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PROSECUTORIAL DISCRETION AND PROSECUTION GUIDELINES

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Prosecutorial discretion is an essential element of our criminal justice. This discretion vests in the Attorney-General as the Public Prosecutor and is constitutionally protected. Recently, there have been several challenges to the exercise of this discretion on the basis of alleged violation of the constitutionally protected right to equal treatment. This article examines the basis of the prosecutorial discretion and considers the value of developing prosecution guidelines to assist prosecutors in making decisions consistently and fairly.

I. INTRODUCTION

Consider the following scenario. Two individuals, Leong and Rajan, enter Singapore riding a motorcycle. Immigration officials find 50g of diamorphine and a packet of Class C drugs hidden in the motorcycle. Both admit that they were carrying the drugs to be delivered to a third person in Singapore. The Public Prosecutor, having considered all the relevant factors and circumstances surrounding the case, charges Leong with trafficking in Class C drugs and Rajan with trafficking in 50g of diamorphine. The death penalty is mandatory for anyone guilty of trafficking more than 15g of diamorphine.[1] The minimum punishment for trafficking in Class C drugs is 2 years' imprisonment and 2 strokes of the cane.[2]

Faced with the death penalty, Rajan demands an explanation for the Public Prosecutor's decision to charge him with an offence carrying the death penalty while charging Leong with a lower offence for essentially the same conduct. The Public Prosecutor refuses to explain the charging decision. One offender is hanged and one is jailed for two years. On the face of it, the two have been treated unequally, with dire consequences for one. This result is the direct consequence of the Public Prosecutor's exercise of discretion in the charging decision.

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1 *Misuse of Drugs Act* (Cap. 185, 2008 Rev. Ed. Sing.), ss. 5, 33 and the Second Schedule.

2 *Ibid*.

The Public Prosecutor enjoys almost unfettered discretion in all aspects of the criminal process including instituting, conducting and discontinuing criminal proceedings.[3] In Singapore, this discretion is enshrined in art. 35(8) of the *Constitution*[4] and its sanctity has been reaffirmed in the Court of Appeal. This discretion exists in similar measure in other common law jurisdictions, including the United States,[5] the United Kingdom,[6] Australia[7] and Hong Kong.[8] It has raised concerns about the potential for abuse or inconsistent application and there have been attempts to have prosecutorial discretion judicially reviewed in Singapore.[9]

The Singapore Court of Appeal in three separate decisions last year considered the extent to which the Public Prosecutor's exercise of discretion was subject to judicial review, especially when it was alleged to have violated the constitutional protection of equality guaranteed under art. 12 of the *Constitution*.[10] The court also considered the relationship between art. 35(8) and art. 93 of the *Constitution*, respectively dealing with the power of the Attorney-General and of the judiciary.[11]

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3 The Attorney-General's independence in exercising the discretion with respect to criminal prosecutions has a long pedigree. See J.Ll.J. Edwards, *The Law Officers of the Crown: A study of the offices of Attorney-General and Solicitor-General of England with an account of the office of the Director of Public Prosecutions in England* (London: Sweet & Maxwell, 1964) at cc. 10, 11 [*The Law Officers of the Crown*].

4 *Constitution of the Republic of Singapore* (1999 Rev. Ed.) [*Constitution*].

5 See *United States v. Christopher Lee Armstrong* 517 U.S. 456 (1996); *Wayte v. United States* 470 U.S. 598 (1985); *United States v. Cox* 342 F. 2d 167 (5th Cir. 1965).

6 *Prosecution of Offences Act 1985* (U.K.), c. 23, s. 3. See *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 (H.L.) [*Gouriet*]; *R. (on the application of Corner House Research) v. Director of the Serious Fraud Office* [2009] 1 A.C. 756 (H.L.) [*Corner House Research*].

7 *Director of Public Prosecutions Act 1983* (Act No. 113 of 1983, Australia), s. 9 [*DPP Act 1983*]. Similar legislation exists in each of the States and Territories. See *Barton v. R.* (1980) 147 C.L.R. 75 (H.C.A.) [*Barton*]; *Jago v. District Court of NSW* (1989) 168 C.L.R. 23 (H.C.A.) [*Jago*]; *Maxwell v. R.* (1996) 184 C.L.R. 501 (H.C.A.) [*Maxwell*]; *Likiardopoulos v. R.* [2012] HCA 37 [*Likiardopoulos*].

8 *Basic Law of Hong Kong* (Order No. 26 of 1990), art. 63. See *Keung Siu Wah v. A.G.* [1990] 2 H.K.L.R. 238 (C.A.).

9 *Huang Meizhe v. A.G.* [2011] 2 S.L.R. 1149 (H.C.) (decision not to appeal); *Sinniah Pillay v. Public Prosecutor* [1991] 2 S.L.R.(R.) 704 (C.A.) (selection of charge); *Ee Yee Hua v. Public Prosecutor* [1968-1970] S.L.R.(R.) 472 (H.C.) [*Ee Yee Hua*] (withdrawal of charge).

10 *Quek Hock Lye v. Public Prosecutor* [2012] 2 S.L.R. 1012 (C.A.) [*Quek*]; *Yong Vui Kong v. Public Prosecutor* [2012] 2 S.L.R. 872 (C.A.) [*Yong*]; *Ramalingam Ravinthran v. A.G.* [2012] 2 S.L.R. 49 (C.A.) [*Ramalingam*]; *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239 (H.C.) [*Phyllis*].

11 For the convenience of the reader, the relevant Constitutional articles are reproduced here:

> Article 12
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> (1) All persons are equal before the law and entitled to the equal protection of the law.
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> (2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.
>
> (3) This Article does not invalidate or prohibit—
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> (*a*) any provision regulating personal law; or
>
> (*b*) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.

This article does not purport to analyse the constitutional issues, important though they are.[12] The focus of this work is on the nature and function of prosecutorial discretion and whether prosecution guidelines may be helpful both in assisting the prosecutors to make decisions consistently and to assure the general public that the discretion, while necessarily a powerful one, is exercised within a framework that includes proper processes for decision-making and clearly developed criteria. The paper concludes with some practical suggestions on how a prosecution guidelines framework may be developed.

II. Challenging Prosecutorial Discretion

In chronological order, the three appeals heard last year were *Ramalingam Ravinthran v. Attorney-General,*[13] *Yong Vui Kong v. Public Prosecutor*,[14] and *Quek Hock Lye v. Public Prosecutor*.[15] Broadly, each case involved a challenge to the constitutionality of the Public Prosecutor's exercise of discretion on the ground of violating art. 12, the equal protection clause in the *Constitution*. The fact pattern in each case was similar to that set out in the introduction. The cases confirmed that the Public Prosecutor's exercise of discretion is constitutionally protected and subject to judicial review on very limited grounds. *Ramalingam* set out the key principles, which were neatly summarised in *Yong* and are reproduced here for convenience:[16]

> The exercise of the prosecutorial discretion under Art 35(8) of the Constitution is subject to judicial review. The rule of law requires that all legal powers, including constitutional powers, be subject to limits, and it is the court's constitutional role to ensure that those limits are observed (see *Ramalingam* at [43] and [51]).
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> The exercise of the prosecutorial discretion is subject to judicial review on two grounds, *viz*: (i) abuse of power (*ie*, an exercise of power in bad faith for an extraneous purpose); and (ii) breach of constitutional rights (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149], which was approved in *Ramalingam* at [51]).
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> Article 12(1) of the Constitution requires that like cases must be treated alike in the context of the classification of offences in legislation. In contrast, in the context of the exercise of the prosecutorial discretion, Art 12(1) only entails that the Prosecution must give unbiased consideration to every offender and must

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> Article 35(8)
> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
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> Article 93
> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

12 See Siyuan Chen, "The Limits on Prosecutorial Discretion in Singapore: Past, Present and Future" (2013) International Review of Law 5, online: QScience.com <http://www.qscience.com/doi/abs/10.5339/irl.2013.5>; Gary Chan Kok Yew, "Prosecutorial Discretion and the Legal Limits in Singapore" (2013) 25 Sing. Ac. L.J. 15.

13 *Ramalingam*, *supra* note 10.

14 *Yong*, *supra* note 10.

15 *Quek*, *supra* note 10.

16 *Yong*, *supra* note 10 at para. 17.

avoid taking into account any irrelevant considerations. In the case of a single offender, this would suffice to ensure that like cases are treated alike, *ie*, to ensure compliance with Art 12(1) (see *Ramalingam* at [51], applying the principle laid down by the Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh*")).

Where several offenders are involved in the same criminal enterprise, Art 12(1) permits the Prosecution to consider various factors in deciding which offenders' cases are alike (if any) and should therefore be treated alike. These factors include, *inter alia*, the available evidence, public interest considerations, the personal circumstances of the offender and the degree of co-operation of the offender with the law enforcement authorities. Where these factors apply differently to different offenders, this would justify differential treatment among them as their cases would *not* be alike for the purposes of Art 12(1) (see *Ramalingam* at [24], [52] and [63]). However, differential treatment would *not* be justified if these factors do *not* apply differently to different offenders. In other words, differential treatment of offenders involved in the same criminal enterprise must be justifiable by reference to relevant differences between the offenders.

The court will presume that the Prosecution has exercised its discretion lawfully (*ie*, in accordance with the requirements of the law) by reason of the separation of powers (see *Ramalingam* at [44]-[46]).

The AG is under no obligation to give reasons for the exercise of his prosecutorial discretion in prosecuting an offender for any offence (see *Ramalingam* at [74]-[78]).

Where an offender alleges that the exercise of the prosecutorial discretion to prosecute him for an offence is in breach of his constitutional rights, the burden lies on him to produce evidence of a *prima facie* breach of such rights. In relation to Art 12(1), a mere difference in the offences which different offenders in the same criminal enterprise are prosecuted for will not in itself be sufficient evidence of such a *prima facie* breach (see *Ramalingam* at [70]-[71]).

If the offender establishes a *prima facie* breach of Art 12(1), the Prosecution will then be required to justify its prosecutorial decision to the court, failing which, it will be held to be in breach of Art 12(1) (see *Ramalingam* at [28]).

If the Prosecution provides some explanation for its decision, the court will then decide, based on the evidence on record and the arguments on both sides, whether the offender has rebutted the presumption of legality, *ie*, whether he has persuaded the court that the Prosecution has indeed breached Art 12(1) (see *Ramalingam* at [73]).

In *Ramalingam*, the accused drove to meet the co-accused, who placed a bag containing drugs in the accused's car before getting into the car. The pair drove off and later went their separate ways. They were arrested and charged with drug trafficking. The bag was found to contain a quantity of cannabis exceeding the amount which attracted the mandatory death penalty. The co-accused was charged with trafficking in an amount of cannabis less than the amount attracting the death penalty, while the accused was charged with trafficking in the whole amount. The accused was convicted, and after exhausting his appeal, applied for a criminal motion to have the charge amended to a non-capital charge on the ground that the Public Prosecutor had exercised his discretion contrary to art. 12 by charging him with a capital offence

and his accomplice with a non-capital offence for the same criminal conduct. After setting out the relevant principles and authorities, the Court of Appeal dismissed the motion.

In *Yong*, the accused was caught delivering drugs for Chia, who was based in Johor Baru. Both were charged with capital offences, but the prosecution subsequently applied for a discontinuance not amounting to an acquittal of the charges against Chia, partly on the ground of lack of evidence. Yong was convicted and sentenced to death. After a lengthy process of appeals, he filed a criminal motion challenging the Public Prosecutor's exercise of discretion as being contrary to art. 12. In dismissing the motion, the Court of Appeal also clarified that the Public Prosecutor's discretion was not only with respect to instituting a prosecution but also with respect to its conduct and discontinuance. Thus, the Public Prosecutor's decision to discontinue the prosecution against Chia and the decision not to call Yong to testify against Chia (even though that could have provided the evidence necessary to convict Chia) could not be challenged as long as those decisions were made in good faith and without bias.

Significantly, the court also said that even if the decision to prosecute *Yong* was in breach of art. 12, it would have no power to set aside the decision purely on the basis of that breach if there was nothing wrong in law with the conviction. All the court could do was to make a declaration of unconstitutionality and leave it to the Attorney-General to determine what action might be necessary to comply with art. 12(1).[17] Presumably, the Attorney-General could comply with art. 12 by prosecuting the other person in the same manner. The point is that the unconstitutionality of the Public Prosecutor's exercise of the discretion on the ground of violating art. 12 does not automatically invalidate the prosecution and conviction of the accused.[18]

In *Quek*, the accused had participated in a criminal conspiracy to traffic drugs. He was found in possession of 62.14g of diamorphine, convicted of trafficking in that amount and sentenced to death. His co-conspirator pleaded guilty to trafficking in not less than 14.99g of diamorphine and escaped the death penalty. The accused's art. 12 challenge was dismissed. The Court of Appeal also considered the interaction of art. 35(8) and art. 93, the former dealing with the power of the Public Prosecutor and the latter with the judiciary. The argument was that as sentencing was a matter for the judiciary, the Public Prosecutor should not be permitted to intrude on the judicial function by exercising his discretion to "manipulate" the sentence. The court clarified that it was "not the function of the court to prefer charges against an accused brought before it."[19] The court's functions were to determine the guilt of an accused based on the charge preferred and then to pass an appropriate sentence based on the law and all the relevant factors. Where the sentence was mandatory, the court had no discretion, but that *per se* did not create any conflict between art. 35(8) and art. 93.[20]

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17 *Ibid*. at para. 51.

18 This is a troubling proposition. Surely, the court should set aside the conviction if it found that the Public Prosecutor had acted unconstitutionally. It also raises questions as to whether the Public Prosecutor should be estopped from proceeding or whether the court should stay the proceedings permanently if a successful challenge against the constitutionality of the Public Prosecutor's discretion were made during or prior to the trial.

19 *Quek, supra* note 10 at para. 28.

20 *Ibid*. See also *Phyllis*, *supra* note 10.

III. Prosecutorial Discretion and Prosecution Guidelines

These decisions have puzzled and troubled many in Singapore whose instinctive reaction was that the decisions were arbitrary and unjust. This was particularly so given the dire consequence of the different treatment due to the mandatory death penalty. Reflective of the more engaged public in Singapore today, there was considerable debate in the media and in Parliament on the exercise of the Public Prosecutor's discretion.[21] Such debate is healthy as it serves to educate the public and provides an additional layer of checks against executive power.

It is vital that both prosecutors and the public understand the rationale behind the prosecutorial discretion in order to ensure that this important power continues to safeguard the public interest in the administration of criminal justice. Strategies need to be in place to ensure that the discretion is not abused or exercised inconsistently. These strategies should comprise two mechanisms—proper processes for decision-making by prosecutors and guidelines on the exercise of prosecutorial discretion. These mechanisms should be anchored to the ethics of prosecution.[22]

To appreciate the importance of prosecutorial ethics, one needs to understand the role of the prosecutor in the criminal justice process. The prosecutor, who has a central and complex role in the administration of criminal justice, is not just an advocate for the State, but is also involved in administration, investigation and adjudication; each of this brings its own sets of challenges.[23] Prosecutors are often referred to as "ministers of justice", by which it is meant that the prosecutor should not be focused only on securing a conviction, but on ensuring that justice is done.[24] They may bypass the judiciary through plea bargaining, selecting the appropriate court, preferring charges that pre-determine the sentence or diverting the offender from the criminal justice system to alternative programmes. These decisions require the prosecutor to take on an increasingly adjudicative role.[25]

The prosecutor also has multiple—potentially conflicting—duties to various parties, including the victim, the defendant, the court, the general public, the State and

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[21] Selina Lum, "Apex court clears air on A-G's power" *The Straits Times* (11 January 2012); K.C. Vijayan, "Good if A-G explains charge decisions, lawyers say" *The Straits Times* (13 January 2012); Braema Mathi, "A-G should give reasons for prosecuting a case", Forum, *The Straits Times* (14 January 2012); K.C. Vijayan, "AGC: Robust reviews before discretion is exercised" *The Straits Times* (21 January 2012); Subhas Anandan, "Lawyers' association explains stand on AGC's discretion", Forum, *The Straits Times* (23 January 2012); M. Ravi, "Lawyers' association wrong about A-G's discretion", Forum, *The Straits Times* (28 January 2012); K.C. Vijayan, "Why A-G does not have to give reasons for charges" *The Straits Times* (7 March 2012); Teo Xuanwei, "Drug trafficker on death row tells court why he should not be hanged" *Today* (15 March 2012).

[22] See generally Ken Crispin, "Prosecutorial Ethics" in Stephen Parker & Charles Sampford, eds., *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Clarendon Press, 1995) at 171; Bennet L. Gershman, "The Prosecutor's Duty to Truth" (2001) 14 Geo. J. Legal Ethics 309; John Jackson, "The Ethical Implications of the Enhanced Role of the Public Prosecutor" (2006) 9 Legal Ethics 35.

[23] See generally S.R. Moody & J. Tombs, *Prosecution in the Public Interest* (Edinburgh: Scottish Academic Press, 1982); Sir Thomas Hetherington, *Prosecution and the Public Interest* (London: Waterlow Publishers, 1989). The extent of involvement differs across jurisdictions.

[24] *R. v. Banks* [1916] 2 K.B. 621; *United States v. Berger* 295 U.S. 78 (1935). See locally *Muhammad bin Kadar v. Public Prosecutor* [2011] 3 S.L.R. 1205 at para. 109 (C.A.) [*Kadar*]. See generally D.S. Medwed, "The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit" (2009) 84 Wash. L. Rev. 35 at 41-49 ["The Prosecution as Minister of Justice"].

[25] See generally Erik Luna & Marianne Wade, "Prosecutors as Judges" (2010) 67 Wash. & Lee L. Rev. 1413.

the police. How strongly should the prosecution argue the case as an advocate for the State? How much information should be disclosed to the accused? Should exculpatory facts be sought and highlighted? To what extent should the victim's rights and interests be taken into account? How should the relationship with the police be managed?[26] It would be impossible for the prosecutor to balance these competing interests without broad discretionary powers.

A. *The Prosecutorial Discretion*

The Attorney-General is the Public Prosecutor in Singapore. Even though the Attorney-General is a member of the Executive, he or she acts independently of the government when it comes to instituting, conducting and discontinuing criminal prosecutions. In some jurisdictions, the Public Prosecutor is the Director of Public Prosecutions, who generally acts independently of the Attorney-General.[27] In Singapore, the Attorney-General's prosecutorial discretion is constitutionally guaranteed and protected from potential interference from the legislature and the judiciary.[28]

The Public Prosecutor's decision to charge has been described as "the most dangerous power of the prosecutor",[29] especially as the scope for judicial review is limited. It is important to remember that the primary reason for this power was to ensure that the Public Prosecutor acted independently of Executive interference or influence. It was to provide the necessary safeguard to prevent the criminal law being used for political ends. This principle is traced back to 1924, following the political fallout from the Campbell case, involving John Ross Campbell, a communist, political activist who had published an anti-war article.

The Attorney-General decided that Campbell should be prosecuted under the *Incitement to Mutiny Act 1797*,[30] but withdrew the prosecution under pressure from the Labour Government led by Ramsay MacDonald. This led the Liberals and Conservatives to pass a no-confidence motion, which brought down the government. The newly elected Prime Minister, from the Conservative Party, announced in Parliament that the previous government's direction to the Attorney-General to withdraw the charges was "unconstitutional, subversive of the administration of justice, and derogatory to the Office of the Attorney General".[31]

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[26] See generally J.E. Hall Williams, ed., *The Role of the Prosecutor* (Aldershot: Avebury, 1988); Bennet L. Gershman, "Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality" (2005) 9 Lewis & Clark Law Review 559.

[27] See *e.g.*, *Clyne v. A.G. (Cth)* (1984) 2 F.C.R. 56 at 62, where Wilcox J. said:

> Parliament has given to the Director the power to determine for himself whether an indictment shall be filed and whether a prosecution shall be discontinued. The evident intention was to divorce the Government, and the Attorney-General in particular, from day to day decision-making in those areas.

[28] See the *Constitution*, *supra* note 4, art. 35(8); *Criminal Procedure Code* (Cap. 68, 2012 Rev. Ed. Sing.), s. 11(1) [*CPC*].

[29] Robert H. Jackson, "The Federal Prosecutor" (1940) 31 Journal of the American Institute of Criminal Law and Criminology 3 at 5, cited in Bennet L. Gershman, "Prosecutorial Decisionmaking and Discretion in the Charging Function" (2011) 62 Hastings L.J. 1259 at 1260.

[30] (U.K.), 37 Geo. 3, c. 70.

[31] See I. Grenville Cross, "Focus on the Discretion Whether to Prosecute" (1998) 28 Hong Kong L.J. 400 at 403, 404. See generally Edwards, *The Law Officers of the Crown*, *supra* note 3 at c. 11. See also the

Apart from political independence, the discretion is also critical to the fair and efficient administration of criminal justice. To prosecute all cases where police investigations reveal that a crime has likely been committed would not be in the interest of justice. The classic statement on prosecutorial discretion is found in a statement to the British House of Commons by Sir Hartley Shawcross in 1951 when he was the Attorney-General:[32]

> It has never been the rule in this country—and I hope it never will be—that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should… prosecute wherever it appears that the offence or the circumstances of its commission is or are of such a nature that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration.

Consider the following situations:

- A father has recently lost his job. Despite his best efforts, he is in debt and has no money. Out of desperation he steals two cans of infant formula to feed his child. He is caught by security officers who report him to the police.
- A mother uses a cane and hits her teenage son, who, despite her continual advice, has been taking drugs. Immediately after the incident, she is filled with remorse and has a long talk with her son, who understands why she acted that way and promises to stop taking drugs. A neighbour, who witnessed the beating, complains to the police.
- A 17 year-old boy has consensual sex with his 17 year-old girlfriend with whom he has been in a relationship for two years prior to the sexual encounter. Both sets of parents do not object, but a friend of the girl makes a report to the police.
- A drug addict caught couriering drugs for the first time agrees to give to the police evidence that will cripple an international drug trafficking syndicate in return for non-prosecution and an agreement to attend a drug rehabilitation programme.

In all of the above cases, it may be assumed that there is enough evidence for the Public Prosecutor to secure a conviction if charges were preferred. But, would it be in the interest of justice to prosecute each of the individuals above? In some cases, no action might be the best option. In others, a simple warning or a conditional warning may be appropriate. In yet others, the best solution might be to treat the offender by compelling the offender to attend reformative programmes or to seek medical treatment. These decisions need to be taken before the case goes to court and requires evaluation of evidence that would not be admissible in court.

The Attorney-General is not obliged to explain why a particular decision was taken to charge or not to charge an individual. The position is set out clearly by Viscount

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fallout from the dismissal of the Whitlam Government in Australia in 1975, which led to the resignation of the Attorney-General, Robert Ellicott, discussed in John Ll.J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984) at 379-388.

[32] U.K., H.C., *Parliamentary Debates*, vol. 483, col. 681 (29 January 1951).

Dilhorne in *Gouriet*:[33]

> The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.

There are good reasons for not requiring disclosure of reasons behind the exercise of the discretion. As will be explained below, a decision not to charge is likely to be taken if the prosecution is of the view that there is insufficient evidence to have a real chance of conviction. Having decided that there was insufficient evidence to proceed, it would be unfair to disclose that evidence, which might cause ongoing speculation about the guilt or innocence of the accused and risk collateral litigation or trial by media. This denies closure for all parties involved, including the accused, the victim and their families. Further, if the victim were unwilling to testify whether out of fear or any other reason, disclosing those reasons would be to add insult to injury.[34]

In the four illustrations above, the prosecutors will have access to a wide range of information, much of it sensitive. The prosecutors will have to consider the effect of prosecution on the accused, the victim and the cost to the government as well as the community in addition to a range of other factors.[35]

B. *Exercising the Discretion*

The major common law jurisdictions, including Singapore, apply a two-stage test to determine whether or not to initiate a prosecution: (i) evidential sufficiency and (ii) public interest. Under the first stage of the test, the prosecution must be satisfied that there is sufficient evidence for a realistic or reasonable prospect of conviction. In assessing the sufficiency of evidence, the prosecution should consider the admissibility, reliability and credibility of the evidence, as well as the availability of relevant witnesses. The evidence of the defence and any arguments it might put forth should be weighed before asking whether it is more likely than not that a court would convict the accused. If this first stage is not passed, a prosecution should not be initiated regardless of the seriousness of the alleged offence.

In cases where the first stage has been passed, the prosecutor must still pass the second stage, *i.e.* it must be in the public interest to prosecute. All things being equal, when there is sufficient evidence to show that a crime has been committed and that there is a reasonable prospect for conviction, it normally should be in the public interest to prosecute. However, sometimes there may be particular circumstances or

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[33] *Supra* note 6 at 487. See also *Ee Yee Hua*, *supra* note 9.

[34] The Minister for Law, Mr K. Shanmugam also explained in Parliament that sometimes there may be operational or strategic considerations that would be undermined by disclosure: see Sing., *Parliamentary Debates*, vol. 88 (6 March 2012).

[35] See text accompanying note 36 for a list of potential considerations.

considerations that may lead the Public Prosecutor to decide that prosecution would not be in the public interest. These considerations cannot be listed exhaustively as they will depend on the particular facts of each case. Nevertheless, a generic list of criteria may be developed; a helpful example, which gives a flavour of the factors to be considered, is found in the Prosecution Policy of the Commonwealth:[36]

> 2.10 Factors which may arise for consideration in determining whether the public interest requires a prosecution include the following non-exhaustive matters:
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> the seriousness or, conversely, the relative triviality of the alleged offence or that it is of a 'technical' nature only;
> mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
> the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, a witness or victim;
> the alleged offender's antecedents and background;
> the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered;
> the degree of culpability of the alleged offender in connection with the offence;
> the effect on community harmony and public confidence in the administration of justice;
> the obsolescence or obscurity of the law;
> whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
> the availability and efficacy of any alternatives to prosecution;
> the prevalence of the alleged offence and the need for deterrence, both personal and general;
> whether the consequences of any resulting conviction would be unduly harsh and oppressive;
> whether the alleged offence is of considerable public concern;
> any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
> the attitude of the victim of the alleged offence to a prosecution;
> the actual or potential harm, occasioned to an individual;
> the likely length and expense of a trial;
> whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
> the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;
> whether the alleged offence is triable only on indictment;
> the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts;
> the need to give effect to regulatory or punitive imperatives;
> the efficacy, as an alternative to prosecution, of any disciplinary proceedings that

[36] Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, online: Commonwealth Director of Public Prosecutors <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>.

> have been found proven against the alleged offender to the extent that they encompass the alleged offence; and
> the adequacy in achieving any regulatory or punitive imperatives, of relevant civil penalty proceedings, either pending or completed, and whether these proceedings may result, or have resulted, in the imposition of a financial penalty.
>
> The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

It was only in the last three decades that governments and prosecuting agencies began to articulate guidelines and criteria for prosecution. For a long time, this discretion was exercised in secret with no clear guiding principles, prompting the Australian Law Reform Commission to make this observation in 1980: "The process of prosecution in Australia at both State and Federal level is probably the most secretive, least understood and most poorly documented aspect of the administration of criminal justice."[37]

The development of prosecution guidelines and structured decision-making processes came with a growing realisation that unfettered prosecutorial discretion could result in potential miscarriages of justice.[38] This risk was heightened by systemic problems in both the U.S. and the U.K. In the former, public prosecutors were elected officials who had an incentive to use their discretion for political mileage.[39] In the latter, prosecutions—until recently—were conducted by the police.[40] Given that the police were prosecuting people they had themselves investigated, there was a risk of bias in favour of prosecuting.[41]

It should be noted that these jurisdictions—the U.S. and the U.K.—are much larger than Singapore, with greater risk of both vertical and horizontal inconsistencies in the exercise of discretion.[42] Singapore's relatively small size, both demographically and geographically, allows for much greater centralisation and control over decisions. For these reasons, Singapore is in a different—and happier—position compared to the U.K. and the U.S., with a lower risk of error or inconsistent decisions. But, low risk is not no risk; there is a need for proper processes for decision-making by prosecutors and guidelines on the exercise of prosecutorial discretion.

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37 Austl., Commonwealth, Law Reform Commission, *Sentencing of Federal Offenders* (Report No. 15) (Canberra: Australian Government Publishing Service, 1980) at 61.

38 See Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995) at 16, 17 [*Public Prosecutors and Discretion*], specifically the reference therein at note 9 to JUSTICE, *The Prosecution Process in England and Wales* (London: JUSTICE, 1970), reprinted in (1970) Crim. L. Rev. 668; Crispin, "Prosecutorial Ethics", *supra* note 22.

39 See Sanford C. Gordon & Gregory A. Huber, "The Political Economy of Prosecution" (2009) 5 Annual Review of Law & Social Science 135; Ronald F. Wright, "How Prosecutor Elections Fail Us" (2009) 6 Ohio State Journal of Criminal Law 581.

40 Even after the creation of the Crown Prosecution Service, the police have a significant role in prosecutorial decisions. See Fionda, *Public Prosecutors and Discretion*, *supra* note 38 at 5, 6.

41 See Jackson, "The Ethical Implications of the Enhanced Role of the Public Prosecutor", *supra* note 22.

42 Vertical policy refers to consistency over time, a particular issue with prosecution services where turnover of personnel tends to be high. Horizontal policy refers to consistency across the large number of officers. See Norman Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion" (1971-1972) 19 U.C.L.A. L. Rev. 1 at 5, 6.

C. *Prosecution Guidelines*

Before considering the development of guidelines, brief mention should be made of the internal processes adopted at the Attorney-General's Chambers to ensure quality and consistency in decision-making. In all cases, the decision to prosecute is not made by an individual Deputy Public Prosecutor ("DPP") acting alone. For minor offences, the recommendation by the DPP must be reviewed and cleared by a senior officer with significant years of experience, appointed at the level of Director or Senior Director. For more serious offences, the decision must be approved by the Chief Prosecutor, and in some cases by the Attorney-General or Solicitor-General. In the most serious cases, the DPP's recommendation will be reviewed by a panel comprising three experienced prosecutors before being sent to the Chief Prosecutor and finally to the Attorney-General for review and approval.[43] There is also considerable sharing of information and drawing on internal records and knowledge.[44]

The move to develop and publish prosecutorial guidelines began around 1977 in both the U.S. and the U.K., through the initiative of their respective Attorneys-General, Edward H. Levi and Sir Thomas Hetherington.[45] Today, many jurisdictions around the world have developed guidelines to regulate the exercise of prosecutorial discretion. Most of these jurisdictions have also published these guidelines, in full or in part.[46]

It would be helpful first to deal with the question of publication before considering how guidelines should be developed. Publication is a controversial issue with arguments for and against. One of the key arguments in favour of publication is that it facilitates public engagement and more open government. This is especially pertinent in Singapore today. Non-publication of guidelines rightly or wrongly creates the perception that there is something to hide,[47] or that the public is viewed as not sufficiently mature or trustworthy to be given the information. It does not necessarily further the ideals of inclusive and transparent government.

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[43] The former Attorney-General, Mr Sundaresh Menon, now Chief Justice of Singapore, noted that in serious cases, up to eight officers would have reviewed the case before it reached the Attorney-General for his decision. Sundaresh Menon S.C., "Judicial Review of Prosecutorial Discretion in Singapore: A Comparative Perspective" (Paper delivered at the Association of Criminal Lawyers of Singapore Annual Lecture, 2011).

[44] Personal sharing of information in a structured manner is often as effective as having published guidelines and codes. See Shawn Marie Boyne, "Uncertainty and the Search for Truth at Trial: Defining Prosecutorial 'Objectivity' in German Sexual Assault Cases" (2010) 67 Wash. & Lee L. Rev. 1287 at 1306, 1307.

[45] Edwards, *The Attorney General, Politics and the Public Interest*, *supra* note 31 at 405, 431. Australia followed suit when the Commonwealth Office of the Director of Public Prosecutions was established pursuant to the *DPP Act 1983*, *supra* note 7, which empowered the Director to issue directives and guidelines.

[46] The Code for Crown Prosecutors (U.K.), online: Crown Prosecution Service <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/>; The Statement of Prosecution Policy and Practice—Code for Prosecutors (Hong Kong), online: Department of Justice, The Government of the Hong Kong Special Administrative Region <http://www.doj.gov.hk/eng/public/pubsoppaptoc.html>; Prosecution Policy of the Commonwealth (Australia), online: <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/>. Similar documents exist for each Australian State and Territory.

[47] This was the reason that a former Chief Constable of Hertfordshire in 1972 published a work detailing the processes leading to the exercise of discretion. See Gareth Evans, "The Discretion to Prosecute" in Ivan L. Potas, ed., *Prosecutorial Discretion* (Canberra: Australian Institute of Criminology, 1984) 7.

Other arguments in favour include the fact that publication encourages public debate and increases social awareness of criminal justice, resulting in improvements to the criminal justice system;[48] it provides a clearer indication to responsible members of the public on what may or may not be done in certain grey areas of the law; and it assists defence counsel to advise their clients better and to be more effective in pre-trial conferences. In terms of the arguments against publication,[49] three that deserve note are the following: the potential diluting effect on deterrence if would-be criminals knew that certain offences may not be prosecuted or may be prosecuted to a lesser extent; the potential contrarian effect whereby publication becomes a disincentive to formulate guidelines; and the risk of encouraging judicial review for non-compliance with the guidelines.

On the deterrent effect of the criminal law, arguably, it may not be appropriate to publish guidelines if doing so might encourage would-be criminals to commit crimes that they believe will not be prosecuted.[50] However, evidence that publication of prosecution guidelines has a direct effect on criminal behaviour is equivocal and the problem may be more apparent than real.[51] Nevertheless, this possibility is a real concern in Singapore with both the former Attorney-General (now Chief Justice of Singapore) and the Minister for Law alluding to it in different fora.[52] On the contrarian effect, it is arguable that publication may result in less details being included, thus making the guidelines less valuable in terms of ensuring consistency. This phenomenon has been seen in the medical arena where doctors were concerned about being too candid in their medical notes when the law was changed to give patients access to those notes.[53]

The judicial review argument may be easily dismissed on one view but presents potentially serious challenges for the prosecution on another. The trilogy of cases set out at the beginning of this article makes clear that judicial review of the exercise of prosecutorial discretion is permissible under one of two conditions: the Public Prosecutor has acted in bad faith or the Public Prosecutor has acted unconstitutionally. In the absence of these two conditions, the Public Prosecutor's discretion is inviolable. The existence of guidelines will not change that,[54] and it is simple

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48 Jacqueline Tombs, "Prosecution—In the Public Interest?" in Ivan L. Potas, ed., *Prosecutorial Discretion*, *ibid.* 11.

49 Eight arguments against publication are listed and refuted in Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", *supra* note 42 at 28-33.

50 Abrams distinguishes between policies of non-prosecution based on substantive concerns (for example, where the law is constitutionally suspect or for moral reasons, unnecessary to enforce) and policies of non-prosecution based on administrative reasons (for example, where limited resources are allocated from one area to another, for example, non-prosecution of minor thefts involving negligible sums). Publication would be appropriate in the former but not the latter. See *ibid*. at 30.

51 See Edwards, *The Attorney General, Politics and the Public Interest*, *supra* note 31. See also *ibid*. at 31.

52 Sundaresh Menon S.C., "Judicial Review of Prosecutorial Discretion in Singapore: A Comparative Perspective", *supra* note 43; Sing., *Parliamentary Debates*, vol. 88 (6 March 2012).

53 Australia's Privacy Commissioner has noted that access to medical records and notes could give rise to concerns that "records will become less frank, candid or informative": see Kevin O'Connor, "Information Privacy Issues in Health Care and Administration" (Paper delivered at the Inaugural National Health Informatics Conference, Brisbane, 4 August 1993), cited in Karen Sampford, "Access to Medical Records" Research Bulletin No 6/99, Queensland Parliamentary Library (1999) at note 58. See also Tom Delbanco *et al.* "Open Notes: Doctors and Patients Signing On" (2010) 153 Annals of Internal Medicine 121.

54 *Cahill v. New South Wales (No. 2)* [2007] NSWIR Comm 187 at paras. 63, 64 [*Cahill*], Boland J. See text accompanying note 56.

enough expressly to exclude judicial review on the basis of failure to comply with the guidelines.

The comparative jurisprudence on judicial review of prosecutorial discretion suggests that Singapore's position is broadly in line with international standards. The courts have reiterated that the separation of judicial and executive powers must be respected and that the exercise of the discretion vested in the Public Prosecutor should not be subject to judicial review except under highly restricted conditions. The High Court of Australia has in a series of decisions reiterated that the exercise of prosecutorial discretion will not be subject to judicial review except in cases where there may be an abuse of process or where the accused may be denied a fair trial.[55] In such cases, the prosecution may be quashed or stayed. The relevance of breach of prosecutorial guidelines to determining whether there was an abuse of process was considered in *Cahill v. New South Wales (No. 2)*:[56]

> I would… make the observation that a breach, *per se*, of prosecutorial ethics, practice and procedure in instituting or conducting a criminal prosecution will not necessarily amount to an abuse of process. Whether or not a prosecutor acted in accordance with prosecutorial guidelines… would not be determinative of whether an abuse of process had occurred… I think the reliance by the defendant on such guidelines that require a prosecutor to determine whether a prima facie case existed and whether there was a reasonable prospect of a conviction, is essentially irrelevant to the question of whether there was abuse of process…

Similarly, the courts in Hong Kong have clarified that while the constitutional protection of prosecutorial independence was aimed at political interference, the rule "necessarily extends to preclude judicial interference, subject only to issues of abuse of the court's process and, possibly, judicial review of decisions taken in bad faith".[57] Failure to follow published prosecutorial policy would not ordinarily be an abuse of process. In *Iqbal Shahid v. Secretary for Justice*,[58] Wright J. said: "In my judgment, the fact that a prosecution has been instituted outside of a prosecution policy is not, of itself, such an exceptional circumstance as will result, inevitably, in a stay of proceedings." In an earlier decision, it was noted that the "Secretary for Justice must be able to make exceptions. Indeed, not to be able to do so would constitute a fettering of his discretion."[59]

The U.K., in some ways, has gone further than the other jurisdictions on judicial review; in addition to abuse of process and unconstitutionality or legality, U.K. courts have been willing to review the exercise of prosecutorial discretion

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55 See *Barton*, *supra* note 7; *Jago*, *supra* note 7; *Maxwell*, *supra* note 7; *Likiardopoulos*, *supra* note 7.

56 *Cahill*, *supra* note 54.

57 *Re C (A Bankrupt)* [2006] 4 H.K.C. 582 at para. 20 (C.A.).

58 [2009] 14 H.K.P.L.R. 302 at para. 33 (Court of First Instance).

59 *RV v. Director of Immigration* [2008] 13 H.K.P.L.R. 343 at para. 85 (Court of First Instance). See also *Iqbal Shahid v. Secretary for Justice* [2010] 5 H.K.C. 51 at para. 48 (C.A.), where the court stated that while it would remit the case to the Magistrate's Court, it would not "bind the [Prosecution] to whatever was considered to be the best approach".

where the prosecutor has failed to consider published policy or has acted contrary to published policy.[60] Beyond these grounds, the judge will not interfere with a prosecutor's decision even if the judge disagrees with that decision.[61] It should be noted that the U.K. is in a unique position as its guidelines have the force of law.[62] Prosecutors are expressly required to abide by the *Human Rights Act 1998*[63] and to follow the published policies and guidance of the Crown Prosecution Service.[64] Nonetheless, it is still only in rare cases that judicial review of prosecutorial discretion will be successful.[65]

It is worth mentioning that many of the English cases involving judicial review of prosecutorial discretion related to obligations imposed by the *European Convention on Human Rights*.[66] The English authorities also suggest that judicial review of prosecutorial discretion is more likely with respect to a decision not to prosecute or to discontinue a prosecution, rather than with respect to a decision to prosecute.[67] This is because any injustice arising from the latter may be remedied through an appeal within the criminal process, whereas for the former, there is no avenue for redress apart from a judicial review action.[68]

There is recognition that accused persons may use judicial review as an additional "defence" tactic; this is frowned upon by the courts. In a recent Irish decision,[69] an accused person applied for judicial review of a decision to prosecute. There was an allegation of assault and the Public Prosecution Service ("PPS") initially decided not to prosecute. The police asked the PPS to review that decision; they did so and upheld it. The victim then asked the PPS to review the decision. They did so again and upheld it. Finally, a Member of the Legislative Assembly wrote to the PPS asking for a review of the decision. On the third review, the PPS found that there was additional evidence available and decided to prosecute. The applicant challenged this on, *inter alia*, the ground that the PPS had not complied with its own published procedures and policies for review.

The court reviewed the law on abuse of process and concluded that there was nothing to justify judicial review of the decision. The court then recalled the observations

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60 The two key documents are the Code for Crown Prosecutors and the Core Quality Standards. In addition, detailed guidelines are issued on particular areas and published on the Crown Prosecution Service website: Prosecution Policy and Guidance, online: Crown Prosecution Service <http://www.cps.gov.uk/prosecution_policy_and_guidance.html>.

61 *R. v. Armstrong* [2012] EWCA Crim. 83.

62 The Code for Crown Prosecutors is issued under s. 10 of the *Prosecution of Offences Act 1985*, *supra* note 6.

63 (U.K.), 1998, c. 42.

64 The Code for Crown Prosecutors, *supra* note 46, clause 2.6, sets out these requirements.

65 See *Corner House Research*, *supra* note 6; *R. v. Director of Public Prosecutions* [1995] 1 Cr. App. R. 136 (Q.B.D.); *R. v. Director of Public Prosecutions* [2001] Q.B. 330. See also Privy Council decisions of *Mohit v. Director of Public Prosecutions of Mauritius* [2006] 1 W.L.R. 3343; *Sharma v. Brown-Antoine* [2007] 1 W.L.R. 780 (Trinidad and Tobago).

66 See *e.g.*, *R. v. G* [2009] 1 A.C. 92 (H.L.); *R. (on the application of Purdy) v. Director of Public Prosecutions* [2010] 1 A.C. 345 (H.L.).

67 See *e.g.*, *R. (on the application of B) v. Director of Public Prosecutions* [2009] EWHC 106 (Admin).

68 *R. v. Director of Public Prosecutions* [2000] 2 A.C. 326 at 369 (H.L.), Lord Steyn.

69 *Wilson's (Jason) Application* [2012] NIQB 102.

in an English decision on the potential abuse of judicial review:[70]

> In view of the frequency of applications seeking to challenge decisions to prosecute, we wish to make it clear and, in particular, clear to the Legal Services Commission (which funds applications of this kind which seek to challenge the bringing of criminal proceedings), that, save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made to this court. The proper course to follow, as should have been followed in this case, is to take the point in accordance with the procedures of the Criminal Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division. The circumstances in which a challenge is made to the bringing of a prosecution should be very rare indeed as the speeches in *Kebilene* make clear.

Despite this, recently the court in *R. (on the application of E) v. Director of Public Prosecutions*[71] observed that the Administrative Court may often be the only avenue for redress where the applicant seeking judicial review of prosecutorial discretion is not the defendant but is one of the victims or perhaps even an interested third party. This case is also of interest because the decision to prosecute was successfully challenged purely on the ground that the prosecutor did not comply with the published guidelines; there was no allegation that the prosecutor had acted in bad faith.[72] This case raises a red flag for publishing prosecution guidelines. The costs and benefits of challenges and collateral litigation as a result of publication of prosecution guidelines need to be evaluated.

Singapore is currently in a state of flux as it undergoes social and political transformation. There is greater demand for political accountability, transparency in government and fundamental rights and liberties, with a growing number of constitutional challenges and judicial review applications. The Court of Appeal has seen changes, including the appointment of a new Chief Justice. Opportunistic challenges based on a fledgling guidelines regime may inadvertently knock the legs out from beneath the move to develop and possibly publish guidelines.

In the landmark criminal disclosure case of *Kadar*,[73] the Court of Appeal took a bold approach in going beyond the express words of the *CPC* to recognise a common law duty of disclosure, whose English roots were grounded in the right to a fair trial.[74] The court undertook an extensive survey of the law in other jurisdictions and

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70 *R. (on the application of Pepushi) v. Crown Prosecution Service* [2004] EWHC 798 (Admin) at para. 49, cited in *ibid*. at para. 15.

71 [2011] EWHC 1465 (Admin).

72 *Ibid*. at para. 40. See also *R. (on the application of Mondelly) v. Commissioner of Police for the Metropolitan* [2006] EWHC 2370 (Admin) challenging the police's decision to caution the applicant for a drug offence contrary to published policy (discussed in L.H. Leigh, "The Seamless Web? Diversion from the Criminal Process and Judicial Review" (2007) 70 Mod. L. Rev. 654).

73 *Supra* note 24.

74 *R. v. Ward* [1993] 96 Cr. App. R. 1 at 25 (C.A.): "[The rules of disclosure] were merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice."

chose to harmonise Singapore's jurisprudence with international standards.[75] The full impact of *Kadar* may still need to be worked out and its relationship with the trilogy of prosecutorial discretion cases needs to be explored. It should be recalled that it was held in *Kadar* that the court would decide on the materiality of evidence and determine what should be disclosed. If the disclosed material points to other potential suspects, whom the Public Prosecutor had decided not to prosecute, would the victim or other interested third party have the right to seek judicial review of that decision in order to force the Public Prosecutor to initiate prosecution?

It may be that the time is not ripe for publication of guidelines, but that should not detract from the important task of developing guidelines which can assist prosecutors in making decisions in a consistent manner, having regard to all the relevant factors. As noted earlier, prosecutorial ethics are the substratum upon which prosecutorial decision-making stands. Guidelines and policies should never be seen as the embodiment of the right decision; adopting that attitude leads to a dilution of the ethical imperative of the prosecutor, and instead of doing what is right, the prosecutor will simply follow the guidelines. The Public Prosecutor must follow the spirit of justice and not just the letter of the law.

D. *Dynamics of Criminal Justice and the Complex Role of the Prosecutor*

Negotiating the dynamics of criminal justice in the multifaceted role of the prosecutor is not an easy task, particularly for new prosecutors. The potential for error of judgment, confusion of roles and inadvertent undermining of legislative policy is real. It goes without saying that prosecutorial discretion must be exercised fairly and consistently. Otherwise, grave injustice may be done in terms of wrongfully convicting an innocent person or failing to prosecute the guilty.

It cannot be gainsaid that the criminal justice policies and priorities of the government are relevant to the prosecutor's exercise of discretion. Policy choices are constantly made in terms of crime control, due process, human rights, restorative justice, decriminalisation, diversion, alternative sentencing and related issues. Clear guidelines are necessary to ensure that executive and legislative policies do not undermine each other.[76] Legislators sometimes draft criminal laws broadly using a "drift net" approach, relying on the prosecutor's discretion to sift out cases that should not be prosecuted.[77] Guidelines should identify these areas and ensure that prosecutorial discretion is exercised judiciously to prevent over-reach of the criminal law.

There is concern that prosecutorial discretion may be misused (wilfully or negligently) with serious consequences for accused persons. The academic literature has

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[75] A similar approach was adopted with respect to common intention, where the Court of Appeal narrowed the scope of the *Penal Code* (Cap. 225, 2008 Rev. Ed. Sing.), s. 34, partly by considering the law in other jurisdictions. See *Daniel Vijay s/o Katherasan v. Public Prosecutor* [2010] 4 S.L.R. 1119 (C.A.); *Lee Chez Kee v. Public Prosecutor* [2008] 3 S.L.R.(R.) 447 (C.A.).

[76] For example, the Legislature made clear that it intended to retain the *Penal Code*, *ibid*., s. 377A (the anti-gay law) for political reasons but gave assurance to gay people that the law would not be proactively enforced against them. Prosecutors thus need to be conscious of this policy when making prosecutorial decisions pertaining to s. 377A.

[77] See Josh Bowers, "Legal Guilt, Normative Innocence, and the Equitable Decision not to Prosecute" (2010) 110 Colum. L. Rev. 1655 at 1664 and the reference therein at note 27.

highlighted this danger, especially in the U.S. where there are numerous documented cases of over-zealous prosecutors behaving capriciously or adopting unethical means to secure convictions.[78] A stark illustration is the prosecution of a 23 year-old, first-time offender for dealing in small quantities of marijuana (he needed money after the birth of his second child) and possessing a firearm.[79] Instead of prosecuting under State law, the prosecutors chose to prosecute him under a harsh Federal law which imposed minimum mandatory sentences. The prosecution offered a plea-bargain for a jail term of 15 years, failing which the prosecution threatened to bring multiple charges carrying a minimum jail term of 105 years. The accused declined to plead guilty, was convicted on three charges and sentenced to a minimum of 55 years in jail.

While such incidents are disturbing, focusing on them distracts from a potentially bigger problem, which is not the occasional bad prosecutor, but the fact that even the most conscientious prosecutor may make the wrong call in the decision-making process. In a seminal article, Alafair Burke argued that prosecutors might get it wrong not because they are rational decision-makers choosing to exploit the discretion, but rather because they are not always rational;[80] this is an innate human trait.[81] Drawing on cognitive and behavioural economics literature, Burke demonstrated that cognitive bias affected prosecutorial decision-making in four ways:

- Confirmation bias
- Selective information processing
- Belief perseverance
- Avoidance of cognitive dissonance

1. *Confirmation bias*

"Confirmation bias is the tendency to seek to confirm, rather than disconfirm, any hypothesis under study."[82] In evaluating the evidence, prosecutors are testing the hypothesis that the accused is guilty, rather than the hypothesis that the accused is innocent. Thus, the confirmation bias results in prosecutors focusing on inculpatory evidence, while marginalising or ignoring exculpatory evidence.[83] In one study, half the test subjects were asked to select questions from a list to ask a target person to find out whether that person was an introvert. The other half were asked to select questions from the same list to find out if the target person was an extrovert. The

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78 See Medwed, "The Prosecutor as Minister of Justice", *supra* note 24 at 36, where he refers to prosecutors who glorify the chance to "taste blood" and to the competition in some prosecutors' office to win the "Two-Ton Contest", a race to be "the first to convict four thousand pounds of flesh".

79 See Luna & Wade, "Prosecutors as Judges", *supra* note 25 at 1415-1421.

80 Alafair S. Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science" (2006) 47 Wm. & Mary L. Rev. 1587 at 1590, 1591.

81 Rational choice theory was the classical assumption underpinning the law and economics movement. This view has been challenged and is now being replaced by a behavioural science approach, in recognition of the fact that people do not always act rationally. See generally Russel B. Korobkin & Thomas S. Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics" (2000) 88 Cal. L. Rev. 1053.

82 *Supra* note 80 at 1593, 1594.

83 *Ibid*. at 1603.

results showed strong confirmation bias, whereby each group selected questions that would prove, rather than disprove, their hypothesis.[84]

2. *Selective information processing*

"Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories."[85] Generally, prosecutors only charge when they believe the accused is guilty. Having made that preliminary assessment, there is a natural tendency in all further investigation to select evidence that supports the initial belief and disregard or subject to higher scrutiny evidence that challenges the prior belief. In one study, two groups—one pro-death penalty and one anti-death penalty—were given the same research evidence on the pros and cons of the death penalty. After evaluating the evidence, each group found that the "objective" evidence strengthened their respective beliefs, *i.e.* each group selectively accepted evidence that corroborated their beliefs and disregarded—or remained sceptical of—evidence that undermined their belief.[86]

3. *Belief perseverance*

"Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved."[87] In one study, subjects were given case histories of firefighters and asked to draw conclusions on the correlation between risk preference and firefighting ability. The case histories had in fact been manipulated to force either a negative or positive conclusion. After the subjects had come to the inevitable conclusion in each case, they were told of the falsity of the evidence. Yet, the subjects continued to believe in their wrongly formed conclusions even in the face of incontrovertible evidence to the contrary.[88]

4. *Avoidance of cognitive dissonance*

"[T]he desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions."[89] In one study, subjects were required to carry out a long, boring task. The control group of subjects were told to inform the next candidate of the nature of the task. Half of the remaining subjects were paid one dollar to deceive the next candidate into thinking that the task was actually interesting. The rest were paid twenty dollars to deceive the next candidate into thinking that the task was actually interesting.

The results showed that the subjects who had been paid one dollar to deceive the next candidate reported that they themselves believed the task to be interesting (Note: The task was actually boring). The control group and the group that had been paid

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84 *Ibid*. at 1595, 1596.
85 *Ibid*. at 1594.
86 *Ibid*. at 1597.
87 *Ibid*. at 1594.
88 *Ibid*. at 1601.
89 *Ibid*. at 1594.

twenty dollars reported that they did not find the task interesting. The conclusion was that there was a cognitive dissonance between the one dollar subjects' own beliefs about the boring nature of the tasks and their action in telling the opposite to another person. To avoid that cognitive dissonance, the one dollar group ended up adjusting their own beliefs. The control group had no such cognitive dissonance and the twenty dollar group had no need to adjust their beliefs to be consistent with their action because they simply accepted that they had been paid to lie.[90]

E. *Developing Prosecution Guidelines*

Prosecution policies and guidelines perform internal and external functions. Internally, they help raise standards, promote consistency and manage knowledge. Externally, they inform the public and engender confidence in the system by providing some assurance that decisions are not made arbitrarily but are in fact constrained by a legal and policy framework. The first step in developing prosecution guidelines is to provide a general description of the constitutional role of the Public Prosecutor and an exposition on the multiple duties, responsibilities and ethics of prosecutors. Equally important would be a section on the internal processes established within the Attorney-General's Chambers to ensure that prosecutorial decisions are made independently, objectively and consistently.

The central role of prosecutorial discretion in the criminal justice system should be explained so that it is not viewed as a concession or necessary evil, and is seen instead as a signal strength or essential virtue of a fair and effective criminal justice system. It would be important to highlight that the discretion allows greater individual justice and systemic efficiency. It also facilitates alternative solutions to crime, including diversionary schemes, stern/conditional warnings and creative case resolutions involving the accused, victim and community. All of this should be published on the Attorney-General's Chambers' website for public access.

Next, general guidelines should be developed, addressing the common issues that arise in most prosecutions. Separately, guidelines for specific offences should be created to help prosecutors in the prosecution of particular offences or in dealing with particular matters. Whether such guidelines should be published in full or in part, or not at all, is something that needs further consideration. The arguments for and against have been considered earlier. The remainder of this article sets out some of the key issues that should be addressed in any proposed general guidelines. They are addressed briefly under separate sub-headings.

1. *Dealing with the court and defence counsel*

Prosecutors should always conduct themselves according to the highest standards of integrity and professionalism. The prosecutor is not just an advocate for the Public Prosecutor, but is also a minister for justice. The prosecutor's role is not merely to seek a conviction but to ensure that justice is done following the commission of a crime. These considerations should guide prosecutors in their interactions with the court and defence counsel.

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[90] *Ibid*. at 1601, 1602.

2. *The court*

Prosecutors should present their case fairly and impartially to the court. While it is not the responsibility of the prosecutor to raise potential defences for the accused, the prosecutor must ensure that all relevant facts, including exculpatory facts, are brought to the court's attention. Prosecutors should comply with the letter and the spirit of the rules of criminal procedure and not make arguments or applications that are clearly baseless or without merit. Prosecutors should never communicate with a judge on a matter pertaining to an ongoing case without the presence of defence counsel, even when the prosecutor is invited by the judge for a discussion in chambers.

3. *Defence counsel*

Prosecutors will have considerable dealings with defence counsel during pre-trial and trial stages. At all times, prosecutors should treat defence counsel professionally and with respect. They should cooperate with defence counsel, disclose relevant information and respond in a timely manner to reasonable queries in order to facilitate efficient and just disposal of matters. Prosecutors should also expect the same from defence counsel.[91]

Prosecutors should abide by the statutory and common law disclosure regimes strictly and ensure punctual attendance at any pre-trial conferences and meetings that have been arranged. Prosecutors should never attempt to influence defence counsel on the accused person's decision whether to plead guilty or claim trial. Prosecutors should never communicate with an accused person except through, or with the permission of, the defence counsel.

4. *Decision to charge*

For a variety of reasons, not all criminal offences have to result in criminal prosecution. Clear guidelines are necessary to ensure that the discretion not to charge is exercised consistently and fairly. The twin criteria, applied in our peer jurisdictions and in Singapore, are the evidence test and the public interest test. Prosecutions should not be commenced where the evidence is insufficient; in cases where the evidential test is passed, it must still be considered whether it would be in the public interest to prosecute. In exceptional cases, where it may be necessary to charge an individual who may be a flight risk, clear guidelines on a lower evidential test with appropriate safeguards should be established.

5. *Selection of charge*

Once a decision to charge is made, the prosecutor must decide on the particular offence with which to charge the accused. Often, criminal conduct results in several

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[91] To this end, the Attorney-General's Chambers and the Law Society of Singapore recently introduced the Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence: online: Attorney-General's Chambers Singapore <http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/Code%20of%20Practice%20for%20the%20Conduct%20of%20Criminal%20Proceedings%20-%20FINAL.pdf>.

offences under several laws, or the same statute may provide for different levels of seriousness of the offence. Guidelines would assist the prosecutor in selecting the appropriate charge, taking into account relevant factors including, but not limited to, the seriousness of the conduct, the antecedents of the accused, the impact on the victim and community, and the need for appropriate sentencing. This is especially relevant in Singapore where there is a plethora of overlapping criminal laws giving rise to a wide range of offences being committed as a result of the same act. The seriousness of these offences varies considerably as do the punishments.

For an illustration of an act that is caught by two separate pieces of legislation, one may consider the following scenario. The accused commits a traffic offence, but another person offers to take the rap for a fee and "confesses" to the police. The accused falsely reports that it was the other person who was in charge of the vehicle. The accused may be charged under s. 81(3) of the *Road Traffic Act*[92] for wilfully or recklessly providing false or misleading information, or under s. 204A of the *Penal Code* for intentionally obstructing, preventing, perverting or defeating the course of justice.[93] The former carries a maximum sentence of 6 months and the latter, 7 years. For an illustration of an act that may have multiple levels of seriousness attracting different charges under the same legislation, one may consider the following scenario. The accused attacks a victim with a dangerous weapon, causing grievous hurt. The accused may be charged under the *Penal Code* with any of the following:

- Causing hurt (s. 321)—sentence up to two years or $5,000 fine, or both
- Causing hurt with dangerous weapon (s. 324)—sentence up to seven years, or fine or caning or any combination of such punishments
- Causing grievous hurt (s. 322)—sentence up to 10 years, and fine or caning
- Causing grievous hurt with dangerous weapon (s. 326)—sentence up to life imprisonment or 15 years, and fine or caning

The prosecutor may select a charge that results only in a 2 year sentence or one which results in life imprisonment and caning. It is critical that these decisions are taken carefully and consistently.

Special care should be taken when relying on inchoate or complicity offences. In the first illustration above, the accused may be charged with abetment of the offence or the offence itself. In most cases, the facts are likely to support a charge of attempting the offence or conspiring to commit the offence. The *actus reus* for such offences is often vague and covers a broad spectrum of acts. These charges should only be proffered when they are warranted on the facts, and not for the sake of convenience or to exert pressure on the accused.

6. *Discontinuance*

The Public Prosecutor has the right to discontinue all cases whether brought by the Public Prosecutor, other agencies or private individuals. In a recent U.K. Supreme

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92 Cap. 276, 2004 Rev. Ed. Sing.

93 An apparently inconsistent charging decision involving a high profile accused recently caused a public uproar and resulted in the matter being debated in Parliament. See Sing., *Parliamentary Debates*, vol. 89 (13 August 2012) (Conviction of Dr Woffles Wu for Abetment of Giving False Information). See recently *Public Prosecutor v. Eah Hock Thiam* [2012] SGDC 475 for a discussion of these two provisions.

Court decision, a challenge was mounted against the Crown Prosecution Service by an applicant whose private prosecution was discontinued by the Crown Prosecution Service based on a revised test for intervention.[94] Under the old test, the private prosecution would have been permitted. The prosecutor's intervention was upheld by the Supreme Court, but the case illustrates the importance of having clarity in the applicable test.

7. *Pleading guilty*

Prosecutors should not accept guilty pleas out of convenience and should be satisfied that the offence(s) to which the accused pleads guilty is/are commensurate with the degree of criminality of the accused's conduct. Care must be taken to ensure clarity in terms of the offence(s) to which the accused is pleading guilty and the offence(s) that will be taken into consideration for sentencing. The guilty plea should not inadvertently allow an accused to avoid minimum or mandatory sentences that could have been imposed.

8. *Plea bargain or charge negotiation*

Charge negotiation has not been formalised in Singapore but is very much part of criminal justice systems elsewhere. Some of the issues to be considered include when to negotiate; what offers may be made, including immunities, concessions, reduced sentence; and what safeguards need to be in place to protect the interests of the State, the accused and victim.

9. *Composition*

The Public Prosecutor has the right to object to composition; in some cases, composition is only permissible with the Public Prosecutor's consent.[95] The Public Prosecutor also has power with respect to a prescribed category of offences to order composition, although this power has yet to come into effect.[96] Guidelines would be useful to determine when to object and when to consent to composition, as well as to determine what conditions, if any, should be imposed when an offence is compounded.

10. *Diversion*

A range of diversionary programmes is being developed to deal with youth offenders, mentally or intellectually disordered offenders and general adult offenders for selected offences.[97] The benefit of these programmes is that it allows certain offenders who may be ill-suited to a criminal trial to bypass the criminal justice system and

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94 *R. (on the application of Gujra) v. Crown Prosecution Service* [2012] UKSC 52.

95 *CPC*, *supra* note 28, s. 241(2).

96 *Ibid*., s. 242.

97 For an introduction to diversionary programmes in criminal law, see Gavin Dingwall & Christopher Harding, *Diversion in the Criminal Process* (London: Sweet & Maxwell, 1998).

enrol in rehabilitative or corrective programmes, or to seek appropriate treatment.[98] Guidelines would be useful to determine who qualifies for these programmes, what conditions should be attached, and whether diversion should be at the pre-trial or post-trial stage.

11. *Disclosure*

The *CPC* has a new disclosure regime for prosecutors, setting out materials that must be disclosed and the timelines by which this needs to be done. The Court of Appeal in *Kadar* has added to this regime a common law disclosure rule the full extent of which remains to be clarified. Clear guidelines are important to ensure that disclosure obligations under both the statutory and common law schemes are met.

12. *Unrepresented accused*

Unrepresented accused persons are often at a severe disadvantage as they are less likely to be fully versed in the law and may not have the necessary skills and knowledge to obtain and present relevant evidence. Sections 164 and 216 of the *CPC* require the court to explain certain matters to the accused. Prosecutors, while maintaining an appropriate detachment, should exercise special care in dealing with unrepresented accused to ensure their rights are protected. This may include bringing to the court's attention matters that may have exculpatory effect or mitigating effect with regard to sentencing.

13. *Vulnerable accused*

Accused persons who are vulnerable because of youth or mental/intellectual disorders or other reasons may need special attention during investigation and trial. Such offenders may also be more suited to diversionary programmes rather than being prosecuted. In some cases, an appropriate adult may need to be appointed to act as a liaison.[99]

14. *Vulnerable witnesses*

Witnesses who are vulnerable need special attention.[100] Guidelines should be in place to help police and prosecutors identify vulnerable witnesses and deal with

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[98] See *e.g.*, Allegra M. McLeod, "Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law" (2012) 100 Geo. L.J. 1587; Mark Coeckelbergh, "Criminals or Patients? Towards a Tragic Conception of Moral and Legal Responsibility" (2010) 4 Criminal Law and Philosophy 233; Mark Kelman, "Interpretive Construction in the Substantive Criminal Law" (1981) 33 Stan. L. Rev. 591.

[99] The appropriate adult's role in the U.K. is described in *L & R v. R.* [2011] EWCA Crim. 649 at para. 15: "By Code C, paragraph 11.17 the role of the appropriate adult would have been to (i) ensure that the detained person understood what was happening to him, (ii) support, advise and assist the detained person, (iii) observe whether the police were acting properly and fairly, and to intervene if they were not, (iv) assist with communication where necessary, and (v) ensure that the detained person understood his rights, and the appropriate adult's role in protecting him."

[100] See Austl., Commonwealth, Criminology Research Council, *Police Interviews with Vulnerable Adult Suspects* (Report No. 21) by Lorana Bartels (Canberra: Australian Institute of Criminology, 2011), online: Australian Government, Australian Institute of Criminology <http://www.aic.gov.au/publications/current%20series/rip/21-40/rip21.html>.

them appropriately. This may include having an appropriate adult present during interviews and at trial and/or having suitably qualified social workers involved at an early stage.

15. *Victims of crime*

While the prosecutor does not act for the victims of crime and should not be overly influenced by the victims, the prosecutor should take into account the victim's interest in deciding whether to prosecute, in selecting the charge or in discontinuing a prosecution. In some cases, the victim's interest may be relevant to the sentence, either for retribution or protection through incapacitation. Communication with victims with respect to prosecutorial decisions and prosecution outcomes also needs to be managed.

16. *Sensitive cases*

Certain offences may be especially sensitive due to the conduct or parties involved and it would be prudent to have protocols in place to manage such cases appropriately. Types of offences that might require sensitive handling include offences affecting racial/religious/cultural harmony, seditious acts, domestic violence and maid abuse, homosexual offences, and criminal defamation.

17. *Sentencing*

While sentencing is a matter for the courts, the prosecutor has a role in assisting the court by advising on the general "tariff" in similar cases and in bringing to the court's attention all relevant mitigating and aggravating factual information.[101] Where there is an option for a custodial sentence or fine, the prosecutor has to determine when to push for a custodial sentence. In some cases, the prosecutor may need to seek a deterrent sentence or a community order. With the advent of the discretionary capital punishment regime, clear guidelines on when to seek the death penalty are critical.

18. *Miscellaneous*

Other matters requiring guidelines include when prosecutors should initiate a criminal motion or reference or revisions as well as when an appeal should be made against an acquittal or sentence. When should prosecutors seek costs or an order for compensation? Under what circumstances should prosecutors seek to confiscate benefits from criminal conduct under the *Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act*?[102] How should the prosecutors advise police investigators or deal with the media?

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[101] See J. Willis, "Some Aspects of the Prosecutor's Role at Sentencing" (Paper delivered at the Prosecuting Justice Conference, Melbourne, 18-19 April 1996), online: Australian Government, Australian Institute of Criminology <http://www.aic.gov.au/media_library/conferences/prosecuting/willis.pdf>.

[102] Cap. 65A, 2000 Rev. Ed. Sing.

IV. Conclusion

The exercise of prosecutorial discretion has come under the attention of courts and academic commentators in many jurisdictions. The common concern is that the discretion is generally not subject to judicial review and is exercised behind closed doors with no explanation provided. In a sense, it goes against the adage that justice must be seen to be done. It risks capricious behaviour and fails to detect errors in decision-making. The alternative would be a system where the Public Prosecutor has no discretion and all complaints are investigated and prosecuted. This would result in the courts being overburdened and a great number of individuals, including accused, victims and witnesses unnecessarily having to face the daunting experience of a criminal trial.

There is misconception that the discretion is there for the convenience of the prosecutor and to enable the prosecutor to make personal judgment calls about guilt and punishment. In fact, the discretion is there to guarantee the independence of the Public Prosecutor from any interference by the Executive and to deliver a practical and fair system of criminal justice. Significantly, the discretion facilitates creative alternatives to the conventional criminal process, including warnings and diversionary programmes, which may be more effective at deterring and rehabilitating offenders as well as protecting and restoring victims of crime.

Nevertheless, there is a real risk of abuse and inadvertent errors of judgment in the exercise of prosecutorial discretion, which ultimately involves a delicate balancing exercising. "There is a competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other."[103] Getting the balance right requires two strategies. One is the development of proper processes for decision-making where all cases are scrutinised and vetted by senior officials or by a committee. Multiple layers of review are likely to ensure objectivity and reduce, or eliminate, errors. The second is to have prosecution guidelines that are sufficiently detailed so that there will be consistency in decisions both vertically and horizontally.

[103] Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", *supra* note 42 at 3.