REPORT OF THE LAW REFORM COMMITTEE

ON

REFORM OF ADMISSIBILITY OF HEARSAY EVIDENCE

IN CIVIL PROCEEDINGS

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

MAY 2007

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About the Law Reform Committee

The Law Reform Committee (LRC) of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

In late 2002, the LRC set up a subcommittee, chaired by Mr Philip Jeyaretnam, SC, to look into various aspects of the Evidence Act. After its preliminary report the subcommittee was directed to confine its study to the reform of the law of hearsay in civil proceedings. The final report and a draft Amendment Bill was submitted to the LRC for consideration in 2004 and was approved by the LRC in September 2004.

The final report was subsequently circulated to various interested parties for feedback and is now contained in this publication.

The report reflects the authors' current thinking on the researched area of law and does not represent the official position of Singapore Academy of Law or any governmental agency. The report has no regulatory effect and does not confer any rights or remedies.

This report is the second part of a series of publications by the LRC concerning reforms in Evidence Law.

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I. Introduction

A. Background to the Report

1 At a meeting of the Law Reform Committee of the Singapore Academy of Law ("LRC") in September 2002, a subcommittee ("the Sub-Committee") was appointed with Mr Philip Jeyaretnam, SC, in the chair to advise the LRC on the reform of the law of evidence.

2 In the course of its discussion, the Sub-Committee considered a bill drafted in early 2000 by a committee appointed by the Attorney-General in 1997 under the chairmanship of Associate Professor Chin Tet Yung MP, then Dean of the Faculty of Law of the National University of Singapore. This bill was kindly made available to the Sub-Committee by the Attorney-General's Chambers.

3 The Sub-Committee presented a preliminary report to the LRC in May 2003 and the LRC directed the Sub-Committee to confine its final report to the reform of the law of hearsay evidence in civil proceedings.

4 In accordance with its narrower remit, the Sub-Committee subsequently presented its final report to the LRC for consideration. The Sub-Committee was initially unable to reach a consensus on how this area of law should be reformed. In its final report, the Sub-Committee set out the two main approaches for which there was substantial though divided support among the members of the Sub-Committee.[1]

5 Since it had also seemed convenient and timely to do so, the Sub-Committee was also directed in September 2002 to advise on the reform of the opinion evidence rule. The LRC later agreed that the Sub-Committee's recommendations on the reform of the opinion evidence rule should be reviewed in a separate report.

6 On 21 February 2004, after careful consideration of the Sub-Committee's report, the LRC reached a consensus on the approach to take in reforming the law of hearsay evidence in civil proceedings. The Sub-Committee was tasked to produce a draft Bill implementing the recommendations of the LRC. On 14 August 2004, the draft Bill was finalised and approved by the LRC. This report sets out the recommendations of the LRC as well as the approved draft Bill.

[1] Although the LRC in May 2003 had favoured reform along the lines proposed by the 1997 committee appointed by the Attorney-General, the LRC had also noted that that reform was intended to advance a uniform approach to hearsay evidence and that the appropriate reform could be different if only civil reform was in view. This report presents the views of the LRC considering the question of reform on the different basis that only civil proceedings are to be affected.

B. Background to the proposed reform

7 The line between hearsay and original evidence is traditionally stated as follows.[2] A statement *that p* is admissible as original evidence if it is adduced for a non-hearsay purpose; for instance, to show that the statement caused a particular reaction or response which is relevant to the facts in issue or expressed a bodily condition or state of mind which is particularly in issue.[3] However a statement *that p* is not admissible to show that p exists. It is hearsay when it is adduced for the purposes of showing the existence of the fact *that p*.

8 Although the line between hearsay and non-hearsay is easily stated, the common law rule against hearsay has for a long time been the subject of adverse criticisms from academics[4] and judges alike.[5] This is primarily because the line between hearsay and non-hearsay evidence has always been difficult to determine with precision.[6] It depends crucially on the real or true purpose for which the evidence of a statement is adduced, and experience shows that the determination of that purpose is frequently controversial.[7] A complication is that even when the real or true purpose is readily ascertained as being of a non-hearsay nature, the risk of reliance on the hearsay contained in the statement admitted as original evidence may lead the courts in particular cases to hold that the evidence is hearsay though it is strictly otherwise. A further complication is that when the hearsay evidence is highly reliable, the courts may be tempted to avoid characterising the evidence as hearsay and to prefer holding that the evidence is "direct or original evidence" and therefore admissible evidence.[8]

9 It has not been possible to remove these practical hearsay difficulties over time. Between 1985 and 1991, fundamental questions of hearsay were twice agitated before

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[2] In *Subramaniam v PP* [1956] 1 WLR 965, da Silva PC said at 970: "Evidence of a statement made to a witness … may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made." This proposition was clarified in *Leong Hong Khie v PP* [1986] 2 MLJ 206, FCM, at 209E as follows: "In our opinion, the general proposition laid down by the Privy Council in that case must be read subject to this condition, *viz*, that the statement must be directly relevant in considering the state of mind of the witness to whom it has been made. In other words, the proposition could only apply when the mental state of the witness evidenced by the statement was itself directly in issue at the trial." See also *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at 168–169. The proposition in the text is based on Cross's definition of hearsay: a hearsay statement is one that is used as evidence of the facts narrated which avoids difficulties as to what is meant by the truth of what is contained in the statement. That definition was approved by the House of Lords in *R v Sharp (Colin)* [1988] 1 WLR 7 at 11F and *R v Kearley* [1992] 2 AC 228 at 254H.

[3] See *Lim Guan Cheng v JSD Construction Pte Ltd* [2004] 1 SLR 318; *CGU International Insurance v Quah Boon Hua* [2000] 4 SLR 606.

[4] See *eg* A Zuckerman, *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989) at p 216.

[5] See *eg* Cooke P in *R v Baker* [1989] 1 NZLR 738 at 741. The Law Reform Advisory Committee for Northern Ireland in *Hearsay Evidence in Civil Proceedings* (Discussion Paper No 1, 1990) describes it as the rule which the average citizen finds the most baffling.

[6] There is still debate whether evidence of the *res gestae* is hearsay or non-hearsay evidence.

[7] For some recent examples, see *R v Cook* [1987] QB 417 (photofits and sketches held to be *sui generis* and not hearsay); *Alexander v R* [1981] 145 CLR 395; *R v Osbourne and Virtue* [1973] QB 678; *R v McCay* [1991] 1 All ER 232 (prior identification evidence); *Saga Foodstuffs Manufacturing (Pte) Ltd v Best Food Pte Ltd* [1995] 1 SLR 739; *Customglass Boats Ltd v Salthouse Bros Ltd* [1976] RPC 589 (survey evidence).

[8] As in *R v Shone* (1983) 76 Cr App R 72 and *R v Muir* (1986) 79 Cr App R 153. But in the label and tag cases, this could not be done. See *Patel v Comptroller of Customs* [1966] AC 356; *Sim Tiew Bee v PP* [1973] 2 MLJ 200 at 202.

the English House of Lords. It was held in the first case, *R v Blastland*,[9] that evidence of a third party's declaration of peculiar knowledge of the whereabouts of the deceased's body was "irrelevant" as proof of the defendant's innocence of a charge of murder. The decision was criticised as being confusing and evasive: confusing, as the House of Lords seemed to be saying that the evidence was inadmissible because it was not probative or (logically) relevant; and evasive, as the House of Lords refrained from clarifying definitively when evidence of a third party's declaration of knowledge would be hearsay.[10] In the second case, *R v Kearley*,[11] a majority of the House of Lords held that implied assertions by statement are hearsay evidence. The majority, it was said, did not fully succeed in providing a satisfactory answer as to why implied assertions which are highly reliable evidence should nevertheless be regarded as hearsay.[12] In Australia too, between 1989 and 1992, in *Walton v R*[13] and *Pollitt v R*,[14] the High Court twice attempted to resolve the question of how implied assertions should be characterised but were unable to reach a consensus on how to formulate the law coherently and consistently with principle and policy.[15]

10 It seems, furthermore, that the numerous common law exceptions to the hearsay rule are unsatisfactory in significant respects. They have "never been easy to apply in practice"[16] primarily because of uncertainty about the conditions in which they originated as well as uneven or *ad hoc* development since then. As Lord Reid observed in *Myers v DPP*:[17]

> By the nineteenth century many exceptions had become well established; but again in most cases we do not know how or when the exception came to be recognised. It does seem, however, that in many cases there was no justification either in principle or logic for carrying the exception just so far and no farther. One might hazard a surmise

[9] [1986] AC 41.

[10] See PB Carter (1987) 103 LQR 106. Note that the trial judge had rejected the evidence on the basis that "[t]he real purpose and relevance of calling the evidence … [was] to say that in effect that there was an implied admission of the knowledge of the crime, which [was] an implied admission of the crime itself" and that was hearsay.

[11] *Supra* n 2.

[12] According to Lords Bridge of Harwich, Ackner and Oliver of Aylmertonand, the phone calls which were sought to be adduced in evidence showed the state of mind of the callers, in particular their belief that Kearley was a supplier of drugs. But that was logically irrelevant to the issues. The only purpose for which the calls were to be in evidence was for the implied assertion that the accused was a supplier of drugs. Implied assertions are hearsay. This was true of any single call and the fact that there were several calls made no difference to admissibility. Lord Griffiths, dissenting, argued that the fact that many callers believed that Kearley was a supplier of drugs could found an inference that the appellant Kearley had "established a market as a drugs dealer by supplying or offering to supply drugs and was thus attracting customers." Lord Browne-Wilkinson, also dissenting, argued that the fact that there were many callers was "proof that there was a market for drugs that the appellant might satisfy and that that fact was relevant to the purpose in having possession of the drugs."

[13] (1989) 166 CLR 283.

[14] (1992) 174 CLR 558.

[15] See Colin Tapper (1990) 106 LQR 441. In the first case, Mason CJ was in favour of applying the hearsay rule flexibly especially in regard to implied assertions made in the course of a social telephone conversation. Wilson, Toohey and Dawson JJ took the view that as most conduct would contain an implied assertion of some sort and it would seriously deplete the stock of evidence if such evidence should be excluded, evidence of conduct is admissible provided the conduct is a relevant fact, notwithstanding it contains an implied assertion of some sort. In the second case, four out of seven members of the High Court held for slightly different reasons that evidence of an implied assertion is admissible to prove the identity of the maker of a phone call.

[16] See *Hearsay Evidence: An Options Paper* (Preliminary Paper No 10, 1989) prepared for the New Zealand Law Commission by an advisory committee on evidence law.

[17] [1965] AC 1001.

> that when the rule proved highly inconvenient in a particular kind of case it was relaxed just sufficiently far to meet that case, and without regard to any question of principle.[18]

11 Uncertainty of this nature had led the House of Lords in 1964 by a majority to refuse judicially to extend the hearsay rule any further and to insist that any further exception could only be created by the Legislature.[19] However, disagreement about the malleability of the common law in fashioning new exceptions to the hearsay rule emerged subsequently in other common law jurisdictions. In Canada, the Supreme Court refused to follow *Myers v DPP* in *Ares v Venner*[20] and again in *R v Khan*.[21] In Australia, a more reformative stance was also adopted in the 1990s when the High Court created a new exception in favour of implied assertions made in social telephone conversations.[22]

12 With respect to existing exceptions, success in incremental rationalisation has been uneven. In 1970 the Privy Council, and in 1987 the House of Lords, radically re-designed the *res gestae* exception.[23] This re-formulation was endorsed and followed by the Federal Court of Malaysia and the High Court of Australia in 1986 and 1992 respectively.[24] The exception in favour of declarations against interest was the subject of re-consideration in 1998. This time, the House of Lords was less forthcoming and declined to extend the rule.[25] In contrast, the Supreme Court of Canada had as early as 1977 extended the common law exception to include declarations against penal interest.[26]

13 With little consensus on many vital elements of hearsay evidence, it is notable that perhaps as early as the 1960s, a dominant view, though not a consensus, emerged that civil proceedings are differentiated from criminal proceedings in two important respects[27] with important implications for the hearsay rule. Unlike an accused, a civil defendant does not require special protection from a mistaken verdict[28] and, unlike a suspect, a potential party to civil proceedings does not need protection from illegal,

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[18] *Id* at 1020B.

[19] See *Myers v DPP*, *id* at 1022 (Lord Reid), at 1028 (Lord Morris of Borth-y-Gest), at 1034 (Lord Hodson). See also *Kee Lik Tian v PP* [1984] 1 MLJ 306 at 307, HCM. Note that common law exceptions not inconsistent with the tenor and language of the Evidence Act "have also been incorporated into" the law of evidence: *Soon Peck Wah v Woon Che Chye* [1998] 1 SLR 234 at 247. See also *Roy S Selvarajah v PP* [1998] 3 SLR 517.

[20] (1971) 14 DLR (3d) 4.

[21] (1991) 59 CCC (3d) 92. The court so decided notwithstanding many Canadian legislatures had enacted to overrule *Myers v DPP*, *supra* n 17, creating some uncertainty as to whether the legislative or judicial reform was binding.

[22] *Pollitt v R*, *supra* n 14. See also *Transport Ministry v Garry* [1973] 1 NZLR 120 at 123. Note that in *Potts v Miller* (1940) 64 CLR 282, a case not cited to the House of Lords in *Myers v DPP*, *supra* n 17, the High Court of Australia held at 303 that "books of accounts kept according to an established system in organized business are receivable in evidence as proof, not of the occurrence of some particular fact recorded or indicated by a specific entry or narration, but of the financial progress or result of business operations conducted on a large scale".

[23] *R v Andrews (Donald)* [1987] AC 281 following *R v Ratten* [1972] AC 378.

[24] *Pollitt v R*, *supra* n 14. See also *Leong Hong Khie v PP*, *supra* n 2, at 209G.

[25] See *R v Myers* [1998] AC 124, [1997] 4 All ER 314.

[26] *R v O'Brien* (1977) 38 CRNS 325.

[27] A Zuckerman, *supra* n 4.

[28] In fact there is a wide spectrum of political differences about how the risks of error should be distributed in general and in special kinds of circumstances: W Twining, "Freedom of Proof and the Reform of Criminal Evidence" (1997) 31 Is L Rev 439 at 457.

unfair or improper treatment in the manner in which evidence was obtained.[29] On both grounds, it was thought that the hearsay rule should not be applied in civil proceedings with the same stringency as in criminal proceedings.[30] Consistent with this, England enacted the Civil Evidence Act 1968 (c 64) to liberalise the hearsay rule in civil proceedings.[31]

14 In our jurisdiction, the law of hearsay as contained in the Evidence Act[32] avoided many of the criticisms which were or have been levelled at the common law exceptions. From their inception, our statutory exceptions were generally intended and drafted to be wider than the common law exceptions.[33] For instance, our business statement exception is wider than that in the common law and the unsatisfactory decision in *Myers v DPP* would have been avoided if the case had arisen in Singapore.[34] Also, our business statement exception departs from the common law in avoiding the requirement that the maker must be under a duty to transact the transaction which is recorded. But though commendably wider than their common law counterparts, our statutory exceptions also leave many questions unanswered.

15 The following are a few examples of where they are or have been found to be unsatisfactory. First, it is not clear whether the statutory public document exception embodies the common law in requiring that persons concerned in the document to be tendered as a public document should have a right to inspect it.[35] Second, our statutory exceptions are now too narrow in relation to civil proceedings. While, for instance, the business statement exception applies when the maker of the business statement cannot be found, or has become incapable of giving evidence, such evidence is still excluded when the maker of the statement cannot be identified or refuses to give evidence. Third, the business statement exception is seriously limited in that it does not allow evidence of a business record compiled by a record keeper from information supplied by a

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[29] This implies greater concern with due process but "again opinions vary widely on the weight to be accorded to process values in criminal cases.": W Twining, *ibid*.

[30] Some arguments in support of the distinction stress the need in criminal proceedings to ensure that the defendant does not have unfair opportunity to raise confusing issues by inundating the court with hearsay evidence of little value or relying on fabricated hearsay evidence. See Law Commission of Ireland, *Report on the Rule against Hearsay in Civil Cases* (Report No 25, 1988) at ch 1, para 14. *cf* New South Wales Law Reform Commission *Report on the Rule Against Hearsay* (Report No 29, 1978) at p 84: "The general attitude was that any widening of admissibility would be likely to be used more by the prosecution than the defence, and it was not pressed on us that the present state of the hearsay rule was in any marked degree responsible for acquittal of guilty persons."

[31] This Act was amended in 1972 to include statements of opinions.

[32] Presently Cap 97, 1997 Rev Ed.

[33] See generally *Halsbury's Laws of Singapore: Evidence* vol 10 (Butterworths Asia, 2000) ch 5.

[34] In Singapore, s 32(*b*) of the Evidence Act will admit the business statement of a maker when he cannot be found without an inordinate expense. Our dying declaration exception as enacted in s 32(*a*) of the Evidence Act is also wider than the common law exception and the decision in *Walton v R*, *supra* n 13, would have been straightforward in Singapore and would not have necessitated the manipulation of the hearsay rule as was evident in the decision of the High Court of Australia. Again, our declaration against interest exception as enacted in s 32(*c*) of the Evidence Act is more logical than the equivalent common law exception because it includes declarations against penal interest. *cf Higham v Ridgway* (1808) 10 East 109, 103 ER 717; *Sturla v Freccia* (1880) 5 App Cas 623; *In re Fountaine* [1909] 2 Ch 382. And again, our reputation and family tradition exception is wider than the common law exception in permitting hearsay evidence of the date of birth to be received. See *Mohamed Syedol Ariffin v Yeoh Ooi Gark* (1916) 1 MC 165, PC.

[35] See *Sturla v Freccia*, *id*, at 643. *cf Gopinathan a/l Subramaniam v Timbalan Menteri dalam Negeri* [2000] 1 MLJ 65 at 73–74, HCM.

transactor to be admitted.[36] It is confined to first-hand reports made by the transactor himself. Fourth, despite a recent decision, it is arguable that evidence of a composite business report is also excluded.[37] Fifth, in respect of reports by experts, the business statement exception does not include a statement of opinion and is apt to admit only statements of facts made by experts in the course of business.[38]

16 There is a further reason peculiar to our law of hearsay in relation to civil proceedings for concluding that the law is in need of comprehensive reform. Unlike the law as it applies in criminal proceedings, reform of the law of hearsay in civil proceedings has been of a piecemeal nature. Whereas the Criminal Procedure Code[39] ("the CPC") was amended in 1976 to reduce the scope of the law of hearsay in criminal proceedings, the law of hearsay in civil proceedings was not subjected to similar or parallel reform. As a result, it could be said that our law has become uneven or even anomalous in applying more liberal hearsay rules in criminal proceedings than in civil proceedings.[40]

17 In practice, for what it is worth, the number of cases in which proof of witness unavailability is inexcusably ignored or overlooked when hearsay evidence is sought to be admitted under s 32 of the Evidence Act is still too significant.[41] This may indicate unfamiliarity with the law of hearsay but of itself furnishes no argument that the law has failed to match the reality of practice and is a trap for the unwary counsel. If indeed requirements of witness unavailability are essential to any principled approach to reform of the hearsay rule, counsel should have no excuse nor expect any excuse for neglecting them under any reform of the law.

C. A short note about this report

18 In preparing this report on the reform of the hearsay rule in civil proceedings, the LRC greatly benefited from the work done elsewhere and gratefully acknowledges the immense help it obtained from the various reports which are mentioned below. On one aspect of reform, little help could be obtained from elsewhere on account of the

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[36] See *Vaynar Suppiah & Sons v KMA Abdul Rahman* [1974] 2 MLJ 183, [1972–1974] SLR 239. See also *Kea Holdings Pte Ltd v Gan Boon Hock* [2000] 3 SLR 129 and *Bansal Hermant Govindprasad v Central Bank of India* [2003] 2 SLR 33, CA. *cf Wellform Construction Pte Ltd v Lay Sing Construction Pte Ltd* [2001] SGHC 12.

[37] *cf Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712.

[38] See *Vaynar Suppiah & Sons v KMA Abdul Rahman, supra* n 36.

[39] Presently Cap 68, 1985 Rev Ed.

[40] The only recent reform affecting hearsay evidence in civil proceedings was the substitution of new provisions in the Evidence Act (s 35) dealing with computer print-out evidence with uniform applicability in civil and in criminal proceedings.

[41] See *Central Bank of India v Hemant Govindprasad Bansal* [2002] 3 SLR 190, HC (where reliance on s 34 of the Evidence Act also failed); *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330; *Sintra Merchants Pte Ltd v Brown Noel Trading Pte Ltd* [1996] 2 SLR 444; *Sim & Associates v Tan Alfred* [1994] 3 SLR 169; *Vaynar Suppiah & Sons v KMA Abdul Rahman, supra* n 36. The hearsay rule continues to be overlooked in a significant number of cases. See *Top Ten Entertainment Pte Ltd v Lucky Red Entertainments Ltd* [2004] 4 SLR 559; *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd* [2004] 2 SLR 117; *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80; *Kea Holdings Pte Ltd v Gan Boon Hock, supra* n 36; *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR 501; *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd* [2000] 3 SLR 529; *Gema Metal Ceilings (Far East) Pte Ltd v Iwatani Techno Construction (M) Sdn Bhd* [2000] SGHC 37; *The Arktis Sky* [2000] 1 SLR 57. It appears that the hearsay rule is commonly overlooked by counsel when proving the plaintiff's losses. See *Intercontinental Specialty Fats Bhd v Bandung Shipping Pte Ltd* [2004] SGHC 1; *Keimfarben GmbH & Co KG v Soo Nam Yuen* [2004] 3 SLR 534.

unique nature of the Evidence Act. Whereas the Act from its inception introduced a different conception of hearsay from the common law, as discernible from the relevant ss 17 to 44, the courts have largely relied on the common law notion of hearsay, supposing that the common law hearsay rule is embodied in s 62, which in fact enacts the direct oral evidence rule.[42] This importation of the common law does not pose a major problem since normally the same results are obtained.[43] If, however, it was decided to introduce statutory amendments or changes to the law of hearsay, it would be necessary to ensure that the drafting of the new provisions be as far as possible compatible with the existing provisions of the Act which deal with hearsay evidence.

19 In the light of the foregoing, this report is in three main parts. The first part (see **Chapter II)** compares the Evidence Act and the common law and shows the differences between the statutory notion and the common law notion of relevancy. These differences need to be borne in mind in drafting such amendments as may be appropriate. The second part (see **Chapter III**) examines the options for reform. The discussion in the second part indicates that reform of the hearsay rule necessarily involves issues of procedural fairness, so the precise nature of the reform will vary from country to country, depending on the trade-off in procedural fairness which is politically acceptable in the country of reform. The third part (see **Chapter IV**) then examines the arguments for reform in the particular circumstances of Singapore, and **Chapter V** concludes the report with recommendations on safeguards to be introduced should the hearsay evidence rule be abrogated.

[42] *Wong Kok Keong v R* [1955] MLJ 13 at 14. See also *Lim Ah Oh v R* [1950] MLJ 269 at 270; *Soon Peck Wah v Whoon Che Chye* [1998] 1 SLR 234.

[43] "The Evidence Act does not formulate the rule against hearsay evidence. Rather it adopts an inclusionary rule, stating what may be admitted in evidence. Under s 5 of the Evidence Act, evidence may be given in any proceedings of [a] fact in issue or relevant fact. The common law definition of hearsay corresponds with the terminology of the Evidence Act. Statements of relevant facts are hearsay and inadmissible unless they fall within an exception to the hearsay rule since they are adduced to prove the facts to which they refer. However, where the statement itself is relevant, then it is the fact that the statement was made which is in issue.": *Roy S Selvarajah v PP*, *supra* n 19, at 530.

II. Comparing the Evidence Act and Common Law

A. Introduction to the Evidence Act

20 Unlike the common law, the scheme of relevancy laid out in the Evidence Act begins with the fundamental proposition stated in s 5, that evidence of a relevant fact is admissible and evidence that does not establish a relevant fact is inadmissible. Thus, facts are either relevant or irrelevant while evidence is not relevant or irrelevant but is either admissible or inadmissible. Section 5 further states implicitly that a fact is relevant if declared by the Act to be relevant. This second fundamental proposition means that a fact is relevant if its nature and degree of connection with another relevant fact or a fact in issue bring it within a category of relevancy as provided by the Act. In other words, "whatever is logically probative is not necessarily admissible in evidence" and a fact is relevant only if it is statutorily relevant.[44] The role of the judge is simply to ensure that the fact is relevant according to one of the many provisions of the Act, such as s 7 which provides that facts of preparation are relevant, and s 8 which provides that motive is a relevant fact.[45]

21 It is important to appreciate that the Act does not state when a statement containing facts is relevant and is silent on what hearsay is.[46] Section 3, however, defines facts to include statements, and various illustrations in the Act confirm that statements may be relevant facts if they satisfy the terms of the provisions of the Act. Thus, a statement may be a relevant fact showing motive, and a recent complaint and its terms may be relevant facts under s 8.[47] A statement of facts may also be relevant under more specialised or specific relevancy provisions such as those of ss 17 to 44 which are recognisable hearsay exceptions. These are specific relevancy provisions in the sense that the relevancy as prescribed is not part of the transaction in issue and is specifically conditional on the fulfilment of prescribed conditions. Speaking generally, a statement of facts will not be a relevant fact under these sections unless the specific conditions which these sections prescribe are met.

22 Where a statement containing facts is a relevant fact, inferences may be drawn as to the existence of the facts contained in the statement. This is discernible from Stephen's *Introduction to the Indian Evidence Act 1872* especially in his discussion of s 11(*b*).[48] There he makes it plain that the fact that the contents of a statement are highly probable must not result in admissibility of the statement in evidence unless the statement is independently a relevant fact as determined by the relevancy provisions of the Act apart from s 11(*b*).[49] It follows that where a statement is a relevant fact

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[44] *PP v Haji Kassim* [1971] 2 MLJ 115 at 115, FCM.

[45] The closest the common law has come to this is its categories of relevance for purposes of the second limb of the similar fact evidence rule.

[46] This necessarily means an out-of-court statement or an in-court statement made on a different occasion.

[47] But no statement as to facts made by persons not called as witnesses is relevant within the categories of relevance prescribed by ss 6 to 11, both inclusive. The effect is that such statement is excluded except in certain specified cases of specific relevance. See Sir James Stephen, *Introduction to the Indian Evidence Act 1872* (Macmillan & Co, 1872) at pp 122–123.

[48] Sir James Stephen was the drafter of the Indian Evidence Act 1872. The Singapore Act was modelled on the Indian Act.

[49] The effect of the section is that "[n]o statement shall be regarded as rendering the matter stated highly probable … unless it is declared to be a relevant fact under some other section of this Act."

independent of s 11(*b*), the courts may draw the inference that the facts exist in accordance with the contents of the statement, if that inference is strong.[50]

23 The fact that the Act distinguishes between relevancy of fact and admissibility of evidence is important in that although a fact is relevant under some section, evidence of it need not necessarily be received or used.[51] For our purposes, whatever may be the true effect of s 138 of the Evidence Act, the courts accept that they have a general discretion to exclude evidence though it may establish a relevant fact.[52] The general discretion to refuse to admit evidence in certain circumstances means that a court is obliged to admit evidence which has a probative value that outweighs its prejudicial effect on the accused.[53]

B. Comparing the common law

24 Instead of comparing our law of hearsay (as contained in the Evidence Act) with the common law of hearsay, it may be more instructive to compare it with the Evidence Act 1995 of the Commonwealth of Australia, which is a very recent codification of the common law of evidence. The reason is that if our Evidence Act is to be amended by copying or adapting precedents from the rest of the common law world, the recent codification will furnish valuable experience as to what statutory pitfalls to avoid and what statutory devices to include.

25 The Evidence Act 1995 of the Commonwealth of Australia applies in proceedings in the Federal Courts or the Australian Capital Territory courts. Among the states which make up the Commonwealth of Australia, only the state of New South Wales has enacted an Act in similar terms. We refer to both indistinguishably in this report. For our purposes, "the statutory concept of relevance [enacted by the Act] can fairly be equated with the common law concept".[54]

26 This is the concept of logical relevance because s 55(1) of the Australian Evidence Act 1995 states that "[t]he evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".[55]

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[50] *cf Wong Foh Hin v PP* [1964] MLJ 149, FCM. See also s 10 which provides that "Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons, in reference to their common intention after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it". There is no doubt therefore that statements made in furtherance of a conspiracy may be used to show the identity of the parties, and not merely to show what acts by way of statements were effected. See *Ching Mun Fong v Peng Ann Realty Pte Ltd* [1995] 2 SLR 541 at 549.

[51] Section 5 contains an explanation: "This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to civil procedure." The explanation alone makes it clear that there is a distinction between relevance and admissibility.

[52] See the majority judgments in *Cheng Swee Tiang v PP* [1964] MLJ 291.

[53] It should be noted that in some instances the relevancy provisions are themselves the product of an *a priori* balancing between probativeness and prejudice; in which event no further balancing is warranted or necessary. See *Lee Kwang Peng v PP* [1997] 3 SLR 278.

[54] Gaudron and Kirby JJ in *Papakosmas v R* (1999) 196 CLR 297 at 312.

[55] Sections 56(1) and 56(2) state that "[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding" and that "[e]vidence that is not relevant in the proceeding is not

27 Various other provisions in the 1995 Act state the rules of exclusion. Among them is s 59(1) which states the hearsay rule as a rule of exclusion as follows: "Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation."[56]

28 For our purposes, another important rule of exclusion is contained in s 135 of the same Act which gives a general power to the court to exclude evidence more prejudicial than probative. The powers given by ss 136 and 137 are noteworthy since they extend the common law in important respects by empowering the court to act on a case-by-case basis to safeguard against what may be specific and identifiable prejudicial effects of any hearsay evidence that is admitted under the Act.[57]

29 Thus, unlike our Evidence Act, the Australian Evidence Act 1995 sets out an exclusionary system of relevancy based on the principle that all logically relevant evidence is admissible unless excluded by rules of exclusion of which the hearsay rule is perhaps the most prominent example.

C. Implications for reform

30 The above comparison implies that the drafting of reformative legislation will not be straightforward. As the Evidence Act's conceptions of relevance and hearsay are unique, there will be no easy precedents to copy and no direct lessons from which to learn. For instance, the Australian Evidence Act 1995 does not distinguish between fact and evidence. One consequence of this is that hearsay must be defined in terms of an out-of-court statement (previous representation) in order to ensure that the statements made in the course of giving evidence in court are not within the hearsay rule. Our Evidence Act, however, distinguishes between fact and evidence and it is already clear that out-of-court statements are facts and potentially within the hearsay rule whereas statements made in the course of giving evidence are evidence and outside the hearsay rule. Drafting difficulties will vary according to which reform option is to be implemented. The difficulties will be greatest if the rule is to be refined and amplified. If the rule is to be supplemented or if the rule is to be abolished, the drafting complications are considerably reduced in that it would be necessary only to attend to the drafting of the independently operative supplemental provisions or safeguards, if any, to accompany abolition of the rule. In either case, this should not significantly affect the existing provisions of our Evidence Act[58] or of any other statutory provisions on hearsay.[59]

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admissible" respectively. Thus, the scheme of relevancy in the Act is based on logical relevance and on the distinction between relevancy of evidence and admissibility of evidence.

[56] Implied assertions are therefore not within the rule.

[57] "Sections 135, 136 and 137 contain powers which are to be applied on a case by case basis because of considerations peculiar to the evidence in the particular case." (McHugh J in *Papakosmas v R*, *supra* n 54, at 327).

[58] Including the provisions in Pt IV on evidence of bankers' books which are said to constitute another exception to the hearsay rule.

[59] Such as the Merchant Shipping Act (Cap 172, 1970 Rev Ed) ss 140(4)–(6) and 143 (see *Deutz Far East (Pte) Ltd v Pacific Navigation Co Pte Ltd* [1989] SLR 926) and the Registration of Births and Deaths Act (Cap 267, 1985 Rev Ed) s 25(5) (see *Re Will and Codicil of Tan Tye decd* [1994] 3 SLR 407).

III. Reform Options

A. Diversity of options

31 In this part, we review a number of reform options which have either been implemented or considered.

32 It is very obvious that no consensus has developed as to how the hearsay rule should be altered or modified. "Over the years courts and commentators have disagreed [and continue to disagree] over the history of, and the rationale for, the hearsay rule."[60] This has impeded uniform reform of the rule. Major law reform commissions have produced divergent recommendations and none have been compelling. To compound the difficulties, each law reform commission has examined the necessity of reform in different contexts and such proposals as may be made are sometimes peculiar responses to differences in context.[61]

B. Australia

(1) Australian reform

33 Australian reform of the hearsay rule comprehensively covers both the rule in civil and in criminal proceedings. Broadly, it assumes that "the rationales for excluding hearsay are its potential unreliability and the threat that hearsay evidence poses to procedural fairness."[62]

34 In the Australian reform, there is a difference between the admissibility of first-hand hearsay in relation to civil and criminal proceedings. In civil trials where the maker of the hearsay statement is unavailable, first-hand hearsay is admissible provided prior notice is given.[63] If the maker is available, hearsay is admissible provided it was made when the facts represented were fresh in the maker's memory.[64] In fact, hearsay is admissible in these circumstances even without calling the maker if to do so would involve undue delay or expense.[65]

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[60] McHugh J in *Papakosmas v R*, *supra* n 54, at 322. According to the Law Commission of England and Wales, the exceptions are based on practical considerations, inherent reliability either because of the circumstances of recordation or because of contrariness to interests of the maker, or because of being the best or only available method of proof of a particular fact. See Law Commission of England and Wales, *The Hearsay Rule in Civil Proceedings* (Report No 216, 1993) at p 4, para 2.3.

[61] The Australian Law Reform Commission examined the question holistically in the context of evidence law as a whole. The Law Commission of England and Wales, however, was mandated to examine the case for civil reform.

[62] McHugh J in *Papakosmas v R*, *supra* n 54, at 322.

[63] Section 67 of the Australian Evidence Act 1995 addresses the issue of procedural fairness by providing that notice must be given before adducing some hearsay evidence including that admitted via s 65(2) and 65(3), though not s 66(2).

[64] Section 60 paves the way to a number of new exceptions. It states that: "The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation." Section 66(2) provides that, in a criminal proceeding, evidence of a previous representation is not inadmissible hearsay if, when the representation was made, the facts represented were fresh in the memory of the representor.

[65] However, in criminal trials where the maker is unavailable, first-hand hearsay is admissible if it satisfies specified guarantees of reliability and prior notice is given. Hearsay evidence given by the accused is not subject to the

35 With respect to multiple hearsay, no distinction is made between civil and criminal proceedings and specific categories such as government and commercial records, reputation as to family relationships and public rights, telecommunications, commercial labels and tags are admissible in evidence on grounds of reliability or necessity or both.

36 In civil proceedings but not criminal proceedings, waiver of the hearsay rule is permitted and the rule is also avoided if its application would cause or involve unnecessary expense or delay. In interlocutory proceedings, the rule is dispensed with provided evidence of the source of any hearsay evidence relied on is adduced.

37 Safeguards against procedural unfairness are included, such as notice rules, extension of discovery rules and power to direct witnesses be called and documents be produced and admissibility of evidence relating to credibility of maker.[66]

38 While the common law and statutory exceptions are preserved, it is evident that the Act has extended the statutory hearsay rule beyond the common law in unprecedented ways by creating new exceptions and conferring new powers which act as safeguards against procedural unfairness.

(2) Australian case law

39 Thus far, the Australian High Court has had to decide a number of questions involving extensions of the hearsay rule beyond the common law.

40 In *Graham v R*,[67] on a trial for sexual offences, evidence was admitted of a complaint made by the complainant to a friend that she had been sexually assaulted by the accused. The complaint was made six years after the last of the acts alleged against the accused. It was held that the evidence was not admissible under s 66 as the facts were not recent or immediate when the complaint was made.

41 In *Lee v R*,[68] "a witness at a trial had made out-of-court statements which included a report of confessional statements made by the accused to the witness. At the trial the witness gave evidence denying, or not admitting, that he had heard the confessional statements." It was held that s 60 did not permit an out-of-court statement which was itself a report of what another had said to be used as proof of the truth of what was reportedly said.

42 In *Papakosmas v R*,[69] it was held that a previous complaint was admissible to prove the substance of the complaint and that this departure from the common law should not be artificially constrained by invoking the powers contained in ss 135, 136 and 137 so as to effectively reinstate the common law rules and distinctions.

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specified guarantees and only prior notice must be given. If the maker is available, only hearsay statements made when the facts were fresh in the memory are admissible.

[66] Section 165 addresses the reliability issue by providing that in a jury trial the judge may warn the jury of the dangers inherent in certain types of evidence including hearsay evidence. Section 121 gives discretion to exclude the evidence if its prejudicial effect exceeds its probativeness.

[67] (1998) 195 CLR 606.

[68] (1998) 195 CLR 594.

[69] *Supra* n 54

43 In *Adam v R*,[70] it was held that evidence of a witness's previous inconsistent statements could be led as evidence of the truth of their contents because, having been admitted for purposes which included an attack on the credibility of the witness, the evidence fell within the exception provided by s 60. As might be expected, the temptation to use the discretion to reinstate the common law rule had to be repelled in this case.[71]

C. South Africa

(1) South African inclusionary scheme

44 The relevant South African reforms were implemented in 1988 (see Law of Evidence Amendment 1988 (Act 45 of 1988)) and are an interesting example of the abolition of the hearsay rule and its replacement by a wholly discretionary and inclusionary scheme. This model from a mixed civil and common law jurisdiction departs from the Australian model in rejecting any differentiation between the rule in civil and in criminal proceedings. In both instances, the effect of the Law of Evidence Amendment Act 1988 is that the judge has discretion to admit or exclude hearsay in contested cases where the maker of the statement does not testify.

45 Section 3(1) reads as follows:

> Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
>
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
>
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
>
> (c) the court having regard to –
>
> (i) the nature of the proceedings;
>
> (ii) the nature of the evidence;
>
> (iii) the purpose for which the evidence is tendered;
>
> (iv) the probative value of the evidence;
>
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
>
> (vi) any prejudice to a party which the admission of such evidence might entail; and
>
> (vii) any other factor which should in the opinion of the court be taken into account,

[70] (2001) 207 CLR 96.

[71] See also *Papakosmas v R*, *supra* n 54, at 323–324.

> is of the opinion that such evidence should be admitted in the interests of justice.

46 Section 3(2) adds that:

> [t]he provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

47 Section 3(4) states that:

> [f]or the purposes of this section –
>
> "hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence ...

(2) South African case law

48 The opening words of the section are intended to abridge common law exceptions while preserving other specialised statutory provisions on hearsay. This appears to have given some difficulty. In *S v Mpofu*,[72] the court stressed that in terms of the definition of hearsay contained in the section, the statement of a passerby must be regarded as hearsay whether or not at common law a statement which is part of the *res gestae* is regarded as being hearsay or not.[73] On the other hand, in *Randfontein Transitional Local Council v Absa Bank Ltd*,[74] Gautschi AJ seems to have proceeded in two steps, first determining admissibility according to the common law and then admissibility under the section. The silence on the effect of the section on affidavit evidence is another difficulty. In *Padongelukkefonds v Van den Berg*,[75] it was held that hearsay evidence in an affidavit could be struck out as it was in the circumstances impossible to exercise the discretion.

49 Experience shows that most of the difficulties have arisen in connection with the assignment of weights to factors which the trial judge should consider in determining admissibility. Under the 1988 Act, the list of factors is deliberately left open-ended and meet for judicial development. Initially, unfamiliarity led to ultra-conservatism, with the discretion sparingly exercised and in effect the common law hearsay rule re-applied under colour of the section. See *Hlongwane v Rector, St Francis College*;[76] *S v Cekiso*[77] where it was held that "the discretion … should not be exercised in favour of allowing hearsay evidence on controversial issues upon which conflicting evidence has already been given." See also Cloete AJ in *Aetiology Today CC t/a Somerset Schools v Van Aswegen*.[78] However, in *Metedad v National Employers' General Insurance Co Ltd*[79] the court expressed a more expansive view of the section,

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[72] 1993 (3) SA 864 (N).

[73] This is still controversial. See *R v Callender* [1998] Crim LR 337.

[74] 2000 (2) SA 1040 (W).

[75] 1999 (2) SA 876 (O).

[76] 1989 (3) SA 318 (D).

[77] 1990 (4) SA 20 (A) at 22A.

[78] 1992 (1) SA 807 (W) at 822A–B.

[79] 1992 (1) SA 494 (W) at 499G.

saying that a court is "bound to apply it when so required by the interests of justice." In *Hewan v Kourie No*,[80] Du Plessis J warned that the flexibility of the section should not be negated by giving reliability pre-eminence and falling back on the common law rule against hearsay. Hearsay should be admitted if a consideration of the factors provides "a clear, though not overwhelming preponderance of reasons in favour of [admissibility]". See also *Mnyama v Gxalaba*.[81]

D. Scotland

(1) Scottish abrogation

50 In the same year when the South African reforms were implemented, the Civil Evidence (Scotland) Act 1988 (c 32) was passed. The Act followed upon the Scottish Law Commission's *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings*[82] but was more radical in scope than the Commission had proposed. In proposing abolition, the Law Commission was influenced primarily by the argument that there had been no problems in those non-judicial proceedings where before the reform hearsay was regularly admitted.[83]

51 Section 2(1), the principal enactment, states that:

> In any civil proceedings—
>
> > (a) evidence shall not be excluded solely on the ground that it is hearsay;
> >
> > (b) a statement made by a person otherwise than in the course of proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible; and
> >
> > (c) the court, or as the case may be the jury, if satisfied that any fact has been established in those proceedings, shall be entitled to find that fact proved by the evidence notwithstanding that the evidence is hearsay.

It is noted that s 2 must be read with the provisions of r 108A of the Rules of Court 1965.

52 By s 9, statements of opinion are given the same treatment as statements of facts. Notice requirements are missing but s 4 permits an additional witness to be called by either party before the start of closing submissions; so if the maker of a statement to be adduced in evidence is available, his presence for cross-examination can be secured, though only with leave of the court. Section 7 makes provisions for admissibility of negative hearsay in business records.

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[80] 1993 (3) SA 233(T) at 240A.

[81] 1990 (1) SA 650 (C).

[82] Scottish Law Commission, *Report on Corroboration, Hearsay and Related Matters in Civil Proceedings* (Report No 100, 1986).

[83] *Id*, at para 3.14. See also Field, "Civil Evidence: A Quantum Leap" 1988 SLT 349.

(2) Scottish case law

53 This was probably the first abolition of the hearsay rule, unaccompanied by any major replacement of the rule in wider form. It has been said that sub-s (a) is effective in abrogating not only the rule but also all the exceptions to the rule.[84] This apparently seems to be trouble-free although it seems from *Sanderson v McManus*[85] that the courts must still differentiate between hearsay and non-hearsay. The reform is undoubtedly a radical one and as Lord President Rodger has had occasion to remark: "At times the courts have had difficulty in adjusting to all the implications of that revolution."[86] The question whether the maker of a statement to be admitted under the section must have been competent at the time when the statement was made posed a particularly intransigent problem. It was only firmly resolved in *T v T*[87] when the Court of Sessions finally decided that the subsection does not embody a competence test. There has also been some difficulty with coverage of expert reports. In *Lenaghan v Ayrshire and Arran Health Board*,[88] it was held that they were not within the abrogation as there was an independent rule of court requiring such reports to be agreed as admissible evidence of their contents before they could be admitted in evidence.

E. New Zealand

(1) New Zealand proposed abrogation

54 New Zealand law shares the same combination of common law and specific statutory exceptions as other common law jurisdictions. The principal statutory exception is found in the Evidence Amendment Act 1980, which preserves hearsay exceptions under the common law and other statutory exceptions and applies in both civil and criminal proceedings.[89] Prompted by the difficulties which the 1980 Act gave rise to in *R v Hovell*,[90] the New Zealand Law Commission was directed to consider how the hearsay rule should be reformed and in 1988 made certain proposals as follows.

55 In civil cases, the hearsay rule should effectively be abolished, subject to the general power to exclude evidence which is unfairly prejudicial, misleading, confusing or time-wasting.[91] This is a variant of the Scottish reform.

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[84] It seems, however, limited to first hand hearsay only. *cf* the Hong Kong Law Reform Commission *Report on Hearsay Rule in Civil Proceedings* (July 1996) at p 48. Multiple hearsay evidence remains inadmissible and if the view that the exceptions are also abrogated is correct, multiple hearsay evidence is inadmissible though before the enactment it would have been.

[85] 1997 HL 55.

[86] *T v T* 2001 SC 337 at 348D.

[87] *Ibid.*

[88] 1994 SC 365.

[89] Replacing the more limited Evidence Amendments Acts of 1945 and 1966.

[90] [1986] 1 NZLR 500.

[91] In criminal cases the general power is arguably an inadequate filter. Rather than abolish the rule it should be rationalised on the basis of a principle of reliability. Hearsay should not be admissible unless the circumstances relating to the statement provide reasonable assurance that it is reliable.

56 Procedural safeguards should apply to the reception of hearsay evidence. In civil cases,[92] whenever a hearsay statement is offered in evidence other parties should be able to require an available declarant to be called, with the hearsay statement being excluded if the party offering it declines to call the declarant (unless the court finds the attendance of the declarant need not be required). A party should also, with the leave of the court, be allowed to call or recall witnesses in relation to the hearsay evidence which is admitted.

57 To date, the proposals have yet to be implemented.

F. England and Wales

(1) English abrogation

58 The English abrogation of the hearsay rule in civil proceedings post-dates all the reforms mentioned above. It was initiated in October 1989 with the Lord Chancellor's inquiry. Four years later, the Law Commission reported in 1993 certain radical proposals and the Civil Evidence Act 1995 implementing the proposals was enacted two years after.[93]

59 The statutory regime which the Commission examined was largely built upon the UK Civil Evidence Act 1968 (c 38) as amended in 1972.[94] This was a hearsay with notice system with special provisions (dispensing with notice) for business records and computer records.

60 The Commission's conclusions were that the current statutory regime was unwieldy, that the law was difficult to understand, and outmoded in some cases, that there was a new and more open approach to civil litigation favouring admission of all relevant evidence, trusting the judge to give only proper weight to evidence which is not the best evidence, that there was concern that intelligent and rational witnesses and litigants were confused by and dissatisfied with the existence of rules of evidence which sometimes operated to prevent them from giving evidence of matters which they rightly perceived as relevant and cogent.

61 For these reasons, the Commission recommended that evidence should no longer be excluded on the ground that it is hearsay; hearsay evidence should, however, remain a category of evidence which is accorded special attention by courts. To this end, parties should give notice, where reasonable and practicable, that they intend to rely on hearsay evidence and the courts should be provided with guidelines to assist

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[92] These rules apply equally in criminal cases with an additional requirement: a party proposing to offer hearsay evidence should notify all other parties in advance so that they have time to prepare to meet the hearsay and to decide whether to require an available declarant to be called.

[93] UK Law Com Report No 216, *supra* n 60. See also UK, Law Commission of England Wales, *The Hearsay Rule in Civil Proceedings* (Consultation Paper No 117, 1991). See now Civil Evidence Act 1995 (c 38) implementing. As to criminal proceedings see *Report of the Royal Commission on Criminal Justice* chaired by Lord Runciman (London: HMSO, Cmnd 2263, 1993) ch 8 paras 25–26. See also the Criminal Justice and Public Order Act 1994 (c 53). See also UK, Law Commission of England and Wales, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Consultation Paper No 138, 1995).

[94] Pursuant to the Law Reform Committee of England And Wales *Thirteenth Report: Report on Hearsay Evidence in Civil Proceedings* (Cmnd 2964, 1966). The 1972 amendments extended the Act to statements of opinion.

them in assessing the weight to be attached to such evidence. The Commission further recommended that there should be a uniform approach to the treatment of hearsay evidence in civil proceedings of all types, although rules of court may provide for the duty to give notice to be disapplied to specified classes of proceedings where appropriate.

62 It should be noted that even before the Civil Evidence Act 1995 came into force, the courts had begun to limit the impact of the hearsay rule in civil proceedings. For instance, in *Secretary of State for Trade and Industry v Ashcroft*,[95] the Court of Appeal denied that the rule had any application in applications by the Secretary of State for disqualification orders against directors pursuant to s 7 of the Company Directors Disqualification Act 1986.[96] It was likewise with respect to immigration matters. See *R v Secretary of State for the Home Department, ex parte Rahman.*[97] However, the Commission, unlike the Scottish Law Commission, would not appear to have been greatly influenced by these considerations in proposing abolition of the hearsay rule.

63 It should also be noted that the English abrogation is more extensive than the Scottish in that it will be possible under the former, but impossible under the latter, it seems, to rely on second-hand hearsay.[98]

(2) English case law

64 To date, the Civil Evidence Act 1995 has given rise to only one reported decision since its coming into force. In *McCool v Rushcliffe Borough Council*[99] the question of the interrelation of civil and criminal proceedings was raised. The applicant applied for a licence to drive a private hire vehicle. The justices refused him a licence and the question was whether they were entitled to go behind an acquittal of a charge of indecent assault when acting as a taxi driver and to decide that he probably committed the assault on a civil standard. Part of the evidence relied on was hearsay evidence. It was held that the justices were entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment.

[95] [1997] 3 All ER 86.

[96] Chapter 46, 1986. See also *Re Rex Williams Leisure plc* [1994] 4 All ER 27 on s 8 of the same Act.

[97] [1996] 4 All ER 945.

[98] See para 53 above.

[99] [1998] 3 All ER 889.

IV. Possible Models for Singapore

A. Preliminary remarks

65 We have included in our review of the options for reform the reformative provisions of the mixed civil and common law jurisdictions of South Africa and Scotland because they serve to show that reform options are not concluded by adversarial considerations. In addition, it could be argued that cases refusing to apply the rule in non-adversarial proceedings are not so much suggesting that the rule is indispensable on adversarial considerations, but that adversarial considerations are merely one of the justifications for the rule of exclusion. This is supported by studies conducted elsewhere which debunk the suggestion that a hearsay rule is not needed when the trial judge has powers to carry out independent investigations. These studies conclude that there is similar sensitivity to hearsay in Continental systems which adopt the inquisitorial mode of trial and the only difference is that this sensitivity does not manifest itself in a rule of exclusion but in directions as to how to find justifications for findings of fact.[100] It is also clear that there is no warrant for saying that mixed civil and common law jurisdictions would be more likely to favour abrogation of the rule. Although among the jurisdictions reviewed, Scotland, a mixed jurisdiction has abandoned the hearsay rule; England (a common law jurisdiction) has preferred and New Zealand (another common law jurisdiction) has proposed abrogation of the rule. A reasonable conclusion from our review of the options for reform is that the hearsay rule responds not so much to adversarial considerations but to notions of procedural fairness which necessarily vary even among common law jurisdictions which adhere to the adversarial mode of trial.

66 In determining which option is most appropriate for Singapore, we have classified the options into two broad categories, namely retention with refinements, and abrogation with safeguards. We then sub-divide each category into sub-categories: the retention category according to type of refinement, and the abrogation category according to type of safeguard. We set out the arguments for and against each option in the following paragraphs.

B. Retention with refinements

67 This option typifies the reform in Australia and has also been adopted in Ireland, Canada and the USA.

68 It is said to be easy to implement as it preserves continuity with the common law. For instance, the Australian reform retains the common law rule in structure and is of an incremental nature. If this option were to be adopted in Singapore, it would arguably preserve continuity with the Evidence Act.

69 It is conservative and practitioners will find it relatively easy to familiarise themselves with amendments to the law. For instance, the Australian reform is familiar

[100] H Reiter, "Hearsay Evidence and Criminal Procedure in Germany and Australia" (1984) 10 Monash L Rev 51 at p 55.

as it builds upon what is already known. The ease of familiarisation will depend of course on what precise refinements are introduced and should not be overstated.

70 This option would serve to provide detailed guidance to the lower courts especially on hearsay evidence. Those who claim this as an advantage of the retention with refinement option assume that the lower courts will find it easier to apply a rule than to apply a judicial discretion. While this may be true of rules which are straightforward, the hearsay rule has acquired a degree of sophistry and the validity of the assumption is questionable.

71 An obvious demerit of the retention with refinement option is that it adds to the complexity of the law. Moreover, since the exceptions had developed in an *ad hoc* manner, such reform would call for an immense amount of work as to where the exact lines should now be drawn. In addition, as we have mentioned earlier, the drafting difficulties are severe and would require much time and effort to overcome.

72 A more expedient alternative would be to supplement the existing exceptions by superadding a few new and wider exceptions to the existing exceptions. This, however, would be an incomplete solution since periodic review would be necessary to see if other new exceptions should be created from time to time. Overlapping exceptions would be inevitable and appeals on overlapping exceptions could proliferate. As experience with our law as it stands bears out, it cannot be assumed that the existing exceptions will fade with time as the new overlapping exceptions become more familiar.[101]

73 Within the second alternative described in the preceding paragraph, namely refinement with supplementation, there are two familiar sub-options so far as first-hand hearsay is concerned. The first requires the party adducing the hearsay evidence to show that the maker of the statement is unavailable in a prescribed sense. The second dispenses with any requirement of witness unavailability and instead requires prior notice to be given. It is of course possible to postulate a slight variation of the second sub-option (which has Australian precedents) in which, as a general rule, prior notice must be given but in exceptional cases even prior notice may be dispensed with.

(1) Retention sub-option matching Criminal Procedure Code reform

74 The first sub-option could take the form of adapting the provisions of s 378 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) for application to civil proceedings. The advantages, it is said, are that there is already familiarity with the provisions of s 378 of the Criminal Procedure Code, and those provisions do not appear to have caused serious problems in practice.[102]

75 However, reform of this nature could be criticised as being timid and not going far enough. We note that such reform was in fact proposed in October 2002 by the

[101] See *Re Will and Codicil of Tan Tye decd*, *supra* n 59. See also *Shanmugam v Pappah* [1994] 1 MLJ 144, HCM; *Jamaluddin bin Hashim v PP* [1999] 4 MLJ 1, HCM; *Commissioners of the Municipality of Malacca v Sinniah* [1974] 1 MLJ 77; *Wan Nafi bin Wan Ismail v Hajjah Lijah bte Omar* [1996] 5 MLJ 534.

[102] But see *Roy S Selvarajah v PP*, *supra* n 19. In addition, it could be disputed that the relative low incidence of case law does not imply freedom from difficulties. Questions such as whether a negative statement may be proved remain untested and the English experience is a more certain predictor of its continued success.

committee appointed by the Attorney-General with Associate Professor Chin Tet Yung in the chair. However, the committee was constrained then to make recommendations for a uniform law of hearsay in civil and criminal proceedings with a view to replacing s 32 of the Evidence Act and the hearsay provisions in the Criminal Procedure Code. Our case is very different since we are no longer constrained by any need to achieve a uniform solution to the problem of hearsay in civil and in criminal proceedings.

76 With respect to multiple hearsay statements, the first sub-option requires adapting the provisions of s 380 of the Criminal Procedure Code to civil proceedings. Again, reform of this nature could be criticised as not doing enough to facilitate proof of commercial transactions in that witness unavailability would still be a condition for admissibility.[103]

(2) Retention sub-option with refined notice system

77 The second sub-option requires the party offering hearsay evidence to give prior notice of his intention to do so to the other party.

78 We think that a notice system is to be preferred to a system based on witness unavailability. It would lower the costs of litigation as well as eliminate tactical objections not based on merit. It would also be less uncertain than a witness unavailability requirement which the case law on s 32(*b*) of the Evidence Act has shown to be troublesome.

79 The arguments which have prevailed upon several law commissions to abandon the notice system are useful indirectly in showing that adoption of a notice system as exemplified by the UK Civil Evidence Act 1968 as amended in 1972 will not be trouble-free. However, experience with the 1968 Act furnishes valuable lessons on how the notice system may be improved.[104] For this reason, the adoption of a notice system suitably simplified and modified in line with the lessons learnt from England and New Zealand is an attractive option.[105]

80 If this reform is to be adopted, we recommend at least three improvements.[106] First, the notice to be given should simply state the nature of the hearsay evidence to be adduced, but if the party against whom the evidence is to be adduced requests, further particulars must be given where it would be reasonable and practicable to do so. Second, in some cases where the evidence would, without fault of either party, be inordinately difficult to procure, the notice may be dispensed with. Third, the party offering the evidence should be obliged to offer evidence of the maker's credibility so far as this is possible.

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[103] The dissatisfaction with the notion of a business record as a primary compilation would also need to be addressed.

[104] To some extent one can also benefit from the experience with the New Zealand Evidence Amendment Act 1980.

[105] Note that under the UK Civil Evidence Act 1968 (c 64), the court is, however, given a residual discretion to admit a particular item of hearsay evidence even where none of these pre-conditions are applicable to the maker of a statement or where no notice has been given of it. If the opposing party requires the attendance of a person unnecessarily he may be penalised in costs.

[106] The English Law Commission thought that if the notice system was to be retained, the notification procedures needed to be amended. See UK Law Com Consultation Paper No 117, *supra* n 93, at paras 4.5–4.9.

81 We are of the opinion that whether a witness unavailability system or a prior notice system is adopted, hearsay should still be permitted if the parties are so agreed. Hearsay is already regularly admitted by agreement even though there is strictly no warrant for it.[107] As has been said, the rule is "already honoured more in the breach than in the observance". A statutory amendment to regularise the present position would make it impossible for counsel to invoke the hearsay rule as a tactical advantage on behalf of his client.

(3) Retention sub-option with inclusionary discretion

82 The most radical retention sub-option rejects both witness unavailability and prior notice as conditions of admissibility and relies instead on a general judicial discretion to admit hearsay evidence (sometimes described as an inclusionary discretion). The South African reform is of this nature.[108] In exercising its discretion, the court may of course take into account the fact, if any, that the party offering the evidence gave prior notice to the other of its intention to do so and/or the fact that the maker of the statement to be adduced in evidence is unavailable as a witness.

83 The wide flexibility inherent in this option is its greatest advantage. Conversely, uncertainty is its greatest drawback. We think that this option is not attractive as it stands. It imposes too great a burden on the judiciary. This seems to be the experience in South Africa. Conversely, it gives the trial judge too great a role and is as likely to result in a narrower hearsay rule as in a wider. Admissibility being a matter of discretion, it would furthermore be difficult for an appellate court to intervene to correct what it feels is an exercise of discretion in the wrong direction. The result would be large differences in the practice of different courts with respect to admissibility, leading to difficulties in trial preparation since the decision on admissibility would not be known until it was actually made.[109]

C. Abrogation

84 This option typifies the reform in England, Scotland and the proposed reform in New Zealand. It is also favoured in Hong Kong and Jersey and has been proposed for Northern Ireland. We note that in no country thus far has this option been extended to such other statutory exceptions to the hearsay rule as may have specifically been enacted. The option typically involves preserving the admissibility of hearsay evidence under other specific statutory provisions. We further note that in the case of England the abrogation is expressly stated not to affect the common law exceptions relating to published works of a public character and public documents and records as well as

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[107] This is because the Evidence Act does not permit parties to a proceeding to make relevant that which is irrelevant. See *Abdul Khoder bin Shafie v Low Yam Chai* [1989] 2 MLJ 483; *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377 at 382. In other words, no waiver of the hearsay rule can be entertained. In *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439 at [49], it was said that the court is entitled to reject hearsay evidence even though counsel did not object. See also *Aw Kew Lim v PP* [1987] SLR 410; *MUI Bank Bhd Johor v Tee Puat Kuay* [1993] 3 MLJ 239; *Keimfarben GmbH & Co KG v Soo Nam Yuen, supra* n 41. Strictly, the court is bound to reject the evidence in spite of the absence of objection. *cf Lim Guan Cheng v JSD Construction Pte Ltd* [2004] 1 SLR 318; *Cheong Gim Fah v Murugian s/o Rangasamy* [2004] SGHC 93; *Toh Kim Chan v Toh Kim Tian* [2004] SGHC 66.

[108] See also the Federal Rules of Evidence (US).

[109] These arguments were made by the English Criminal Law Revision Committee in its *Eleventh Report on Evidence (General)* (Cmnd 4991, 1972) at para 246. These arguments apply equally in civil proceedings.

hearsay statements of reputation and family tradition.[110] The special considerations which have led to this qualified abrogation in England do not apply in Singapore.[111] If the abrogation option is to be adopted in Singapore, it will only be necessary to ensure that the existing provisions relating to public documents and hearsay statements of reputation and family tradition are confined to criminal proceedings.[112]

85 The chief advantage of the abrogation option is that it is simple and the hearsay rule will cease to afford a ground of appeal as of right.[113]

86 The option reflects the existing practice with respect especially to parties' agreeing on an agreed bundle of documents for the trial but removes its drawback of affording a tactical ground to object to the evidence in the course of trial. Although the practice has served as *de facto* reform and removes much of the pressure for reform of the hearsay rule in civil proceedings, "[i]t is a method of reform … that carries with it grave dangers. … the rules lie in wait for any practitioner to use when it is to his client's tactical advantage."[114]

87 This option reflects the common sense judgment that no party would willingly put forward hearsay evidence if better direct evidence was available.[115] In other words, abolition would not result in the court being flooded with evidence of low probative value because it is in the party's interest to adduce non-hearsay evidence in preference to hearsay whenever it is available.[116] Moreover, the failure to do so could attract adverse inferences and weaken a party's case.[117]

88 It could lower the costs of trial as it would allow parties to prove formal or introductory and other less significant relevant facts by hearsay whenever the costs of calling witnesses to testify to those facts are grossly disproportionate to the importance of the fact in relation to the facts in issue. The number of witnesses required to be called could also be reduced, making proof of facts more intuitive and straightforward.

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[110] Civil Evidence Act 1995 (c 38) (UK) s 7.

[111] The English Law Commission took the view that abrogation could affect the common law rules about public registers which needed to be preserved for the sake of existing statutory provisions which were not to be abrogated, namely the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (c 4) s 1 and Oaths and Evidence (Overseas Authorities and Countries) Act 1963 (c 27) s 5. Our position is similar to that of Hong Kong and for similar reasons as given by the HK Law Reform Commission in their Report (July 1996), *supra* n 84, at para 5.60, there should be no need to specially preserve our statutory public documents exception in relation to civil proceedings. Section 84 of our Evidence Act is similar to s 11 of the Evidence Act 1851 (c 99) (UK) which applies in Hong Kong. It is apt to admit a document which by the law in force for the time being in England or Northern Ireland would be admissible in a court of justice in England or Northern Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed. The section is also a relevancy provision and it is apt to admit hearsay: see *Khoo Boo Hooi v Robert Cecil Russell* [1938] MLJ 51 at 57. Therefore, like s 11, it will admit hearsay statements contained in a foreign public register declared by order in Council in accordance with the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 (c 27) (UK) s 5 whenever the evidence is admissible in a court of justice in England. We do not need to preserve the common rules about public registers for the purposes of s 84 but we shall need to preserve s 84 in any reform based on abrogation of the hearsay rule.

[112] Our statutory provisions relating to evidence of bankers' books which are contained in Pt IV of the Evidence Act should not be affected by the reform.

[113] The English Law Commission considered that simplicity was the main advantage of this option.

[114] Australia Law Reform Commission, *Interim Report: Evidence* vol 1 (Report No 26, 1985) at p 122.

[115] UK Law Com Report No 216, *supra* n 60, at p 21.

[116] The HK Law Reform Com Report (July 1996), *supra* n 84, at pp 42–43, para 3.42.

[117] *Ibid*.

89 A witness would also find it easier to give his evidence as the course of examination-in-chief would be more in line with the manner in which he makes personal and business decisions.

90 Some of the demerits of the option are fully answerable. It is said that the task of assessing the weight of evidence of a hearsay statement involves potential increased difficulties. This is overstated since the trial judge has available to him a considerable amount of learning from the existing common law which would now serve not as rules of admissibility but as guides on what factors are important to take into account in assessing the weight of the evidence.

91 A related point is that it is not unfair to the parties since "[i]n a judge-alone civil case the judge is able to assess the risks pertaining to hearsay evidence."[118] Further, it would not be unfair to the parties since inability to cross-examine does not constitute a sufficient ground for exclusion. "Now that so few cases are heard by juries and whilst so many depend substantially upon documents, we were doubtful whether the abolition of the exclusionary rule would lead to an appreciable decline in the incidence of cross-examination."[119] The option does cause a shift of emphasis from admissibility to weight. However this has the advantage that the hearsay evidence can be judged against the totality of the evidence and where the circumstances are such that the weight of the hearsay evidence cannot be assessed because it is vitally dependent on the credibility of the maker of the hearsay statement, the judge can exercise his discretion to exclude the evidence.

92 This option does of course have some demerits. There is some merit in filtering out evidence of doubtful reliability. Stephen was particularly concerned that any doing away of the rule "would present a great temptation to indolent judges to be satisfied with second-hand reports" and that "[i]t would waste an incalculable amount of time. To try and trace unauthorised and irresponsible gossip, and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water."[120] However, the argument which reflects 19th century conditions of the colonial judiciary is overstated and the introduction of suitable safeguards can effectively minimise the scale of the problem. However, once safeguards are introduced, the attractive simplicity of the option will be compromised.

(1) Abrogation sub-option without specific safeguards

93 The Scottish reform is of this nature. The reform has the merit of being simpler than the English reform. But it is not very clear from the actual enactment whether the abrogation of the hearsay rule is confined to first-hand hearsay. If so, the Scottish reform would be less attractive to us since a limitation to first-hand hearsay seems to be too narrow and insufficiently caters to the needs of business people who not infrequently rely on multiple hearsay statements in their dealings. We think that the greater dangers of unreliability and unfairness posed by multiple hearsay evidence can

[118] New Zealand Law Commission, *Evidence Law: Hearsay: A Discussion Paper* (Preliminary Paper No 15, 1991).

[119] UK Law Com Report No 216, *supra* n 60, at p 21, para 3.42.

[120] See Sir James Stephen, *supra* n 47, at p 125.

be overcome by providing suitable safeguards which are short of being a rule of exclusion.

94 Emphasising the virtue of simplicity, the Scottish reform avoids laying down specific safeguards against unfairness to a party against whom the hearsay evidence is adduced. This predicates that such general safeguards as already exist in the law should suffice to ensure that a party who offers hearsay evidence unduly and in a manner calculated to embarrass or prejudice the other party unjustifiably will be penalised in costs where the court is unable to insist that non-hearsay evidence be given instead.[121] The absence of any specific safeguards as of right may be worrying for parties who used to have the right to object to hearsay evidence and may perceive that they are now made worse off for no tangible benefit.

(2) Abrogation option with safeguards

95 The English reform and proposed New Zealand reform belong here. They differ, however, in the perceived need for safeguards to ensure that a defendant is protected against procedural unfairness.

96 As we have already mentioned, the safeguards proposed in New Zealand are that the party against whom the hearsay evidence is adduced may require an available declarant to be called, with the hearsay statement being excluded if the party offering it declines to call the declarant (unless the court finds the attendance of the declarant need not be required). A party may also, with the leave of the court, call or recall witnesses in relation to the hearsay evidence which is admitted.

97 The English reform contains three specific safeguards. Foremost is a simplified notice system which requires the party adducing hearsay evidence to give notice of his intention to do so, by for instance attaching a hearsay notice to the bundle of exchanged documents (except where the parties agree otherwise). Second, a party may, with the leave of the court, call and cross-examine the maker of the hearsay statement to be called. Third, in estimating the weight of the evidence, the court must have regard to any circumstance from which an inference as to reliability may be drawn. A list of factors to consider is provided.

D. Recommendations

98 With respect to retention options, whether the existing exceptions are entirely replaced or added to, litigation will be inevitable no matter how much care is taken in drafting the new provisions. As between the Australian reform and retention with superaddition, our view is that there is less to be said for adoption of the Australian reform. We have already mentioned that it has on several occasions resulted in appeals to the highest court and we are not confident that reform of this nature would fare better

[121] We note that our law contains similar general safeguards. Section 135 of our Evidence Act gives the trial judge power to call any witness in the interests of justice and a judge may award costs of adjournment against a party when an adjournment is necessitated by improper conduct of the trial on his part. We note that the costs sanction may be ineffective in interlocutory proceedings.

in Singapore in view of the serious drafting difficulties which would first have to be overcome.[122]

99 Of the various reform options which remain, two seem particularly attractive for adoption. The more conservative option would be to supplement the law with a refined notice system with notice dispensable when necessary. The more radical option would be to abolish the hearsay rule whilst introducing proper safeguards to ensure that there is a basic level of fairness to the defendant or plaintiff. We recommend that the more radical option be adopted for the reasons set out below.

100 The refined notice option would certainly not present a temptation to both the judiciary and profession to be content with second-hand reports and to take short cuts with matters of evidence without giving careful consideration to the risk of unfairness to a party. Notwithstanding there is now a greater scope for pre-trial discovery in civil proceedings and exchange of affidavits (and in some cases expert reports) before trial, the notice system could be valuable in affording the party against whom the hearsay evidence is to be adduced an opportunity to investigate the source of the evidence as part of its preparation for cross-examination on the credibility of the evidence. It could also be argued that this option would be attractive as a transition to any eventual abrogation in building up familiarity and experience, among the profession, with a more liberal and more principled hearsay rule.

101 However, we do not believe that immediate adoption of the more radical option would throw the profession into disarray or induce judicial complacency when it would in fact be approximate to what is already happening in practice. The option would reflect the existing practice with respect especially to parties' agreeing on an agreed bundle of documents for the trial but remove its drawback of affording a tactical ground to object to the evidence in the course of trial.[123] The issue of fairness to the plaintiff or defendant of course remains of primary concern and, although no option is without costs, the more radical option would not unduly disadvantage a defendant if there were adequate and specific safeguards against identifiable categories of procedural fairness. (In this regard, we are mindful that a system with too many safeguards could prove as troublesome as a refined notice system.) Finally, we believe that abolition with safeguards should result in a more even-keeled trial process, especially in international disputes, and increase the attractiveness of Singapore as a forum for adjudication of international civil disputes.

[122] See para 30 above.

[123] See n 107.

V. Safeguards

A. Notice as safeguard

102 We are of the opinion that the advantages of a simplified notice system can be secured without its disadvantages by introducing a requirement to give notice of hearsay, not as a condition of admissibility, but as a safeguard in the sense that failure in compliance will give the trial judge discretion to penalise the party in breach in costs or adversely affect the weight to be given to the hearsay evidence or in extreme cases give rise to an adverse inference. Although the case for not requiring a party to give notice of the fact to be proved by hearsay evidence is not without merits,[124] we think that the requirement of notice should be adopted as a compromise and a transitional measure to allay the fears of the profession and build up familiarity with the use and evaluation of hearsay evidence whilst maintaining existing vigilance in generally avoiding hearsay.[125] This requirement could eventually be dropped as the rules of court are further developed and as experience is gained with a radical departure from the present system of exclusion of hearsay.

103 The imposition of this safeguard would not be unduly onerous. In most actions begun by writ, discovery of documents is already a matter of course as a result of O 24 r 1 of the Rules of Court (2001 Rev Ed) ("the Rules") which empowers the court to order discovery of a list of documents that are or have been in the possession, power or custody of a party.[126] In practice, after the list has been served, the parties' solicitors will agree to a bundle of documents for use at the trial. We considered whether the burden of giving notice of hearsay should be lightened by allowing that where there is discovery of documents or an agreement on the documents to be relied on at the trial, the parties should be deemed to have been given notice of any hearsay contained in the list of documents or agreed bundle of documents. It was our view that at this time a separate notice of intention to rely on hearsay should be required so as to compel counsel to identify in advance the hearsay on which he wishes to rely. This would not only be fair to the other party in giving him advance notice of what he may expect during trial, it would also inculcate and maintain the same existing vigilance in avoiding hearsay as far as possible.

104 For the same reasons, we think that the proposed safeguard should also apply where O 24 r 6(2) of the Rules is invoked. Order 24 r 6(2) provides that an application for discovery against a third party after the commencement of proceedings must be made by summons to be served on every party to the proceedings. Where the document to be discovered contains hearsay, such service should not be considered to be satisfaction of the proposed safeguard and a separate notice of intention to rely on the hearsay contained in the document would be required.

105 Similarly, where the parties agree or the court orders the parties to agree to exchange witnesses' affidavits of the evidence-in-chief, it would be necessary under

[124] See HK Law Reform Com Report (July 1996), *supra* n 84, at para 5.23 and following.

[125] The rule that affidavits filed in interlocutory proceedings may contain hearsay provided the source of the hearsay is stated is unaffected. For a statement of the rule, see *Glencore International AG v Petromar Energy Resources Pte Ltd* [1998] SGHC 349.

[126] Including service of an affidavit verifying such list on the other party.

our proposed safeguard for a party to give a separate notice of intention to rely on the hearsay contained in any affidavit.

106 We are of the view that at this time no exceptions should be allowed to the proposed safeguard. A party which has served an expert report on the other party, whether voluntarily or pursuant to an order of the court, should equally be required to give a separate notice of intention to rely on any hearsay contained in the report.

107 The proposed safeguard however would not affect the manner in which depositions are receivable in evidence. A party intending to use deposition evidence must still give notice within a reasonable time before trial and the deposition evidence must, in accordance with O 38 r 9 of the Rules, be made under an order of the court and be received only when the parties so consent or the deponent is dead, beyond the jurisdiction of the court, or unable from sickness or infirmity to attend the trial.

108 Further, the proposed safeguard is not intended to affect the manner in which interrogatories are to be answered. As implicitly prescribed by O 26, a party to whom an interrogatory is directed must still speak to his personal knowledge of the facts. Neither is the proposed safeguard intended to affect the provisions of the Evidence Act relating to the production and admissibility of bankers' books.

B. Power to call person as witness as safeguard

109 We further recommend that the trial judge should have power to order the maker of a statement admitted as hearsay to be called at the behest of any other party to the proceedings in which the hearsay is admitted. Order 38 r 13 of the Rules already empowers the court to order any person to attend any proceeding and produce documents necessary for the purposes of the proceedings. This rule however is limited as it does not confer any additional right of production against non-parties and does not operate during trial. It will be necessary therefore to give the court a more general power to call the maker of a statement as a witness for the purposes of cross-examination on his statement. Evidence adduced at such cross-examination should be treated as if the maker had been called by the party adducing the statement and as if the hearsay statement were his evidence-in-chief. While the trial judge presently has power to permit further evidence to be led in the interests of justice in the course of counsel's closing speeches, our recommendation will go further to ensure that the maker of the hearsay statement will be treated as if he had been called by the party adducing the hearsay statement.

C. A Postscript on Computer-Generated Evidence

110 We are aware that in 2003 the Technology Law Development Group of the Singapore Academy of Law had, after publishing a very comprehensive and informative consultation paper and inviting views as to how the law on computerised output as evidence should be reformed,[127] recommended that computer-generated evidence should be treated indistinguishably from non-computer-generated evidence.

[127] Daniel Seng and Sriram Chakravarthi, *Computer Output as Evidence: Consultation Paper* (Singapore Academy of Law, 2004).

Our recommendations to liberalise or abrogate the hearsay rule in civil proceedings will further facilitate the use of such evidence in civil proceedings. Presently, s 35 of the Evidence Act requires not only that computer-generated evidence must be admissible in its own right either as original or as admissible hearsay evidence but also that there be proof of the reliability of the computer when it generated the evidence. Our recommendations will supersede the first requirement. Generally speaking, they will not affect the second requirement and proof that the computer was functioning or operating properly will still be necessary in accordance with s 35 unless the requirement is abrogated in the manner recommended by the Technology Law Development Group.

ANNEX:

DRAFT AMENDMENTS TO EVIDENCE ACT

AND RULES OF COURT

(a) Draft Evidence (Amendment) Bill

(b) Draft Rules of Court (Amendment) Rules

Evidence (Amendment) Bill

Bill No. 00/_____.

Read the first time on *20xx.*

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 provide for the admissibility of hearsay evidence in civil proceedings and certain related matters.

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 2004 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

New sections 41A to 41J

2. The Evidence Act (referred to in this Act as the principal Act) is amended by inserting, immediately after section 41, the following sections:

"*Admissibility of hearsay evidence in civil proceedings*

Admissibility of hearsay evidence

41A.—(1) In civil proceedings evidence of a statement shall not be inadmissible by reason only that it is hearsay.

(2) Nothing in sections 41A to 41J affects the admissibility of evidence admissible apart from this section.

(3) The provisions of sections 41B to 41F (safeguards and supplementary provisions relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

(4) In sections 41A to 41J —

"civil proceedings" means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties;

"copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

"hearsay" means a statement made otherwise than by a person while giving evidence in the proceedings which is tendered as evidence of the matters stated, and references to hearsay include hearsay of whatever degree;

"statement" means any representation of relevant fact or opinion, however made; and

"the original statement", in relation to hearsay evidence, means the underlying statement (if any) by —

(*a*) in the case of evidence of fact, a person having personal knowledge of that fact, or

(*b*) in the case of evidence of opinion, the person whose opinion it is.

Subsection (1) gives effect to the principal recommendation in the report and renders evidence of a hearsay statement admissible in civil proceedings.

Subsections (2) and (3) provide that hearsay evidence admissible under existing law will not be affected by the new provisions. That is to say, the hearsay rule is abolished without affecting (a) the admissibility of evidence under existing hearsay exceptions; (b) the admissibility of evidence that is not

hearsay to begin with; or (c) the admissibility of evidence that is hearsay but is admissible under other written law. It will therefore be open to a party to seek to admit hearsay evidence under s 32 of the Evidence Act or to contend that the evidence is non-hearsay evidence and admissible under ss 6 to 16 of the Evidence Act. In that event, the party adducing the evidence will not be obliged to comply with the other provisions of the Bill.

In effect, the proposed abrogation is not absolute but is structured as another layer of admissibility. In the course of time, and with increased familiarity with the new rules, only very exceptional reliance on the existing exceptions to the hearsay rule is expected.

The definitions in sub-s (4) are adapted from ss 1(2), 11 and 13 of the UK Civil Evidence Act 1995 (c 38).

Definition of "civil proceedings": The provisions apply to all civil proceedings to which the strict rules of evidence apply. This accommodates the fact that in some civil proceedings, notably child care proceedings and interlocutory proceedings, the hearsay rule was never applicable and makes provisions for admissibility of hearsay only in those civil proceedings which were subject to the hearsay rule. In civil proceedings to which the strict rules of evidence has never been applied (such as small claims proceedings in the small claims tribunals), the new provisions continue to be irrelevant.

Definitions of "court" and "document" in the UK legislation are omitted as our Evidence Act defines these satisfactorily, in s 3.

"Hearsay" is defined to include hearsay "of whatever degree"; the new provisions thus apply to both first-hand and second-hand (multiple) hearsay. Whether hearsay evidence is first-hand or second-hand may however affect the weight to be given to it [see s 41D(2)(*c*)].

The definition of "oral evidence" is omitted. This is already implicit in s 121(2) of our Evidence Act:

Dumb witnesses
121. *—(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but such writing must be written and the signs made in open court.*

(2) Evidence so given shall be deemed to be oral evidence.

The UK definition of "statement" has been modified slightly to refer to any representation of "relevant" fact or opinion, to fit the language of our Evidence Act. The statement to be admitted as hearsay must be a statement of a relevant fact. The same result is obtained in England on account of *R v Blastland*.

Hearsay evidence is constituted by statements. The definition of "statement" in the Bill leaves unresolved the question of whether assertive or non-assertive conduct or both should come within the definition of a hearsay statement. We

consider that this particular issue should, as is the position under current law, be left for judicial consideration and development. In any event, with hearsay now being admissible under the Bill, the consequences of a determination one way or other is less significant.

Section 1, 11 and 13, UK Civil Evidence Act 1995

Admissibility of hearsay evidence

1.*—(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.*

(2) In this Act—

(a) "hearsay" means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and

(b) references to hearsay include hearsay of whatever degree.

(3) Nothing in this Act affects the admissibility of evidence admissible apart from this section.

(4) The provisions of sections 2 to 6 (safeguards and supplementary provisions relating to hearsay evidence) do not apply in relation to hearsay evidence admissible apart from this section, notwithstanding that it may also be admissible by virtue of this section.

Meaning of "civil proceedings".

11. *In this Act "civil proceedings" means civil proceedings, before any tribunal, in relation to which the strict rules of evidence apply, whether as a matter of law or by agreement of the parties.*

References to "the court" and "rules of court" shall be construed accordingly.

Interpretation.

13. *In this Act—*

"civil proceedings" has the meaning given by section 11 and "court" and "rules of court" shall be construed in accordance with that section;

"document" means anything in which information of any description is recorded, and "copy" , in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly;

"hearsay" shall be construed in accordance with section 1(2);

"oral evidence" includes evidence which, by reason of a defect of speech or hearing, a person called as a witness gives in writing or by signs;

"the original statement", in relation to hearsay evidence, means the underlying statement (if any) by—

(a) in the case of evidence of fact, a person having personal knowledge of that fact, or

(b) in the case of evidence of opinion, the person whose opinion it is; and

"statement" means any representation of fact or opinion, however made.

Safeguards in relation to hearsay evidence

Notice of proposal to adduce hearsay evidence

41B.—(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings —

(*a*) such notice (if any) of that fact, and

(*b*) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(2) Provision may be made by Rules of Court —

(*a*) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and

(*b*) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

Explanation.—An agreement to waive formal proof of documents is not to be regarded as an agreement to waive notice of a proposal to adduce hearsay evidence.

(4) A failure to comply with subsection (1), or with Rules of Court under subsection (2)(*b*), does not affect the admissibility of the evidence but may be taken into account by the court —

(*a*) in considering the exercise of its powers with respect to the course of proceedings and costs;

(*b*) as a matter adversely affecting the weight to be given to the evidence in accordance with section 41D; and

(c) as a matter from which an adverse inference may be drawn under section 116.

This section implements the first safeguard and makes provision for parties to be enabled to make pre-trial inquiries, where necessary, of matters arising from hearsay evidence.

Subsection (1) imposes a general duty on parties to give fair warning, where reasonable and practicable, that they intend to adduce hearsay evidence. It also provides that, if requested by the other party, the party proposing to adduce the evidence has to provide particulars of the hearsay. The notice requirements will be enlarged on by the proposed Rules of Court.

Subsection (2) envisages that the Rules of Court will prescribe the manner in which the duties imposed by sub-s (1) are to be complied with, and that they

may also exempt certain classes of proceedings or evidence from the duty to give notice. This provides the mechanism for the duty under sub-s (1) to be disapplied in areas where this is considered appropriate (for example, where evidence is required by law or by the court to be given by affidavit).

Subsection (3) makes provision for the duty in sub-s (1) to be excluded by agreement (for example, in an arbitration agreement) and to be waived. With regard to documents contained in an agreed bundle, there are two levels of agreement: (a) agreement as to authenticity of the documents; and (b) agreement as to the authenticity and contents of the documents. While it is clear that an agreement as to (a) does not amount to waiver of any hearsay objection, it is less clear whether an agreement as to (b) would amount to such a waiver. The explanation to sub-s (3) seeks to clarify that a party's agreement to waive formal proof of documents (whether in an agreed bundle or otherwise) is not to be regarded as an agreement to waive a hearsay notice.

Subsection (4) provides that failure to comply with the duty to give notice will not attract the sanction of inadmissibility but may attract costs or other sanctions at the court's disposal (sub-s (4)(*a*)). For example, the court may order an adjournment and penalise the defaulting party with costs. This is in line with our object of moving away from arguments over admissibility. The court will, however, be able to take the failure to give notice into account when considering the weight to be given to the evidence under s 41D (sub-s (4)(*b*)). The court may also draw adverse inferences from a party's default, under s 116 of the Evidence Act, as may be appropriate.

Section 2, UK Civil Evidence Act 1995

Notice of proposal to adduce hearsay evidence.

2.*—(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings—*

(a) such notice (if any) of that fact, and

(b) on request, such particulars of or relating to the evidence,

as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(2) Provision may be made by rules of court—

(a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and

(b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.

(3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (1), or with rules under subsection (2)(b), does not affect the admissibility of the evidence but may be

taken into account by the court—

(a) in considering the exercise of its powers with respect to the course of proceedings and costs, and

(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4.

Power to call witness for cross-examination on hearsay statement

41C. Rules of Court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.

This provision implements the second safeguard. It provides for a power to call for cross-examination a person whose statement has been tendered as hearsay evidence but who has not been called to give oral evidence. The witness is treated as a witness for the party seeking to adduce his hearsay evidence. The Rules of Court will elaborate on the power to cross-examine including providing that the court may give such directions as it sees fit to secure the attendance of the witness and as to the procedure to be followed (Rule 4(3)).

Section 3, UK Civil Evidence Act 1995

Power to call witness for cross-examination on hearsay statement.

3. *Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the hearsay statement were his evidence in chief.*

Supplementary provisions as to hearsay evidence

Considerations relevant to weighing of hearsay evidence

41D.—(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.

(2) Regard may be had, in particular, to the following —

(*a*) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(*b*) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(*c*) whether the evidence involves multiple hearsay;

(*d*) whether any person involved had any motive to conceal or misrepresent matters;

(*e*) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(*f*) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

The section provides statutory guidelines to assist the court in assessing the weight that should be attached to hearsay evidence. These are no more than guidelines and indeed they do little more than set out matters which courts already consider when assessing evidence and as such, this provision merely reflects present law but is enacted out of an abundance of caution; it may be useful particularly for our subordinate courts.

In one respect, however, the section usefully highlights the need to consider whether it would have been reasonable and practicable for the party adducing the evidence to have called the maker of the statement and whether the circumstances of the adduction of the evidence suggest an attempt to frustrate a proper assessment of its weight: If a police statement is adduced as evidence, and not merely as corroboration, as will be permitted under the Bill, the court is not excused from not having regard to the fact that the statement was made with criminal proceedings in view. This is because regard must be had to any circumstance from which an inference can reasonably be drawn as to the reliability of the evidence.

Section 4, UK Civil Evidence Act 1995

Considerations relevant to weighing of hearsay evidence.

4.*—(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.*

(2) Regard may be had, in particular, to the following—

(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight.

Competence

41E. Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness.

This section requires that the maker of a statement which is adduced as hearsay must have been competent (at the time he made the statement) to give direct oral evidence. In other words, the hearsay evidence of a person who was incompetent (at the time he made the statement) is excluded.

Although s 41A(1) provides that evidence shall not be excluded on the ground that it is hearsay *if it is otherwise admissible*, it is necessary to state the competence requirement separately, because the competency requirement under existing law (in s 120 Evidence Act) only requires the witness to be competent *at the time of the proceedings*, rather than on the *date on which the statement was made*. We suggest that the relevant date should be the time at which the statement was made.

We have not included the definition of "not competent as a witness" in sub-s (1) of the UK Act as we have s 120 of the Evidence Act (which defines competency) and s 6 of the Oaths and Declarations Act (which provides for the reception of unsworn evidence of a child):

Section 120, Evidence Act

Who may testify

120. *All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.*

Section 6, Oaths and Declarations Act

Caution in lieu of oath or affirmation

6. *Where a person required by section 4 or any other written law to take an oath ought not, in the opinion of the court or person acting judicially, to take an oath or make an affirmation by reason of immaturity of age, he may, instead of taking an oath or making an affirmation, be cautioned by the court or person acting judicially to state the truth, the whole truth, and nothing but the truth.*

Section 5(2) of the UK Act seeks to provide that, where a hearsay statement is adduced without oral evidence from its maker, the adverse party should have the same opportunity to adduce evidence for the purpose of attacking his credibility and that the party that has adduced it should be capable of presenting evidence to support the statement maker's credibility (sub-s (2)(a)). Similarly, evidence may be adduced of previous and later inconsistent statements of a person not

called as a witness in the proceedings (sub-s (2)(b)).

We have not included sub-s (2) of the UK Act as it mirrors s 160 of the Evidence Act which directs the court to receive evidence of putative credibility. With hearsay evidence now being admissible not just under ss 32 and 33 but also under ss 41A to 41J, it is necessary to amend s 160 to include references to ss 41A to 41J.

The "finality rule" in the proviso to sub-s (2)(b) of the UK Act is set out in s 155 of the Evidence Act. It is suggested that the words "[s]ubject to section 155" be inserted in s 160 of the Evidence Act to make it clear that the rule allowing the tendering of evidence of putative credibility is subject to the finality rule. This would have a similar effect as the proviso in the UK Act. The amended s 160 would read as follows:

What matters may be proved in connection with proved statement relevant or admissible in evidence under section 32, ~~or~~ 33 or 41A to 41J
160. *Subject to section 155, ~~W~~whenever any statement relevant or admissible in evidence under section 32, ~~or~~ 33 or 41A to 41J is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.*

Section 155, Evidence Act

Exclusion of evidence to contradict answers to questions testing veracity
155. *When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely he may afterwards be charged with giving false evidence.*

Exception 1.—*If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.*

Exception 2.—*If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.*

Section 5, UK Civil Evidence Act 1995

Competence and credibility.
5.—*(1) Hearsay evidence shall not be admitted in civil proceedings if or to the extent that it is shown to consist of, or to be proved by means of, a statement made by a person who at the time he made the statement was not competent as a witness.*

For this purpose "not competent as a witness" means suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings; but a child shall be treated as

competent as a witness if he satisfies the requirements of section 96(2)(a) and (b) of the Children Act 1989 [c 41] (conditions for reception of unsworn evidence of child).

(2) Where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement, is not called as a witness—

(a) evidence which if he had been so called would be admissible for the purpose of attacking or supporting his credibility as a witness is admissible for that purpose in the proceedings; and

(b) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he had contradicted himself.

Provided that evidence may not be given of any matter of which, if he had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

Previous statements of witnesses

41F.—(1) Subject as follows, sections 41A to 41J apply equally (but with any necessary modifications) in relation to a previous statement made by a person called as a witness in the proceedings.

(2) A party who has called or intends to call a person as a witness in civil proceedings may not in those proceedings adduce evidence of a previous statement made by that person, except —

(*a*) with the leave of the court; or

(*b*) where the previous statement is itself a relevant fact or is otherwise relevant under written law.

(3) Where in the case of civil proceedings section 147 or 156 applies, which makes provision as to —

(*a*) the proof of contradictory statements made by a witness;

(*b*) cross-examination as to previous statements in writing; and

(*c*) how far a witness may be discredited by the party producing him;

sections 41A to 41J do not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those sections.

(4) Nothing in subsection (3) shall prejudice the operation of any provision made by Rules of Court under section 41C above (power to call witness for cross-examination on hearsay statement).

(5) Nothing in sections 41A to 41J affects the operation of sections 161 and 162 as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in the proceedings.

(6) Nothing in this section shall be construed as preventing a statement of any description referred to above from being admissible by virtue of section 41A as evidence of the matters stated.

This section renders admissible, subject to the new notice and weighing requirements, the previous statements of witnesses (whether consistent or inconsistent) as evidence of the facts that they contain.

In a sense, sub-s (2) takes into account fears that use of consistent statements would encourage superfluous evidence. Subsection (2) therefore provides that where the maker of a statement is to be called as a witness, the hearsay statement may not be given without leave of the court, unless the previous statement is itself a relevant fact or is otherwise relevant under written law. The leave requirement is necessary to prevent the pointless proliferation of previous statements, which would needlessly prolong trials and increase costs.

Subsection (1) is superfluous in relation to previous inconsistent statements as s 147(3) of the Evidence Act already provides that such statements may be received as evidence of the facts contained in them. Subsection (4) preserves the operation of s 147.

We have not included the proviso to sub-s (2) of the UK Act because unlike UK, courts in Singapore do not receive "witness statements" in civil proceedings.

We have not replicated sub-s (3) of the UK Act as we are of the view that it is unnecessary, since a witness statement or affidavit EIC is not a "previous statement".

Subsection (5) preserves the position under ss 161 and 162 of the Evidence Act that where a witness is cross-examined on a document which he has previously used to refresh his memory, the document becomes evidence and is admissible as proof of any fact of which direct oral evidence would be admissible.

Subsection (6) provides that previous statements of witnesses adduced under this section shall be admissible as evidence of the matters stated in them.

Section 6, UK Civil Evidence Act 1995

Previous statements of witnesses.
6.*—(1) Subject as follows, the provisions of this Act as to hearsay evidence in civil proceedings apply equally (but with any necessary modifications) in relation to a previous statement made by a person called as a witness in the proceedings.*

(2) A party who has called or intends to call a person as a witness in civil proceedings may not in those proceedings adduce evidence of a previous statement made by that person, except—

- *(a) with the leave of the court, or*
- *(b) for the purpose of rebutting a suggestion that his evidence has been fabricated.*

This shall not be construed as preventing a witness statement (that is, a written statement of oral evidence which a party to the proceedings intends to lead) from being adopted by a witness in giving evidence or treated as his evidence.

[Paragraph (a) is modeled on s 2(2)(b) Civil Evidence Act 1968; para (b) is modeled on s 3(1)(b) Civil Evidence Act 1968.]

(3) Where in the case of civil proceedings section 3, 4 or 5 of the Criminal Procedure Act 1865 [c 18] applies, which make provision as to—

(a) how far a witness may be discredited by the party producing him,
(b) the proof of contradictory statements made by a witness, and
(c) cross-examination as to previous statements in writing,

this Act does not authorise the adducing of evidence of a previous inconsistent or contradictory statement otherwise than in accordance with those sections.

This is without prejudice to any provision made by rules of court under section 3 above (power to call witness for cross-examination on hearsay statement).

[modeled on s 3(1)(a) Civil Evidence Act 1968.]

(4) Nothing in this Act affects any of the rules of law as to the circumstances in which, where a person called as a witness in civil proceedings is cross-examined on a document used by him to refresh his memory, that document may be made evidence in the proceedings.

(5) Nothing in this section shall be construed as preventing a statement of any description referred to above from being admissible by virtue of section 1 as evidence of the matters stated.

UK Criminal Procedure Act 1865 (28 & 29 Vict c 18)

3. How far witness may be discredited by the party producing
A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

4. As to proof of contradictory statements of adverse witness
If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

5. Cross-examinations as to previous statements in writing
A witness may be cross-examined as to previous statements made by him in

writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

Other matters

Mode of proof of statements contained in documents

41G.—(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved —

(*a*) by the production of that document, or

(*b*) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.

(2) It is immaterial for the purpose of this section how many removes there are between a copy and the original.

This section provides that where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved by the production of that document, or by the production of a copy of that document, or a copy of a copy of it, *etc* authenticated in such manner as the court might approve (sub-s (1)). It is immaterial how many removes there are between a copy and the original. Subsection (2) confers a new discretion on the court to receive copies of copies as proof of hearsay. This is not intended to apply to documents sought to be admitted as original evidence, in respect of which s 66 and 67 of the Evidence Act would apply. This is consistent with the position at criminal law under s 381(1) of the Criminal Procedure Code ("CPC").

Presently, as a general rule, only primary evidence is permitted as proof of admissible hearsay. Secondary evidence is permitted only if there is proof of circumstances enumerated in s 67 justifying admissibility of secondary evidence. Parties continue to be able to rely on these provisions to prove a hearsay statement in a document.

We had considered whether this and the next section should appear in Pt III of the Evidence Act as they are basically provisions which facilitate the proof of documentary hearsay statements which are to be admitted under s 41A. However, we felt that these provisions should be located in s 41A to J because Pt III would also apply to criminal proceedings, whereas the position under criminal law is already governed by s 381(1) of the CPC. Sections 41G and 41H are general provisions that apply even to hearsay in civil proceedings admissible apart from s 41A (*eg* under an existing hearsay exception) as the provisions

refer to proof of statements in documents admissible in *civil proceedings*.

Section 381(1) CPC states:

Provisions supplementary to section 378 or 380.

381.—*(1) Where in any criminal proceedings a statement contained in a document is admissible in evidence by virtue of section 378 or 380, it may be proved by the production of that document or (whether or not that document is still in existence) by the production of a copy of that document, or of the material part thereof, authenticated in such manner as the court may approve.*

Section 8, UK Civil Evidence Act 1995
[modeled on s 27 Criminal Justice Act 1988]

Proof of statements contained in documents.
8.—*(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved—*

(a) by the production of that document, or
(b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it,

authenticated in such manner as the court may approve.
(2) It is immaterial for this purpose how many removes there are between a copy and the original.

Mode of proof of records of public authority or business
41H.—(1) A document which is shown to form part of the records of a public authority may be received in evidence in civil proceedings without further proof.

(2) A document shall be taken to form part of the records of a public authority if there is produced to the court a certificate to that effect signed by an officer of the public authority to which the records belong.

(3) For the purpose of subsection (2) —

(*a*) a document purporting to be a certificate signed by an officer of a public authority shall be presumed, until the contrary is proved, to have been duly given by such an officer and signed by him; and
(*b*) a certificate shall be presumed, until the contrary is proved, to be signed by a person if it purports to bear a facsimile of his signature.

(4) The absence of an entry in the records of a public authority may be proved in civil proceedings by affidavit of an officer of the public authority to which the records belong.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the provisions of this section do not apply in relation to a particular document or record, or description of documents or records.

(6) The court may, having regard to the circumstances of the case, direct that all or any of the provisions of this section shall apply in relation to a particular document or record, or description of documents or records, issued by a business.

(7) In this section —

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority (as the case may be) or in relation to its records; and

"public authority" includes any public or statutory undertaking, any Government department and any person holding office under the Government.

"records" means records in whatever form;

This section facilitates proof of public documentary hearsay and, subject to the court's discretion, business hearsay. Presently, admissible public documentary and business hearsay is proved by producing the public documentary or business hearsay, where it is in writing, and calling a witness, who must have personal knowledge of the circumstances testified to, to testify to the circumstances in which the hearsay is generated and recorded.

Under this section, proof of public documentary hearsay (and, subject to the court's discretion, business hearsay) is considerably simplified by requiring merely a demonstration that it forms part of the records of a public authority or business. This demonstration in turn is satisfied by producing a certificate signed by an officer of the public authority or business to which the records belong. It matters little whether the hearsay to be proved by the certificate is positive hearsay or negative hearsay since the absence of an entry in a record may be proved by an affidavit of an officer of the authority or business to which the records belong.

Public documentary records have long been treated as belonging to a class of evidence which can be regarded as likely to be reliable. However, we recognise that there are bound to be exceptions in particular cases. Subsection (5) provides a specific discretion to the courts to disapply the certification provisions. The court may require such documents to be authenticated in such manner as it may approve under s 41G(1)(*b*).

Conversely, there may be other classes of evidence which can be regarded as likely to be reliable but in respect of which there is no similar "self-proving" process. Under sub-s (5), the court has the discretion to waive the certification provisions.

Subsection (6) allows the court to extend the application of the provision to documents or records issued by certain businesses, having regard to the circumstances. We felt that there is no clear parity between the reliability of business records and public authority records. Some business records, for example bank records, are more reliable than others.

The Singapore provision differs from UK in two respects:

(a) The Singapore provision does not apply to business records except by

special application.

(b) The UK deeming provision in sub-s (3) is merely a rebuttable presumption in Singapore.

"Business" is defined widely and reflects the view that it is the quality of the regularity that lends a business record its reliability, not the existence of a profit motive or the juridical nature of the person carrying on the activity. A "business" defined in this way may not have "officers" in any strict sense of the word, and "officer" is accordingly defined in terms of a sufficiently responsible person in relation to the records or activities of the business concerned.

"Records" is defined in a manner which allows for the widest possible admission. We have not sought to define the type of record which is capable of being admitted.

This section does not affect s 35 of the Evidence Act which makes specific provisions for admissibility of computer evidence to afford protection against misuse of computer data through hacking, corruption and other alteration of information. As we note in para 26.0, the Technology Law Development Group has recommended reform of s 35 in a manner consistent with the draft Bill.

Section 9, UK Civil Evidence Act 1995

Proof of records of business or public authority.
9.*—(1) A document which is shown to form part of the records of a business or public authority may be received in evidence in civil proceedings without further proof.*

(2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

For this purpose—

- *(a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by him; and*
- *(b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of his signature.*

(3) The absence of an entry in the records of a business or public authority may be proved in civil proceedings by affidavit of an officer of the business or authority to which the records belong.

(4) In this section—

"records" means records in whatever form;

"business" includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual;

"officer" includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and

"public authority" includes any public or statutory undertaking, any government department and any person holding office under Her Majesty.

(5) The court may, having regard to the circumstances of the case, direct that all or any of the above provisions of this section do not apply in relation to a particular document or record, or description of documents or records.

General

Rules on hearsay evidence in civil proceedings

41I. The Rules Committee constituted under the Supreme Court of Judicature Act (Cap. 322) may make such rules as appear to it to be necessary or expedient for the purpose of giving effect to and for prescribing anything which may be prescribed under sections 41A to 41J.

This is the general rule-making provision empowering the Rules Committee to make such Rules of Court as may be necessary or expedient to put into effect the new provisions on hearsay in civil proceedings. A similar provision is to be found in s 36A(1) of the Evidence Act:

Rules for filing and receiving evidence and documents in court by using information technology

36A. *—(1) The Rules Committee constituted under the Supreme Court of Judicature Act (Cap. 322) may make rules to provide for the filing, receiving and recording of evidence and documents in court by the use of information technology in such form, manner or method as may be prescribed.*

(2) Without prejudice to the generality of subsection (1), such rules may —

*(*a*) modify such provisions of this Act as may be necessary for the purpose of facilitating the use of electronic filing of documents in court;*

*(*b*) provide for the burden of proof and rebuttable presumptions in relation to the identity and authority of the person sending or filing the evidence or documents by the use of information technology; and*

*(*c*) provide for the authentication of evidence and documents filed or received by the use of information technology.*

Section 12, UK Civil Evidence Act 1995

Provisions as to rules of court.

12.*—(1) Any power to make rules of court regulating the practice or procedure of the court in relation to civil proceedings includes power to make such provision as may be necessary or expedient for carrying into effect the provisions of this Act.*

(2) Any rules of court made for the purposes of this Act as it applies in relation

to proceedings in the High Court apply, except in so far as their operation is excluded by agreement, to arbitration proceedings to which this Act applies, subject to such modifications as may be appropriate.

Any question arising as to what modifications are appropriate shall be determined, in default of agreement, by the arbitrator or umpire, as the case may be.

Savings and transitional provisions

41J.—(1) Nothing in sections 41A to 41I affects the inadmissibility of evidence on grounds other than that it is hearsay.

(2) Subsection (1) applies whether the evidence is rendered inadmissible by any written law or rule of law, for failure to comply with rules of court or an order of the court, or otherwise.

(3) Nothing in sections 41A to 41I affects the proof of documents by means other than those specified in section 41G or 41H.

(4) Unless parties otherwise agree, the provisions of the Evidence Act as amended by this Act shall apply in relation to trials commenced on or after 3 months from the date of commencement of this Act, and the court may make any order as it sees fit to give effect to those provisions.".

Subsection (1) ensures that if evidence is inadmissible both because it is hearsay and for some other reason, the abolition of the hearsay rule will not affect the inadmissibility for that other reason. This is the case whether the evidence falls to be excluded under any written or common law or for failure to comply with rules of court or an order of court (sub-s (2)).

The new provisions apply only to "*trials commenced*", rather than "*proceedings begun*" (as in the UK Act) on or after 3 months from the date of commencement of the Act (sub-s (4)), so that if a trial commenced before the cross-over date, the old law should prevail for the rest of the trial.

Parties may agree to apply the new provisions to trials commencing on an earlier date. We felt that the litigants should enjoy the benefits arising from the abolition of the hearsay rule as soon as possible. At the same time, we are sensitive to the fact that parties may have run their case based on the existence of the hearsay regime (for example, in deciding whether to put in an offer to settle). The proposed transitional provision is meant to strike a compromise to address both concerns.

For comparison, the transitional provision for the Evidence (Amendment) Act 1995 introducing the new computer output provisions read:

Section 1, Evidence (Amendment) Act 1995

Short title and commencement

1. *—(1) This Act may be cited as the Evidence (Amendment) Act 1995 and shall*

come into operation on such date as the Minister may, by notification in the Gazette, appoint.

(2) Section 3 [which repealed and re-enacted ss 35, 36 and 36A] shall apply to any judicial proceedings in or before any court which takes place on or after the commencement of this Act, and the court may make any order as it thinks fit to give effect to that section.

…

We do not need s 14(3) of the UK Act. The preservation of s 1 of the Evidence (Colonial Statutes) Act 1907 (c 16), s 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (c 4), and s 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 (c 27) in the UK ensures that these statutes will be applicable in Singapore as a result of s 84 of our Evidence Act:

Presumption as to document admissible in England without proof of seal or signature

84. *When any document is produced before any court purporting to be a document which by the law in force for the time being in England or Northern Ireland would be admissible in proof of any particular in any court of justice in England or Northern Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed —*

(a) *the court shall presume that such seal, stamp or signature is genuine, and that the person signing it held at the time when he signed it the judicial or official character which he claims; and*

(b) *the document shall be admissible for the same purpose for which it would be admissible in England or Northern Ireland.*

<u>Sections 14 and 16, UK Civil Evidence Act 1995</u>

Savings.

14.*—(1) Nothing in this Act affects the exclusion of evidence on grounds other than that it is hearsay.*

This applies whether the evidence falls to be excluded in pursuance of any enactment or rule of law, for failure to comply with rules of court or an order of the court, or otherwise.

(2) Nothing in this Act affects the proof of documents by means other than those specified in section 8 or 9.

(3) Nothing in this Act affects the operation of the following enactments—

(a) section 2 of the Documentary Evidence Act 1868 [c 37] (mode of proving certain official documents);

(b) section 2 of the Documentary Evidence Act 1882 [c 9] (documents printed under the superintendence of Stationery Office);

(c) section 1 of the Evidence (Colonial Statutes) Act 1907 [c 16]

(proof of statutes of certain legislatures);

(d) section 1 of the Evidence (Foreign, Dominion and Colonial Documents) Act 1933 [c 4] (proof and effect of registers and official certificates of certain countries);

(e) section 5 of the Oaths and Evidence (Overseas Authorities and Countries) Act 1963 [c 27] (provision in respect of public registers of other countries).

Short title, commencement and extent.

***16.**—(1) This Act may be cited as the Civil Evidence Act 1995.*

(2) The provisions of this Act come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument, and different days may be appointed for different provisions and for different purposes.

(3) An order under subsection (2) may contain such transitional provisions as appear to the Lord Chancellor to be appropriate; and subject to any such provision, the provisions of this Act shall not apply in relation to proceedings begun before commencement.

(4) This Act extends to England and Wales.

(5) Section 10 (admissibility and proof of Ogden Tables) also extends to Northern Ireland.

As it extends to Northern Ireland, the following shall be substituted for subsection (3)(b)—

"(b) 'action for personal injury' includes an action brought by virtue of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Act 1937 [c 9 (N I)] or the Fatal Accidents (Northern Ireland) Order 1977 [SI 1977/1251 (N I 18)]."

(6) The provisions of Schedules 1 and 2 (consequential amendments and repeals) have the same extent as the enactments respectively amended or repealed.

Amendment of section 48

3. Section 48 of the principal Act is amended by inserting, immediately after section 48, the following Explanation:

"*Explanation.*—"Facts not otherwise relevant" include hearsay statements which are admissible as evidence of relevant facts under section 41A."

This Explanation to s 48 clarifies that an expert may rely on hearsay in forming his expert evidence whether it is admissible under s 41A or any other provisions of the Evidence Act.

Section 48 is a codification of the rule at common law that an expert when giving expert testimony may not testify to the effect that he heard such and such and accordingly his opinion is this or that. He may refer to and rely on general hearsay, but not specific hearsay. Hence, a valuer, for instance, may not refer to and rely on what his fellow valuer told him about some related transaction as to which he has had no personal involvement.

With abolition of the hearsay rule in Singapore, it follows that an expert may now refer to hearsay but the safeguards will apply. The Explanation merely serves to highlight the change to practitioners and may indeed be dispensed with if the effect of the abolition for the expert is obvious.

Section 48, Evidence Act

Facts bearing upon opinions of expert
48. *Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.*

Illustrations

*(*a*) The question is whether* A *was poisoned by a certain poison. The fact that other persons who were poisoned by that poison exhibited certain symptoms, which experts affirm or deny to be the symptoms of that poison, is relevant.*

*(*b*) The question is whether an obstruction to a harbour is caused by a certain sea-wall.*
The fact that other harbours similarly situated in other respects but where there were no such sea-walls began to be obstructed at about the same time is relevant.

Amendment of section 160

4. Section 160 of the principal Act is amended by deleting the section and substituting the following section:

"What matters may be proved in connection with proved statement relevant or admissible in evidence under section 32, 33 or 41A to 41J

160. Subject to section 155, whenever any statement relevant or admissible in evidence under section 32, 33 or 41A to 41J is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

(see also Comments for s 41E above.)

Section 160 currently directs the court to receive evidence of putative credibility of the maker of a hearsay statement admitted under the hearsay exceptions in ss 32 and 33. With hearsay evidence now being admissible not just under ss 32 and 33 but also under ss 41A to 41J, it is necessary to amend s 160 to include references to ss 41A to 41J. As ss 41A to 41J do not render hearsay evidence "relevant", merely "admissible", the words "*or admissible in evidence*" are added to the heading and the text.

The amendment brings our position in line with UK's. Section 5(2) of the UK Civil Evidence Act provides that where a hearsay statement is adduced without

oral evidence from its maker, the adverse party should have the same opportunity to adduce evidence for the purpose of attacking his credibility and that the party that has adduced it should be capable of presenting evidence to support the statement maker's credibility (s 5(2)(a)). Similarly, evidence may be adduced of previous and later inconsistent statements of a person not called as a witness in the proceedings (s 5(2)(b)).

The words "*[s]ubject to section 155*" are inserted to make it clear that the rule allowing the tendering of evidence of putative credibility is subject to the finality rule in s 155 of our Evidence Act.

Section 160, Evidence Act

What matters may be proved in connection with proved statement relevant under section 32 or 33

160. *Whenever any statement relevant under section 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.*

EXPLANATORY STATEMENT

This Bill seeks to amend the Evidence Act (Cap. 97) to provide for the admissibility of hearsay evidence in civil proceedings

Clause 1 relates to the short title and commencement.

Clause 2 ….

Clause 3 ….

EXPENDITURE OF PUBLIC MONEY

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

No. S

SUPREME COURT OF JUDICATURE ACT
(CHAPTER 322)
RULES OF COURT (AMENDMENT) RULES _____

In exercise of the powers conferred on us by section 80 of the Supreme Court of Judicature Act and all other powers enabling us under any written law, we, the Rules Committee, hereby make the following Rules:

Citation and commencement

1. These Rules may be cited as the Rules of Court (Amendment) Rules _____ and shall come into operation on _____.

New Order 38B

2. The principal Rules are amended by inserting, immediately after Order 38A, the following Order:

"ORDER 38B

EVIDENCE: HEARSAY EVIDENCE IN CIVIL PROCEEDINGS

Application and interpretation (O. 38B, r. 1)

1.—(1) This Order applies in relation to the trial or hearing of an issue or question arising in a cause or matter and to a reference, inquiry and assessment of damages, as it applies to the trial or hearing of a cause or matter. [*O 38, r 20(3)*]

(2) In this Order —

(*a*) "hearsay evidence" means evidence consisting of hearsay within the meaning of section 41A(1) of the Evidence Act (Chapter 97); [*O 38, r 20(2)*]

(*b*) "hearsay notice" means a notice under section 41B of the Evidence Act (Chapter 97);

"statement" means any representation of relevant fact or opinion, however made; [*s 41A EA*] and

(*c*) "the original statement", in relation to hearsay evidence, means the underlying statement (if any) by —

(i) in the case of evidence of fact, a person having personal knowledge of that fact, or

(ii) in the case of evidence of opinion, the person whose opinion it is. [*s 41A EA*]

Hearsay Notices (O. 8B, r. 2)

2.—(1) A hearsay notice must —

(*a*) state that it is a hearsay notice;

(*b*) identify the hearsay evidence and the fact or facts sought to be established by that hearsay evidence;

(*c*) identify, and state the last known address and particulars of, the person who made the statement which is to be given in evidence; and

(*d*) state whether that person will be called to give oral evidence and if not, the reason why not.

[*O 38, r 21(1) (modified)*]

(2) A single hearsay notice may deal with the hearsay evidence of more than one witness. [*O 38, r 21 (2)*]

(3) A hearsay notice must be filed and served at the same time as affidavit evidence in chief is required to be filed and served, and in any event not later than 14 days before the commencement of the trial or hearing.

(4) A party proposing to rely on hearsay evidence shall —

(*a*) if the hearsay evidence is to be in a document, supply a copy to any party who requests him to do so; and [*CPR 33.2(4)(*b)]

(*b*) on request, give to the other party or parties to the proceedings such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay. [*s 41B(1)(*b)]

Circumstances in which a hearsay notice is not required (O. 38B, r. 3)

3. Section 41B(1) of the Evidence Act (Cap. 97) (duty to give notice of intention to rely on hearsay evidence) does not apply —

(*a*) to evidence at hearings other than trials;

(*b*) to an affidavit which is to be used at trial but which does not contain hearsay evidence;

(*c*) to a statement which a party to a probate action wishes to put in evidence and which is alleged to have been made by the person whose estate is the subject of the proceedings; or

[(*d*) where the requirement is excluded by a practice direction.]

[*CPR 33.3, cf O 38, r 21(3)*]

Power to call witness for cross-examination on hearsay evidence (O. 38B, r. 4)

4.—(1) Where a party —

(*a*) proposes to rely on hearsay evidence; and

(*b*) does not propose to call the person who made the original statement to give oral evidence,

any other party may call and cross-examine the maker of the statement on the contents of the statement.

(2) Where any other party seeks to call and cross-examine the person who made the statement, the Court may give such directions as it thinks fit to secure the attendance of that person and as to the procedure to be followed.

[*CPR 33.4 and O 38, r 22*]

Made this ____day of _____ ."