no warrant in legislation or practice in Singapore".[52] In *Public Prosecutor v Ng Beng Siang*,[53] Kan Ting Chiu J opined that there was "room for further consideration" in the matter of whether an accused person should have access to the statements recorded from him which the Prosecution did not tender in evidence.[54] The Prosecution submitted that the accused person should first disclose his defence if he wanted to have his investigative statements. Kan J rejected this suggestion, noting that there was no obligation for an accused person to disclose his defence to the Prosecution.[55] He also held that, if such an obligation was to be imposed, it should be clearly provided in law rather than left to be dealt with on an *ad hoc* basis.[56] On statements provided by other witnesses, Yong Pung How CJ in *Selvarajan James v Public Prosecutor*[57] ("*Selvarajan James*") found that the Prosecution had no duty to disclose witness statements to the Defence. He hence rejected an application by the Defence for the Prosecution to disclose a statement made by an accomplice that was apparently exculpatory. Yong CJ acknowledged that this position was "not necessarily the most ideal".[58] However, the learned Chief Justice held that it was for Parliament to decide if it wanted to revise the position.[59]

50 *Public Prosecutor v Ng Beng Siang* [2003] 4 SLR(R) 609 at [54].
51 [1985-1986] SLR(R) 663.
52 *Kulwant v Public Prosecutor* [1985-1986] SLR(R) 663 at [50].
53 [2003] 4 SLR(R) 609.
54 *Public Prosecutor v Ng Beng Siang* [2003] 4 SLR(R) 609 at [47].
55 *Public Prosecutor v Ng Beng Siang* [2003] 4 SLR(R) 609 at [54].
56 *Public Prosecutor v Ng Beng Siang* [2003] 4 SLR(R) 609 at [55].
57 [2000] 2 SLR(R) 946.
58 *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946 at [19].
59 *Selvarajan James v Public Prosecutor* [2000] 2 SLR(R) 946 at [19].

19 Prior to 2010, disclosure was thus mostly voluntary and based on professional courtesy, which was pithily described by one commentator as "a very flimsy foundation for any coherent system of discovery".[60]

B. Statutory CCD regime

20 The enactment of the revised CPC in 2010[61] was the first step towards encouraging collaboration and reciprocity through mutual disclosure. The legislation introduced the statutory CCD regime which provided a framework for the Prosecution and the Defence to exchange information and documents relating to their respective cases prior to trial. When first introduced, the regime applied to all High Court cases[62] and District Court cases involving offences specified in the Second Schedule to the CPC.[63] The Second Schedule included the majority of serious offences, although certain crimes, such as those under the Prevention of Corruption Act and the Moneylenders Act, were initially not included. The regime also applied to less serious offences tried in the Magistrate's Court if all parties consented.[64]

21 The CCD regime sets out a sequential, reciprocal process which may be summarised as follows:

(a) First, the Prosecution is required to file the Case for the Prosecution comprising: the charge(s), a summary of facts in support of the charge(s), lists of the Prosecution's witnesses and exhibits, and the statements of the accused person which the Prosecution intends to adduce in evidence.

(b) Thereafter, the Defence must file and serve the Case for the Defence, comprising a summary of the defence to the charge(s) and the facts in support of the defence, the Defence's lists of witnesses and exhibits, and any objections to the Case for the Prosecution involving any issue of fact or law.

(c) Once the Case for the Defence has been served, the Prosecution must then serve on the Defence a Prosecution's Supplementary Bundle containing all other statements given by the accused person relating to the charge(s), as well as a copy of all the documentary exhibits listed in the Prosecution's list of exhibits. When the regime was first introduced, there was no

60 Valentine S Winslow, "Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia" (1989) 31 Malaya L Rev 1 at 43.
61 Criminal Procedure Code 2010 (Act 15 of 2010).
62 Criminal Procedure Code 2010 (Act 15 of 2010) Pt X.
63 Criminal Procedure Code 2010 (Act 15 of 2010) s 159(1).
64 Criminal Procedure Code 2010 (Act 15 of 2010) s 159(3).

corresponding obligation on the Defence to serve copies of its exhibits on the Prosecution.[65]

22 The regime also provides the courts with powers to ensure that parties take their obligations seriously.[66] If either party fails to file its case, or files an incomplete case, or advances an argument at trial inconsistent with its previously filed case, the court may draw adverse inferences at trial.[67] In addition, where the Prosecution fails to comply with its obligations, the court may order a discharge not amounting to an acquittal.[68] The Court of Appeal, in *Public Prosecutor v Li Weiming*[69] ("*Li Weiming*"), further recognised that the consequences specified in the legislation for non-compliance are not exhaustive; the court assumes an active role in case management at the pre-trial stage and has the general power to order parties to furnish additional particulars in their summary of facts to comply with the statutory requirements.[70]

23 The 2010 amendments hence marked a decisive break from the *ad hoc*, voluntary nature of criminal disclosure under the traditional adversarial approach. The amendments were described by the then-Attorney-General as a "sea-change" which heralded "a new era in criminal proceedings marked by greater transparency".[71] Particularly, the CCD regime facilitated the crystallisation of the material issues before the trial.[72] The sequential nature of the process also protected the interests of the Prosecution and the Defence: the onus is on the Prosecution to set out its case first, and the provision of all statements after the Defence discloses its case reduces opportunities for the accused person to tailor evidence.[73] In this way, the CCD regime shifted the dynamics of the trial process from a purely adversarial model to a collaborative truth-seeking model, as the Court of Appeal recognised in *Li Weiming*:[74]

65 This position was subsequently revised by the Criminal Justice Reform Act 2018 (Act 19 of 2018): see para 24 below.
66 Singapore Parl Debates; Vol 87; [18 May 2010].
67 Criminal Procedure Code 2010 (Act 15 of 2010) ss 169(1) and 221.
68 Criminal Procedure Code 2010 (Act 15 of 2010) ss 169(2). This power was initially limited to State Court cases but has since been extended to cases tried in the High Court: see s 22 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).
69 [2014] 2 SLR 393.
70 *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 at [40]–[61].
71 Attorney-General Sundaresh Menon SC, Attorney-General's Chambers of Singapore, address at Opening of the Legal Year 2011 (7 January 2011) at para 4.
72 Singapore Parl Debates; Vol 84; Col 1090; [27 February 2008].
73 Singapore Parl Debates; Vol 87; [18 May 2010].
74 *Public Prosecutor v Li Weiming* [2014] 2 SLR 393 at [26]. See also *S Iswaran v Public Prosecutor* [2024] 4 SLR 1624 at [40].

> Timely disclosure of information facilitates the efficient dispensation of criminal justice as both the Prosecution and accused are in a position to evaluate the merits of their respective cases and decide whether a reduction or a withdrawal of the charge is warranted or whether early guilty pleas should be entered (see *18 May 2010 Parliamentary Debates* at cols 449–450 (Mr Christopher De Souza, Member of Parliament for Holland-Bukit Timah); Melanie Chng, 'Modernising the Criminal Justice Framework: The Criminal Procedure Code 2010' (2011) 23 SAcLJ 23 ('*Modernising the Criminal Justice Framework*') at para 37). Disputed issues are also identified at an early stage and parties may focus efforts on only the material issues, saving time and costs. *Pre-trial disclosure also shifts the dynamics of the trial process from a purely adversarial model akin to a 'game or sporting contest'* (see Glanville Williams, 'Advance Notice of the Defence' (1959) Criminal Law Review 548 at 554) *to a truth-seeking model.* The CCDC regime encourages the Prosecution and accused to engage with each other on a reasoned and open basis by providing an avenue for parties to sharpen the material issues in the Cases. This creates a balanced and fair procedure that provides a system for arriving at the truth (see *18 May 2010 Parliamentary Debates* at col 408 (K Shanmugam, Minister for Law)) and precludes resort to ambush tactics. … [emphasis added]

24 However, the CCD regime, as enacted in 2010, was only the first step in the evolution of Singapore's criminal disclosure regime. The framework was further enhanced in 2018 through the Criminal Justice Reform Act 2018[75] ("CJRA 2018"). Notably, the list of offences in the Second Schedule was expanded to cover more offences, including those under the Prevention of Corruption Act and the Moneylenders Act.[76] The CJRA 2018 also introduced a corresponding duty on the Defence to disclose copies of its documentary exhibits to the Prosecution.[77] Nevertheless, the CCD framework retained features of the adversarial model. In particular, the Defence was not obliged to participate and could unilaterally opt out of the regime in the State Courts.[78] In the High Court, although the regime was mandatory in so far as the Prosecution was concerned, it was optional for the Defence to file its case.[79] Most pertinently, the CCD regime only required parties to disclose the material they intended to rely on at trial; it did not apply to "unused material" which the parties did not intend to adduce – including material in the Prosecution's possession which may undermine its case or assist the Defence.

75 Act 19 of 2018.
76 Criminal Justice Reform Act 2018 (Act 19 of 2018) s 119.
77 Criminal Justice Reform Act 2018 (Act 19 of 2018) ss 42 and 54.
78 Criminal Procedure Code 2010 (Act 15 of 2010) s 159(2).
79 Criminal Procedure Code 2010 (Act 15 of 2010) s 215(2), which allowed the Defence to elect whether to file the Case for the Defence.

C. Common law disclosure: Kadar *and* Nabill

25 The disclosure of unused material took centre stage in the landmark decision of the Court of Appeal in *Kadar*. The judgment has been widely commented upon,[80] and a detailed analysis of the case is beyond the scope of this article. For present purposes, the crucial aspect of *Kadar* is the recognition by the Court of Appeal that – in addition to the statutory obligations under the CCD regime – the Prosecution also has a legal duty under the common law to disclose unused material that "tends to undermine the Prosecution's case or strengthen the Defence's case"[81] even though such material may be "unhelpful or even detrimental to the Prosecution's case".[82] The obligation was set out as follows in the judgment:[83]

> [T]he Prosecution must disclose to the Defence material which takes the form of:
>
> > (a) any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
> >
> > (b) any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.
>
> This will not include material which is neutral or adverse to the accused – it only includes material that tends to undermine the Prosecution's case or strengthen the Defence's case.

26 The timing for the disclosure of such material (colloquially termed "*Kadar* disclosure") was calibrated in accordance with the CCD regime to ensure congruence – namely, the material had to be disclosed by the Prosecution at the same time as the filing of the Case for the Prosecution.[84]

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80 See, *eg*, Chen Siyuan, "The Prosecution's Duty of Disclosure in Singapore: *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205" (2011) 11(2) *Oxford University Commonwealth Law Journal* 207; Michael Hor, "The Future of Singapore's Criminal Process" (2013) 25 SAcLJ 847; Denise Wong, "Discovering the Right to Criminal Disclosure" (2013) 25(2) SAcLJ 548; and Benny Tan, "The Role of Prosecutors as Ministers of Justice: Disclosure of Unused Material, and Calling of Witnesses at Trial (Part 1)" *Singapore Law Gazette* (February 2021) <https://lawgazette.com.sg/feature/the-role-of-prosecutors-as-ministers-of-justice/#:~:text=At%20a%20general%20philosophical%20level,its%20determination%20of%20the%20truth.> (accessed 1 December 2024).

81 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

82 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [109].

83 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

84 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].

For cases where the CCD regime did not apply, the material had to be disclosed at the latest before the commencement of trial.[85] However, the Court of Appeal stressed that the duty of disclosure is a continuing one and only ends when the case has been completely disposed of, including any appeal.[86] The court also cautioned that where the Prosecution fails to discharge its duty of disclosure in a timely manner, this might cause a conviction to be overturned if this occasions a failure of justice or renders the conviction unsafe.[87] In setting out these principles, the Court of Appeal departed from both *Kulwant* and *Selvarajan James*.

27 The normative basis of *Kadar* is significant. At the heart of the judgment lies the court's assessment that the role of prosecutors in the adversarial process – and their "freedom to act as adversary to defence counsel" – is qualified by the grave consequences of criminal conviction and the more fundamental duty of prosecutors to regard themselves as "ministers of justice" assisting in the administration of justice rather than as advocates.[88] To cite the Court of Appeal:[89]

> The duty of prosecutors is not to secure a conviction at all costs. It is also not their duty to timorously discontinue proceedings the instant some weakness is found in their case. Their duty is to assist the court in coming to the correct decision. Although this assistance often takes the form of presenting evidence of guilt as part of the adversarial process, the prosecutor's freedom to act as adversary to defence counsel is qualified by the grave consequences of criminal conviction. The certainty required by the court before it will impose these consequences is recognised in the presumption of innocence enjoyed by the accused. *For this reason, a decision to prosecute in the public interest must be seen as compatible with a willingness to disclose all material that is prima facie useful to the court's determination of the truth, even if it is unhelpful or even detrimental to the Prosecution's case.* [emphasis in original]

28 The above reasoning represents a clear embrace of the collaborative model, which prioritises the broader interest of the criminal justice system in seeking the truth over the adversarial role of the prosecutor as an advocate for the Prosecution's case. The courts subsequently built on *Kadar*, and continued to emphasise in subsequent judgments that the Prosecution must eschew a strictly adversarial approach. The most significant of these cases is *Nabill*, where the Court of Appeal recognised an additional obligation on the Prosecution to disclose to the Defence the statements of any potential witnesses that the Prosecution did not intend to call to testify, but who "can be expected to

85 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].
86 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [113].
87 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [120].
88 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [109].
89 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [109].

confirm or, conversely, contradict an accused person's defence in material respects".[90] This obligation (termed "*Nabill* disclosure") applied to all statements of such "material witnesses" – it did not matter whether the statement was favourable, neutral or adverse to the Defence.[91] As with *Kadar*, the timing for *Nabill* disclosure was aligned with the filing of the Case for the Prosecution under the CCD regime or, at the latest, before the trial began for cases which were not subject to the CCD regime.[92] However, it was a continuing obligation which applied until the case had been fully disposed of.[93]

29 The additional disclosure obligation recognised in *Nabill* was premised on two proximate reasons identified by the court. First, the Prosecution might, despite acting in good faith, fail to disclose statements which might tend to support the Defence, and which ought to have been disclosed under *Kadar*.[94] Second, an accused person ought to have access to all relevant information to make an informed choice in deciding whether to call a "material witness".[95] However, the Court of Appeal also raised a "broader question" as to the proper ambit of the Prosecution's role.[96] In addressing this question, the court referred back to *Kadar*, and reiterated that "it is generally unnecessary for the Prosecution to adopt a strictly adversarial position in criminal proceedings" and that "the Prosecution owes a duty to the court and to the wider public to ensure that only the guilty are convicted, and that all relevant material is placed before the court to assist it in its determination of the truth".[97]

30 Other cases which similarly emphasised the role of prosecutors as "ministers of justice" include *Public Prosecutor v Wee Teong Boo*,[98] where the Court of Appeal found that delayed disclosure by the Prosecution of a medical report caused prejudice to the accused person. In its judgment, the court stressed that prosecutors are "more than advocates and solicitors".[99] Another notable authority is *Lim Hong Liang v Public Prosecutor*,[100] where the High Court acknowledged that "[t]here may be various reasons why a statement is held back, some of which may be thought to go to legitimate litigation strategy" but stressed that such

90 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [4].
91 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [41(a)].
92 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [50].
93 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [50].
94 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [44].
95 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [45]–[47].
96 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [37].
97 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [37].
98 [2020] 2 SLR 533.
99 *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [136].
100 [2020] 5 SLR 1015.

litigation strategy must give way to the wider considerations that are paramount "even at the expense of obtaining a conviction".[101] Likewise, in *Beh Chew Boo v Public Prosecutor*,[102] the Court of Appeal found that the Prosecution ought to have called a potential witness, Lew, whose DNA had been found on the drug bundles that the appellant had been accused of importing into Singapore, and who was "linked inextricably" to the case.[103] This was even though calling Lew would not have advanced the Prosecution's case and could have turned out to be a "poisoned chalice".[104] The court emphasised that, against such considerations, "there is the Prosecution's role in the fair and impartial administration of criminal justice" and its duty "to serve the public interest by assisting the court to establish the truth".[105] Such reasoning is difficult to reconcile with the traditional adversarial model; but it falls squarely within the collaborative model of criminal litigation where the search for the truth may trump a party's self-interest.

31 At the same time, the disclosure obligations recognised in *Kadar* and *Nabill* not only impacted the Prosecution, but also provided a clear incentive for accused persons to formulate and disclose their defence early and in detail to compel relevant disclosure. *Nabill* disclosure, for instance, is premised on the identification of "material witnesses" who may be expected to confirm or contradict *the accused person's defence*. In other words, the obligation is triggered as a response to a defence which the accused person has already alluded to.[106] It follows that if "the accused person's statements are so unclear that one cannot reasonably be expected to discern the accused person's defence, then the Prosecution's additional disclosure obligations would not be triggered", as recognised by the Court of Appeal in *Roshdi bin Abdullah Altway v Public Prosecutor*.[107] The corollary of this proposition is that clear and early articulation of a defence makes it more likely that the Prosecution's disclosure obligations will be triggered. As noted in one commentary by defence practitioners, "[g]iven the current landscape, it is probably worthwhile for the Defence to articulate its case theory in some detail at the pre-trial stage" which can "lay the groundwork for assessing requests, or applications, for the Prosecution to disclose" material under *Kadar* or *Nabill*.[108]

101 *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [30].
102 [2020] 2 SLR 1375.
103 *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 at [71]–[76].
104 *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 at [74].
105 *Beh Chew Boo v Public Prosecutor* [2020] 2 SLR 1375 at [74].
106 See *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [52].
107 *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [152].
108 Mervyn Cheong & Chooi Jing Yen, "Disclosure of a Prosecution Witness's Prior Statements" *Singapore Law Gazette* (April 2022) <https://lawgazette.
(cont'd on the next page)

32 Separately, just as the courts have emphasised the role of prosecutors as "ministers of justice", the courts have recognised that defence counsel, too, are officers of the court who owe a duty to assist in the administration of justice instead of simply acting as a mouthpiece for their clients. For example, in *Miya Manik v Public Prosecutor*,[109] the Court of Appeal held that a legal practitioner owed not just "a duty to his client to assess the merits of any application appropriately before invoking the court's processes", but "also owes a duty to the court, as well as to the public, to assist in the administration of justice".[110] The case involved an application by the Defence to adduce further evidence on appeal, which was found to be an abuse of process. In *Wong Tian Jun De Beers v Public Prosecutor*,[111] Sundaresh Menon CJ, in relation to the duties of defence counsel in instructing experts, made it clear that "[s]olicitors … in their capacity as officers of the court, are under an obligation to ensure that the *relevant* material is placed before the expert when procuring an expert report".[112] These authorities are further signs of a shift towards a collaborative model of litigation, where defence counsel are expected to play a constructive role and assist the court in establishing the truth, instead of pursuing the interest of their clients at all costs.

III. The present: CPMAA 2024

33 This section outlines the present position, as reflected in the CPMAA 2024.[113] The Act contains two main categories of criminal disclosure amendments. First, there are amendments to the CCD regime to enhance participation in the pre-trial disclosure process. Second, and notably, the CPMAA 2024 codifies the common law rules on the disclosure of unused material, as set out in *Kadar* and *Nabill*, with certain modifications to cohere with the sequential and reciprocal nature of the CCD regime. It was shared in Parliament that these amendments were arrived at after extensive consultations with various stakeholders, including the Defence Bar, the Attorney-General's Chambers and the Judiciary.[114]

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com.sg/feature/disclosure-of-a-prosecution-witnesss-prior-statements/> (accessed 1 December 2024).

109 [2021] 2 SLR 1169.

110 *Miya Manik v Public Prosecutor* [2021] 2 SLR 1169 at [87].

111 [2022] 4 SLR 805.

112 *Wong Tian Jun De Beers v Public Prosecutor* [2022] 4 SLR 805 at [27].

113 Passed by Parliament on 5 February 2024 and assented to by the President on 22 February 2024. As of 1 October 2024, the provisions on disclosure had yet to come into force.

114 Singapore Parl Debates; Vol 95; [5 February 2024].

A. Amendments to CCD regime

34 The CPMAA 2024 enhances participation in the CCD regime by: (a) removing the option for the Defence to opt out of the regime in State Court cases;[115] and (b) requiring the compulsory filing of the Case for the Defence in High Court cases,[116] which was previously optional.[117] Accused persons may be cross-examined at trial on their failure to file the Case for the Defence. The court may then consider the accused's explanation and draw such inference as it thinks fit.[118] These amendments move Singapore further towards a collaborative approach by requiring active participation by the Defence at the pre-trial stage. This improves the efficiency of the pre-trial process by avoiding the potential delays and inefficiencies that may arise from a belated disclosure of the Defence's case, such as the need for adjournments to undertake further investigations or having to recall witnesses.[119] More importantly, active participation by the Defence through pre-trial disclosure promotes the search for the truth, as noted earlier. Specifically, it mitigates the risk of "ambush tactics" distorting the outcome of the trial process. From the Defence's perspective, it also facilitates more relevant disclosure by the Prosecution as "a clear articulation of the accused's defence in the [Case for the Defence] will help the Prosecution to identify relevant evidence, including evidence that may be helpful to the Defence".[120]

35 The amendments build on the success of the CCD regime since it was introduced over a decade ago. In particular, the requirement to file a Case for the Defence is not new.[121] It has been a feature of CCD cases in the State Courts, where the vast majority of criminal cases are tried, since the regime was first introduced. It was also shared in Parliament that the Defence regularly files its Case for the Defence "for most State Court CCD trials".[122] Hence, the obligation to file a Case for the Defence is one that criminal practitioners would be familiar with.

36 In addition, the CPMAA 2024 contains other amendments to align the position in the High Court and the State Courts. The Prosecution

115 Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024) s 14 (amendment of s 159 of the Criminal Procedure Code 2010).
116 Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024) s 19 (amendment of s 215 of the Criminal Procedure Code 2010).
117 See para 24 above.
118 Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024) s 15 (amendment of s 163 of the Criminal Procedure Code 2010) and s 19(*b*) (amendment of s 215 of the Criminal Procedure Code 2010).
119 Singapore Parl Debates; Vol 95; [5 February 2024].
120 Singapore Parl Debates; Vol 95; [5 February 2024].
121 See para 21 above.
122 Singapore Parl Debates; Vol 95; [5 February 2024].

is now required to file a summary of facts in support of the charge as part of its Case for the Prosecution in the High Court;[123] this was previously a requirement only for State Courts cases. The summary of facts will benefit the Defence, which no longer needs to infer the Prosecution's case by perusing the witness statements and exhibits disclosed in the Case for the Prosecution in the High Court.[124]

B. Codification of common law disclosure obligations on unused material, with modifications

37 The CPMAA 2024 also comprehensively sets out, in statutory form, the rules on the disclosure of unused material.[125] This is perhaps the most significant aspect of the CPMAA 2024 – it sends a clear signal that Parliament recognises the importance of the obligations developed by the courts in *Kadar* and *Nabill* on the disclosure of unused material in ensuring fairness to accused persons and achieving just outcomes.[126] Putting these obligations in legislation also provides greater transparency and clarity – particularly for self-represented persons and those new to criminal practice, who no longer need to turn to multiple legal sources and grapple with both the statutory regime and the common law rules which developed in parallel over the years. Law students, one imagines, will be grateful.

38 In substance, the legislation codifies the common law position, with certain modifications. On *Kadar* disclosure, the new s 221B(1)(*a*) of the CPC requires the Prosecution to serve on the Defence "any unused material". The term "unused material" is defined under the new s 221A(1) of the CPC and largely mirrors the scope of material that was previously disclosable under *Kadar*.[127] The timing for disclosure is also unchanged from the common law position, including the continuing nature of the obligation.[128] There are three aspects of the legislation worth noting:

(a) First, to determine whether a material "tends to support the accused's defence" and therefore needs to be disclosed, what is relevant is the defence stated by the accused in his or her

123 Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024) s 18 (amendment of s 214 of the Criminal Procedure Code 2010).

124 Criminal Procedure Code 2010 (2020 Rev Ed) s 214.

125 Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024) s 23, which introduces a new Pt 10A of the Criminal Procedure Code 2010 governing the disclosure of unused material by the Prosecution.

126 Singapore Parl Debates; Vol 95; [5 February 2024].

127 See para 25 above.

128 Sections 221B(3)–221B(4) and 221D of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

investigative statements, the Case for the Defence or the accused's testimony in court.[129] Any defence that "cannot reasonably be ascertained" from these sources is to be disregarded.[130] These legislative clarifications – which also apply to *Nabill* disclosure under the new s 221B(1)(*b*) of the CPC[131] – assist the court and the Prosecution to better assess the scope of material that needs to be disclosed, and further incentivises the accused person to disclose his or her defence clearly in order to obtain material that may be useful to his or her case.

(b) Second, statements recorded from the accused person are excluded from the definition of "unused material".[132] As the High Court observed in *Xu Yuanchen v Public Prosecutor*,[133] the accused person's own statements are "a form of evidence that emanates entirely from the accused person" and may not properly fall within the universe of unused evidentiary material that *Kadar* disclosure was intended to address, namely evidence in the Prosecution's possession that "the accused person cannot access or might not even be aware of".[134] Put simply, the accused's statements are different from other types of unused material which the accused may not know about.[135] Accordingly, they are subject to different disclosure rules. For CCD cases, all relevant statements recorded from the accused person must be disclosed prior to trial as part of the Prosecution's Supplementary Bundle, at the latest.[136] For the less serious cases which fall outside the CCD regime, the accused person's statements must be disclosed at the latest after he or she has testified in court or has elected not to do so, whichever is applicable.[137] The latter position ensures consistency with the sequential, reciprocal nature of disclosure under the CCD regime, where the relevant statements are only disclosable after the Defence has filed its case.

129 Section 221A(1)(*d*)(ii) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

130 Section 221A(3) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024), which is adapted from *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [152].

131 Sections 221A(2)–221A(3) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

132 Section 221A(1)(*a*) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

133 [2021] 4 SLR 719.

134 *Xu Yuanchen v Public Prosecutor* [2021] 4 SLR 719 at [42]–[43].

135 Singapore Parl Debates; Vol 95; [5 February 2024].

136 See para 21 above.

137 Section 221B(3)(*c*) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

(c) Third, the legislation codifies the common law ruling in *Soh Guan Cheow Anthony v Public Prosecutor*[138] *("Anthony Soh")* that there is no obligation on the Prosecution to serve on the Defence a list of all material in its possession that it does not intend to adduce into evidence.[139] In other jurisdictions, notably England and Wales,[140] the obligation on the State to produce and disclose such schedules of unused material have prolonged proceedings and resulted in disclosure applications being wielded as a further tactical tool. As the High Court noted in *Anthony Soh*, it is not appropriate to "allow the Defence to trawl through lists of unused material in the speculative hope of finding a defence, while placing the burden on the court to decide on the relevance or credibility of those materials".[141] The statutory clarification on this issue avoids this risk which, if eventualised, would increase the resource burden on the State and the court system, to the detriment of the administration of justice.

39 In relation to *Nabill* disclosure, the new s 221B(1)(*b*) of the CPC requires the Prosecution to serve on the Defence "any statement of any material witness". A "material witness" is defined in s 221A(2) of the CPC as "any witness (other than a prosecution witness) who may confirm or contradict, in material respects, an accused's defence".[142] Again, the definition mirrors the position at common law, with the following points to note:

(a) First, the timing for the disclosure of such witness statements has been modified. At common law, such statements had to be disclosed at the same time as the filing of the Case for the Prosecution (*ie*, before the Defence is required to disclose its case).[143] Under the legislation, the Prosecution is only required to serve the statements after the Case for the Defence is filed, or, if there is no Case for the Defence filed, after the accused has testified or decided not to testify.[144] This modification is, once again, in line with the sequential and reciprocal norms which underpin the disclosure regime. It was explained in Parliament that moving

138 [2017] 3 SLR 147.
139 Section 221C of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).
140 See para 42 below.
141 *Soh Guan Cheow Anthony v Public Prosecutor* [2017] 3 SLR 147 at [106].
142 Section 221A(2) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).
143 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [50]; see para 28 above.
144 Section 221B(3)(*b*) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024).

the disclosure to after the accused person has committed to a defence "is more consistent with the sequential and reciprocal nature of the CCD regime, where the accused will generally only receive material after filing the [Case for the Defence]".[145] To address concerns that this shift in timing may prejudice the accused person, it was emphasised during the Second Reading speech that "accused persons will not be prevented from running a new or different defence, which was genuinely uncovered after the Defence obtained new material disclosed".[146] In any event, any statement of a "material witness" that is exculpatory in nature – because it tends to undermine the Prosecution's case or assist the Defence's case – must still be disclosed earlier when the Prosecution files its case as the statement would fall within the definition of "unused material" in s 221A(1) of the CPC. In this way, there remains a potential overlap between the categories of "unused material" (*ie*, *Kadar* disclosure) and "material witness" statements (*ie*, *Nabill* disclosure).

(b) Second, on a related note, the legislation clarifies that the statements of potential witnesses who the Prosecution does intend to call (termed "prosecution witnesses") need not be disclosed *unless* they fall within the definition of "unused material" in s 221A(1) of the CPC (*ie*, unless the prosecution witness statement falls within the scope of *Kadar* disclosure).[147] This was an issue which the Court of Appeal had left open in *Nabill*. The legislation provides useful legal clarity; it strikes a balance between the public policy in encouraging witnesses to come forward and assist in investigations, which may be undermined if such witnesses know that their statements will be automatically supplied to the Defence,[148] and the need to ensure that the accused person has access to evidence that is exculpatory.

40 The CPMAA 2024 therefore further advances the collaborative model of criminal litigation by promoting greater participation and reciprocity in pre-trial disclosure, and the advantages that this brings over the strictly adversarial model. The amendments also bring transparency and coherence to the legal landscape by rationalising the common

145 Singapore Parl Debates; Vol 95; [5 February 2024].
146 Singapore Parl Debates; Vol 95; [5 February 2024].
147 Section 221B(2) of the Criminal Procedure Code 2010 introduced by s 23 of the Criminal Procedure (Miscellaneous Amendments) Act 2024 (Act 5 of 2024). See para 43 below.
148 Singapore Parl Debates; Vol 87; [19 May 2010].

law rules, which developed in a "somewhat piecemeal"[149] manner, and integrating them with the pre-existing statutory framework. Finally, the amendments provide clarity on legal issues which were previously left open or unclear, which should reduce satellite litigation on issues of disclosure.

IV. The future

41 The penultimate Part of this article provides some tentative thoughts on the future. In the immediate future, much will turn on how the new provisions under the CPMAA 2024 are received and applied in practice – in particular, whether they are applied in the spirit of reciprocity and collaboration, as intended by Parliament, or whether parties continue to engage in tactical gamesmanship in their own self-interest. If the right approach is adopted, it is anticipated that there will be significant benefits to the criminal justice system. As outlined above, we have already seen such benefits accrue since the advent of the CCD regime and *Kadar* disclosure in the early 2010s. In particular, early disclosure of the Prosecution's and the Defence's case and evidence will allow for factual disputes to be resolved earlier, and promote more informed and fruitful pre-trial negotiations. This may lead to more cases being resolved at the pre-trial stage, with only genuine disputes heading to trial. For cases which head to trial, the triable issues can be narrowed, and there will be less delays and inefficiencies due to ambush tactics and late disclosure of material during trial. All of these will contribute to a less acrimonious and adversarial process, which will not only enhance the search for the truth but also promote therapeutic justice. It will allow accused persons, witnesses and other affected parties to recover and rebuild their lives and relationships following the criminal process – instead of the trial process causing further trauma and acrimony. If such a vision seems idealistic, then one only needs to turn back the clock to the pre-2010 position to see how transformational progress has been achieved over a relatively short span of a decade and a half, despite the pessimistic outlook of some commentators that the system – which was entrenched in the traditional adversarial model for most of Singapore's history – was not congenial to change.[150]

42 There are also areas to watch for further development. One important area is whether further measures – in the form of policy solutions and digital tools – need to be developed to address the

149 Denise Wong, "Discovering the Right to Criminal Disclosure" (2013) 25(2) SAcLJ 548 at para 4.

150 See Wong Siew Ming Audrey, "Criminal Justice for All? Wrongful Convictions and Poverty in Singapore" (2010) 28 Sing L Rev 67.

increasing volume of evidence, particularly electronic evidence, that is generated in criminal cases. Civil and commercial litigators have been struggling with this issue for some time, in the context of civil electronic discovery.[151] Increasingly, the same issues will arise in criminal disclosure, especially in cases involving online and commercial crimes. Indeed, other jurisdictions have already faced such difficulties in complex white-collar cases. For example, In England and Wales the Serious Fraud Office ("SFO") has had to abandon prosecutions entirely due to an inability to handle issues of disclosure in cases with a high volume of material. A prominent illustration is the SFO's high-profile prosecution of former executives of the security company G4S for allegedly defrauding the UK Government, which had to be abandoned after almost ten years due to an inability to resolve issues of disclosure within a reasonable time.[152] The SFO's director explained that repeated disclosure requests by the Defence had broadened the scope of the case, with over seven million potentially relevant documents.[153] The SFO Director also shared that disclosure remained a resource-heavy, manual process which often takes years and requires considerable public cost.[154] Such difficulties have led to recent attempts to review and reform the disclosure regime in England and Wales,[155] which bear close monitoring.

43 Another area of interest is the disclosure of prosecution witness statements on the grounds of material inconsistency. As the Court of Appeal observed in *Nabill*,[156] if a prosecution witness had provided a statement that was inconsistent with his testimony at trial, that statement ought to be disclosed to the Defence as part of the Prosecution's disclosure obligations under *Kadar* – now the new s 221A(1) of the CPC. This will allow the Defence to have the statement for the purposes of cross-examination and impeachment of the witness's credit, if appropriate. However, it is not always easy to assess when the threshold of "material"

151 See Danna Er, "Weathering the Evolving Landscape of Electronic Discovery" (2017) 29 SAcLJ 343.

152 Kate Beioley & Jane Croft, "Collapse of fraud case triggers demand for overhaul of UK disclosure rules" *Financial Times* (10 April 2023) <https://www.ft.com/content/5ebd6a09-ee61-484f-bc2c-5a97f2bc2394> (accessed 1 December 2024).

153 Letter from Lisa Osofsky, Director, Serious Fraud Office, to Sir Robert Neill MP, Chairman of the House of Commons Justice Committee (10 March 2023) at para 5.

154 Letter from Lisa Osofsky, Director, Serious Fraud Office, to Sir Robert Neill MP, Chairman of the House of Commons Justice Committee (10 March 2023) at paras 9–10.

155 "Independent Review of Disclosure and Fraud Offences launched" *GOV.UK* (12 October 2023) <https://www.gov.uk/government/news/independent-review-of-disclosure-and-fraud-offences-launched> (accessed 1 December 2024).

156 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [54]; *Pigg, Derek Gordon v Public Prosecutor* [2022] SGHC 5.

inconsistency[157] is met. This is ultimately a fact-specific issue which cannot be easily resolved through legislation. It is hence anticipated that the case law in this area will continue to develop to provide more guidance. For now, some tentative thoughts are provided, in line with the analytical approach adopted in this article. The general tenor of the case law, in line with the collaborative model, is that prosecutors ought to err on the side of disclosure.[158] However, in more complex cases, there are other options available, which would allow the issue to be openly litigated in court without placing the difficult burden of assessment solely on the prosecutor. Where appropriate, the Prosecution can apply to the court for a ruling on whether the statement is disclosable under the relevant statutory provisions.[159] Alternatively, the Prosecution may disclose the statement to the Defence while reserving its right to object to the statement's use during cross-examination and impeachment on the basis that the legal threshold for impeachment, as set out in *Muthusamy v Public Prosecutor*,[160] is not met. These possible approaches will ensure that the issue of material inconsistency is resolved in a collaborative and open manner, with the participation of both the Prosecution and the Defence.

V. Conclusion

44 Singapore's criminal disclosure regime has come a long way. As this article has sought to demonstrate, the changes reflect a more fundamental shift from a model of criminal litigation that is purely adversarial to a collaborative model in which parties co-operate, through mutual disclosure, to advance the search for the truth. This is a wholly welcome development as the collaborative model promotes fairness as well as efficient and accurate outcomes. However, rules alone are insufficient. Fundamentally, it is culture which matters. It is hoped that practitioners, both from the Prosecution and the Defence, will carry out their disclosure obligations in the constructive spirit of reciprocity and trust which undergirds the CPMAA 2024 to achieve the ultimate interest of the criminal justice system in establishing the truth – so that the guilty are duly convicted while the innocent are protected.

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157 *Pigg, Derek Gordon v Public Prosecutor* [2022] SGHC 5 at [18].

158 *Muhammad Nabill bin Mohd Fuad v Public Prosecutor* [2020] 1 SLR 984 at [48]; *Public Prosecutor v Wee Teong Boo* [2020] 2 SLR 533 at [131]; *Lim Hong Liang v Public Prosecutor* [2020] 5 SLR 1015 at [30].

159 See *Roshdi bin Abdullah Altway v Public Prosecutor* [2022] 1 SLR 535 at [161].

160 [1948] MLJ 57.