

Evidence (Amendment) Bill

Bill No. / 2011

Read the first time on *2011.*

A BILL

i n t i t u l e d

An Act to amend the Evidence Act (Chapter 97 of the 1997 Revised Edition) to reform the law of evidence in relation to hearsay evidence in civil and criminal proceedings, evidence of electronic output, expert opinion evidence and legal professional privilege, and matters related thereto.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act may be cited as the Evidence (Amendment) Act 2011 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

5 Amendment of section 3

2. Section 3 of the Evidence Act is amended —

(a) by deleting the definitions of “computer” and “computer output” in subsection (1);

10 (b) by inserting, immediately after the definition of “document” in subsection (1), the following definition:

“ “electronic record” means a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or transmitted from one information system to another and has the same meaning as in section 2 of the Electronic Transactions Act 2010;”;

15 (c) by inserting, immediately after subsection (5), the following subsections:

20 “(6) For the purposes of sections 23, 128, 128A, 130 and 131, a reference to “advocate or solicitor” shall be deemed to include the Attorney-General, the Solicitor-General, the Public Prosecutor, State Counsel, Deputy Public Prosecutor and Assistant Public Prosecutor.

25 (7) For the purposes of sections 23, 128A, 130 and 130A, a “qualified legal counsel” means —

(a) a person (by whatever name called) who is —

30 (i) an employee of an entity, employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes; and

(ii) duly authorised or registered to practice law in a state or territory (including Singapore) by an authority having the function conferred by law of authorising or registering persons to practice law in that state or territory; or

(b) a Legal Service Officer —

(i) working in a Government ministry or department or organ of state as legal adviser to that Government Ministry or department or organ of state; or

(ii) seconded to any board, commission, committee or similar body, whether corporate or unincorporate, established under a written law.”.

Amendment of section 9

3. Section 9 of the Evidence Act is amended by inserting, immediately after paragraph (f) of the *Illustrations*, the following paragraph:

“(g) A seeks to adduce evidence against B in the form of an electronic record. The method and manner in which the electronic record was (properly or improperly) generated, communicated, received or stored (by A or B), the reliability of the devices and the circumstances in which the devices were (properly or improperly) used or operated to generate, communicate, receive or store the electronic record, may be relevant facts (if the contents are relevant) as authenticating the electronic record and therefore as explaining or introducing the electronic record, or identifying it as the relevant electronic record to support a finding that the record is, or is not, what its proponent A claims. An electronic record of a breathalyzer showing the level of alcohol in a person’s blood is a relevant fact where that person is prosecuted for an offence of driving while under the influence of alcohol and the method or circumstances in

which the breathalyzer is operated are also relevant facts.”.

Repeal and re-enactment of section 23

5 4. Section 23 of the Evidence Act is repealed and the following section substituted therefor:

“Admissions in civil cases when relevant

23.—(1) In civil cases, no admission is relevant if it is made —

10 (a) upon an express condition that evidence of it is not to be given; or

(b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

(2) Nothing in subsection (1) shall be taken —

15 (a) to exempt any advocate or solicitor from giving evidence of any matter of which he may be compelled to give evidence under section 128; or

20 (b) to exempt any qualified legal counsel in an entity from giving evidence of any matter of which he may be compelled to give evidence under section 128A.”.

Amendment of Section 32

5. Section 32 of the Evidence Act is amended —

(a) by renumbering the section as subsection (1) of that section;

25 (b) by deleting the words “Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable,” in subsection (1)

30 and substituting the words “Subject to subsections (2) and

(3), statements of relevant facts made by a person (whether orally, in a document or otherwise);”;

(c) by deleting paragraph (b) of subsection (1) and substituting the following paragraph:

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“or is made in course of business;

(b) when the statement was made by any person in the ordinary course of business, and in particular when it consists of any entry or memorandum in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment (whether written or signed) for the receipt of money, goods, securities or property of any kind, or any information in market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations, or of a document constituting, or forming part of, the records (whether past or present) of any business that are recorded, owned or kept by any person, body or organisation carrying out the business;”;

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(d) by deleting the full-stop at the end of paragraph (h) of subsection (1) and substituting a semi-colon, and by inserting immediately thereafter the following paragraphs:

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“or is made by a person who is compellable but refuses to give evidence;

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(i) being compellable to give evidence on behalf of the party desiring to give the statement in evidence, he attends or is brought before the court, but refuses to be sworn or affirmed, or is sworn or affirmed but refuses to give any evidence;

or is made by a person who is dead or who cannot be produced as a witness;

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(j) it is shown with respect to him —

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- (i) that he is dead or unfit because of his bodily or mental condition to attend as a witness;
 - (ii) that despite reasonable efforts to locate him, he cannot be found whether within or outside Singapore;
 - (iii) that he is outside Singapore and it is not practicable to secure his attendance; or
 - (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so; or
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or by agreement;

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- (k) the parties to the proceedings agree that for the purpose of those proceedings the statement may be given in evidence.”; and

(e) by inserting, immediately after subsection (1), the following subsections:

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“(2) No statement may be admitted in evidence under subsection (1) if the court is of the view that it would not be in the interests of justice to admit the statement.

(3) Except in the case of subsection (1)(k), evidence may not be given under subsection (1) on behalf of a party to the proceedings unless that party complies —

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- (a) in the case of criminal proceedings, with such notice requirements as may be prescribed by the Minister under section 428 of the Criminal Procedure Code 2011; and
 - (b) in all other proceedings, with such notice requirements as may be prescribed in Rules of Court made by the Rules Committee constituted under section 80 of the Supreme Court of Judicature Act (Cap. 322, 2007 Ed.).
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Amendment of section 65

9. The *Illustrations* in section 65 of the Evidence Act is amended by deleting paragraphs (b) and (c).

Amendment of section 68A

5 **10.** Section 68A of the Evidence Act is amended —

(a) by deleting the words “, computer output or other explanatory material” in subsection (1) and substituting the words “or other explanatory material, in electronic or other medium,”; and

10 (b) by deleting the words “in any form, including computer output;” in subsection (3)(a) and substituting the words “in electronic or other medium;”.

New section 116A

15 **11.** The Evidence Act is amended by inserting, immediately after section 116, the following section:

“Presumptions in relation to electronic records

20 **116A.**—(1) Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, if properly used, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.

Illustration

25 A seeks to adduce evidence in the form of an electronic record or document produced by an electronic device or process. A proves that the electronic device or process in question is one that, or is of a kind that, if properly used, ordinarily produces that electronic record or document. This is a relevant fact for the court to presume that in producing the electronic record or document on the occasion in question, the electronic device or process produced the electronic record or document which A seeks to adduce.

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(2) Unless evidence to the contrary is adduced, the court shall presume that any electronic record generated, recorded or stored is authentic if it is established that the electronic record was generated, recorded or stored in the usual and ordinary course of business by a person who was not a party to the civil proceedings on the occasion in question and who did not generate, record or store it under the control of the party seeking to introduce the record.

Illustration

A seeks to adduce evidence against B in the form of an electronic record. The fact that the electronic record was generated, recorded or stored in the usual and ordinary course of business by C, a neutral third party, is a relevant fact for the court to presume that the electronic record is authentic and accurate.

(3) Unless evidence to the contrary is adduced, where an electronic record was generated, recorded or stored by a party who is adverse in interest to the party seeking to adduce the evidence, the court may in civil proceedings presume that the electronic record is authentic in relation to the authentication issues arising from the generation, recording or storage of that electronic record.

Illustration

A seeks to adduce evidence against B in the form of an electronic record. The fact that the electronic record was generated, recorded or stored by B, who opposes the relevance of the evidence, is a relevant fact for the court to presume that the electronic record is authentic and accurate.

(4) The Minister may make regulations providing for a process by which a document may be recorded or stored through the use of an imaging system, including providing for the appointment of one or more persons or organisations to certify these systems and their use, and for any matters incidental thereto, and an “approved process” in subsection (5) means a process that has been approved in accordance with the provisions of such regulations.

(5) Where an electronic record was recorded or stored from a document produced pursuant to an approved process, the court

shall presume, unless evidence to the contrary is adduced, that the electronic record accurately reproduces that document.

(6) The matters referred to in subsection (1) to (5) may be established by an affidavit given to the best of the deponent's knowledge and belief."

New section 128A

12. The Evidence Act is amended by inserting, immediately after section 128, the following section:

“Communications with qualified legal counsel in entity

128A.—(1) No qualified legal counsel in an entity shall at any time be permitted, unless with the entity's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal counsel, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his employment as such legal counsel, or to disclose any advice given by him to the entity, or to any officer or employee of the entity, in the course and for the purpose of such employment.

(2) Nothing in subsection (1) shall protect from disclosure —

- (a) any such communication made in furtherance of any illegal purpose;
- (b) any fact observed by any qualified legal counsel in an entity in the course of his employment as such legal counsel showing that any crime or fraud has been committed since the commencement of his employment as such legal counsel; or
- (c) any such communication not made for the purpose of legal advice.

(3) For the purposes of subsection (2)(b), it is immaterial whether the attention of the qualified legal counsel was or was not directed to that fact by or on behalf of the entity.

(4) Where a qualified legal counsel is employed by one of a number of corporations that are related to each other under section 6 of the Companies Act (Cap. 50), subsection (1) shall apply in relation to the qualified legal counsel and the related corporation as if the qualified legal counsel were employed by each of the related corporations.

(5) Without prejudice to the generality of subsection (1) —

(a) where the qualified legal counsel is a Legal Service Officer working in a Government ministry or department or organ of state or seconded to any board, commission, committee or similar body, whether corporate or unincorporate, established under a written law; or

(b) where a qualified legal counsel, other than a Legal Service Officer, is employed by the Government to work in a Government ministry or department or organ of state as an officer of that Government ministry or department or organ of state to provide of legal advice or assistance in connection with the application of the law or any form of resolution of legal dispute,

and such qualified legal counsel is required as part of his duties of employment or appointment to provide legal advice or assistance in connection with the application of the law or any form of resolution of legal dispute to any public agency, then the reference to “entity” in subsection (1) shall be read to extend to such public agency.

(6) For the purposes of subsection (5), “public agency” includes —

(a) the Government, including any ministry, department, agency, or organ of state or instrumentality of the Government;

(b) any board, commission, committee or similar body, whether corporate or unincorporate, established under a written law for a public

purpose (referred to in this subsection as a “statutory body”);

- (c) any other board, commission, committee or similar body appointed by the Government, or by a statutory body, for a public purpose.”.

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Repeal and re-enactment of section 129

13. Section 129 of the Evidence Act is repealed and the following section substituted therefor:

“Sections 128 and 128A to apply to interpreters, etc.

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129. Sections 128 and 128A shall apply to —

- (a) interpreters; and
(b) persons who work under the supervision of legal professional advisers.”.

Repeal and re-enactment of section 130

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14. Section 130 of the Evidence Act is repealed and the following section substituted therefor:

“Privilege not waived by volunteering evidence

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130.—(1) If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 128 or 128A.

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(2) If any party to a suit or proceeding calls any advocate or solicitor as a witness, that party shall be deemed to have consented to such disclosure as is mentioned in section 128 only if that party questions the advocate or solicitor on matters which but for the question the advocate or solicitor would not be at liberty to disclose.

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(3) If any party to a suit or proceeding calls any qualified legal counsel in an entity as a witness, that party shall be deemed to have consented to such disclosure as is mentioned in section 128A only if that party questions the legal counsel on

matters which but for the question the legal counsel would not be at liberty to disclose.”.

Amendment of Section 131

5 **15.** The Evidence Act is amended by renumbering section 131 as subsection (1) of that section, and by inserting immediately thereafter the following subsection:

“(2) For the purposes of sections 129 and 131, “legal professional adviser” means —

- (a) an advocate or solicitor; or
- 10 (b) in the case of any confidential communication which has taken place between any officer or employee of an entity and a qualified legal counsel in the entity, that legal counsel.”.

Consequential amendments to Criminal Procedure Code 2010

15 **16.** [To be drafted later depending on outcome of public consultation.]

Transitional provision

20 **17.** Notwithstanding the repeal of section 35 of the Evidence Act, the regulations made under the repealed section 35(5) and in force immediately before the commencement of this Act shall continue to be in force as if they have been made under section 116A(4).

EXPLANATORY STATEMENT

This Bill seeks to amend the Evidence Act (Cap. 97) to —

- (a) give effect to the recommendations of the Technology Law Development Group of the Singapore Academy of Law in its Consultation Paper “Computer Output as Evidence”, September 2003 and the Final Report, December 2004.
- (b) reform the legal framework for hearsay evidence;

- (c) expand the scope of admission of expert evidence; and
- (d) extend legal professional privilege to qualified legal counsel.

Clause 1 relates to the short title and commencement.

Clause 2 amends section 3 —

- (a) by deleting the definition of “computer” and “computer output” which are no longer necessary in view of the repeal of sections 35 and 36;
- (b) by inserting a new definition of “electronic record” similar to the definition in the Electronic Transactions Act 2010 is introduced;
- (c) by inserting a new subsection (6) to provide that a reference to “advocate or solicitor” in sections 23, 128, 128A, 130 and 131 shall be deemed to include the Attorney-General, the Solicitor-General, the Public Prosecutor, a State Counsel, Deputy Public Prosecutor and Assistant Public Prosecutor; and
- (d) by inserting a new subsection (7) to define “qualified legal counsel” for the purposes of sections 23, 128A, 130 and 131.

Clause 3 amends section 9 by inserting a new illustration relating to evidence adduced in the form of an electronic record if the record proves a relevant fact. The expression “generated, communicated, received or stored” is adapted from the definition of an “electronic record” in section 2 of the Electronic Transactions Act 2010. The references to “reliability of devices” and “circumstances in which the devices were used or operated” are intended to encompass all issues relating to the reliability of the devices as well as the human or automated agents that use or operate the devices.

Clause 4 repeals and substitutes section 23 as a consequence of new section 128A (inserted by clause 12).

Clause 5 amends section 32 (which contains several exceptions that allow for the admission of hearsay evidence), to —

- (a) expand the scope of the existing exceptions, especially the exception for statements made in the course of business;
- (b) better align the hearsay exceptions in civil and criminal proceedings by including three exceptions that currently exist only in respect of criminal proceedings;
- (c) provide the court with a broad and overriding discretion to refuse to admit hearsay under the exceptions if it would not be in the interests of justice to do so; and
- (d) except in the case of admission by agreement, require a party who intends to introduce hearsay evidence to give notice in accordance with any applicable rules of procedure.

Clause 6 repeals sections 35 and 36. The Report “Computer Output as Evidence” recommended the adoption of a non computer-specific approach but to provide presumptions to facilitate the admissibility of certain electronic evidence. This approach is based on the principle of non-discrimination, which requires that electronic evidence be treated no differently from evidence not in electronic form. In this approach, the existing rules in sections 35 and 36 will be repealed and will no longer regulate the admissibility of electronic evidence. Instead the existing rules providing for the relevancy and admissibility of evidence (such as hearsay, the best evidence rules and rules on authentication) will regulate the admissibility of electronic evidence in the same manner as any other item of evidence. The courts are given a wide discretion to call for evidence to authenticate the electronic evidence in any manner that the courts deem appropriate. By avoiding the prescription of express requirements, such as that under the repealed section 35, that the proponent of the electronic evidence has to satisfy before the evidence can be considered for admissibility, full flexibility is preserved.

Clause 7 repeals and re-enacts section 47 to extend the scope of admission of expert evidence to points of “*scientific, technical or other specialised knowledge*” generally.

Clause 8 amends section 64 by inserting a new *Explanation* to the effect that if a copy of a document in the form of an electronic record is shown to reflect the “original document” accurately, the copy is primary evidence. The concept of “original document” is of little or no relevance in the context of electronic copies which are identical and perfect. This amendment recognises that electronic copies that are shown to reflect the contents of the original document accurately are original or primary evidence.

Clause 9 amends section 65 as a consequence to the amendment to section 64 made by clause 8.

Clause 10 amends section 68A of the Act as a consequence of deleting the definition of “computer output”.

Clause 11 inserts a new section 116A which introduces four new presumptions in relation to electronic evidence.

Section 116A(1) prescribes an evidential burden similar to sections 146 and 147 of the Australian Commonwealth Evidence Act 1995. Section 116A(1) is a restatement of the common law maxim *praese-muntur omnia rite esse acta*, which is the presumption that “mechanical instruments were in order when they were used”.

Section 116A(2) is modelled after section 5(c) of the Canadian Uniform Electronic Evidence Act (“UEEA”). Section 116A(2) creates a presumption of authenticity of business records of a person who is not a party to the civil proceeding, where the proponent of the record did not control the making of the record. The concept of business records here is intended to include more than strictly commercial operations. It will apply broadly to enterprise records of

organisations not devoted to making a profit, such as Government bodies or non-profit organisations.

Section 116A(3) also prescribes a legal burden and is modelled after section 5(b) of the Canadian UEEA. Section 116A(3) deals with an electronic record obtained by a proponent from an adverse party to civil proceedings and used against that party. The record is presumed authentic. If it is not authentic, then the adverse party has the means to disprove the authenticity of the record and rebut the presumption, since that party was in control, at the material time, of the record-generation or record-keeping system.

Section 116A(4) defines an “approved process” in a manner consistent with the repealed section 35(4), (5) and (10)(a).

Section 116A(5) introduces the presumption consistent with the repealed section 35(10)(b) that a document produced pursuant to an approved process is presumed to accurately reproduce the contents of that document. The effect is that such an electronic record may be primary evidence of that document pursuant to *Explanation 3* in section 64.

Clause 12 inserts a new section 128A to protect professional communications with or by a qualified legal counsel in an entity against disclosure except in specified circumstances. The new section essentially extends the statutory protection of professional communications with advocates or solicitors conferred by section 128 to “qualified legal counsel” (including legal officers in the public sector).

Clause 13 amends section 129 to provide that the provisions of section 128 and new section 128A (relating to protection against disclosure of professional communications with advocates, solicitors and qualified legal counsel) shall apply to interpreters, and persons who work under the supervision of legal professional advisors (which term is defined in new subsection (2) of section 131.

Clause 14 repeals and substitutes section 130 to provide that in a party in a suit or proceeding does not waive privilege by volunteering evidence except in certain circumstances. The new section essentially extends the provisions of existing section 130 to “*qualified legal counsel*”.

Clause 15 amends section 131 to define the term “*legal professional advisor*” for the purposes of sections 129 and 131.

Clause 16 makes consequential amendments to the Criminal Procedure Code 2010 [to be drafted later depending on outcome of public consultation].

Clause 17 provides as a transitional measure the continuance of the regulations relating to approved process and certifying authority made under the repealed section 35(5).

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.