THE LAW SOCIETY OF SINGAPORE

The Law Society of Singapore
39 South Bridge Road S(058673)

t: +65 6538 2500 f: + 65 6533 5700
w: www.lawsociety.org.sg

Sender's Fax: 6533 5700
Sender's DID: 6530 0226/233
Sender's Email: represent@lawsoc.org.sg

Our Ref: LS/11/CLO.EA/AC/11-01/AC.jf
Your Ref:

31 October 2011

Ministry of Law
100 High Street
#08-02, The Treasury
Singapore 179434

BY EMAIL & BY HAND

Attn: Ms Valerie Thean
Director, Legal Policy &
Legal Industry Divisions

Dear Ms Thean

PROPOSED AMENDMENTS TO THE EVIDENCE ACT

We refer to your e-mail dated 30 September 2011 inviting the Law Society to provide its feedback on the consultation paper for the draft Evidence (Amendment) Bill.

The proposed amendments to the Evidence Act were referred to the relevant committees of the Law Society for views. The views of the Civil Practice Committee and the Information Technology Committee are enclosed at Annex A and Annex B respectively for the Ministry's consideration. The Council of the Law Society has considered the Committees' views and shares their views in this regard.

In addition, the Council would highlight the following points for the Ministry's consideration:

Legal professional privilege outside the context of judicial proceedings

(a) The proposed amendments to the Evidence Act do not address the issue of the applicability of legal professional privilege outside the context of judicial proceedings, especially in the context of search and seizure by police and other regulatory authorities in the course of their investigations. This is a practical issue which many lawyers are concerned about as it regularly arises in legal practice but there is no clarity in law on how lawyers or investigation authorities should proceed.

(b) In the recent October 2011 report of the Law Reform Committee of the Singapore Academy of Law on Reforming Legal Professional Privilege, the authors noted that "the extent to which legal advisers should be entitled to claim legal advice privilege on behalf of their clients when required by investigatory authorities to disclose documents and other communications

made in the course and for the purposes of giving legal advice to their clients" was an important question. However, the report did not address this issue as the authors appeared to have taken the view that this issue was beyond the scope of the Evidence Act.

(c) The Council is of the view that this issue should be specifically addressed by an amendment to section 128 (and, consequentially, section 128A) of the Evidence Act to clarify that advocates and solicitors are entitled to claim legal professional privilege outside the context of judicial proceedings unless such privilege is expressly abrogated by the relevant statute. This amendment would be consistent with the recognition in many Commonwealth jurisdictions such as the UK and Hong Kong that legal professional privilege is a fundamental common law right.

(d) Moreover, if "qualified legal counsel" are entitled to claim legal professional privilege outside the context of judicial proceedings under the proposed amendments to the Evidence Act (it is not entirely clear that they are unable to do so), practising lawyers should not be in a worse off position and be given less protection in the interests of their clients.

Legal professional privilege and private international law

(e) Another issue that is likely to arise in the near future is the applicability of legal professional privilege under the Evidence Act in the context of foreign enforcement authorities in seeking information or documents from Singapore lawyers in the course of their investigatory and enforcement work.

(f) In light of Singapore's growing status as an international hub for legal and commercial services, as well as the prevalence of cross-border transactions, the Ministry may also wish to consider statutory clarification of the applicability of legal professional privilege in the context of Private International Law. In this regard, while the orthodox position has largely been to treat claims of legal professional privilege relating to foreign legal advice as a matter of procedure, to be governed by the domestic scope of the forum, the debate on this issue is largely unsettled (see James McComish, "*Foreign Legal Professional Privilege: A New Problem for Australian Private International Law*", (2006) 28 Sydney Law Review 297-342).

(g) This issue would be relevant in situations where, for instance, a party involved in a litigation matter in a European Court has sought advice on the matter from an in-house counsel employed by its Singapore office. The question that arises is whether the in-house counsel employed in Singapore is entitled to legal professional privilege as provided under the proposed section 128A of the Act, or whether the *lex fori* will be applicable instead. In this respect, we note that in the 2010 case of *Akzo Nobel Chemicals Limited v Commission of the European Communities* (Case C-550/7), the European Court of Justice held that legal professional privilege will not apply to communications exchanged between a company's manager and its in-house counsel. Different considerations may also apply when a public law aspect is present in matters where foreign government authorities exercise their statutory powers to search and gather information and materials that might otherwise be privileged under Singapore law, and which might not have been susceptible to investigation by local government authorities.

No reference to "advocate and solicitor" in proposed section 128A

(h) The Council notes that Clause 2(c) of the draft Evidence (Amendment) Bill proposes to introduce a new section 3(6) stating that "[f]or the purposes of sections 23, 128, 128A, 130 and 131, a reference to "advocate or solicitor" shall be deemed to include the Attorney-

General, the Solicitor-General, the Public Prosecutor, State Counsel, Deputy Public Prosecutor and Assistant Public Prosecutor". However, section 128A does not refer to the term "advocate and solicitor". It would also appear that the proposed definition of "qualified legal counsel" is wide enough to include the Attorney-General, the Solicitor-General, the Public Prosecutor, State Counsel, Deputy Public Prosecutor and Assistant Public Prosecutor. If this is correct, they would effectively enjoy legal professional privilege under both sections 128 and 128A. The Council is of the view that it would suffice for one of the sections to apply to the Attorney-General, the Solicitor-General, the Public Prosecutor, State Counsel, Deputy Public Prosecutor and Assistant Public Prosecutor.

Thank you for giving the Law Society the opportunity to present our views on this matter.

Yours faithfully

Alvin Chen
Chief Legal Officer
Director, Representation and Law Reform

Encs.

cc (1) Council
(2) Civil Practice Committee
(3) IT Committee

ANNEX A

CIVIL PRACTICE COMMITTEE'S VIEWS ON PROPOSED AMENDMENTS TO THE EVIDENCE ACT

1. The Civil Practice Committee (the "Committee") is generally in support of the proposed amendments to the Evidence Act (the "Act"), as set out in the Ministry of Law's consultation paper ("Consultation Paper") and the draft Evidence (Amendment) Bill (the "draft Bill"). The review of the Act, being Singapore's key legislation governing the law of Evidence, is timely in view of the developments in this area of law and the practice of law generally. However, there are certain specific amendments on which the Committee would like to provide its views for the Ministry's consideration:

Legal Professional Privilege

2. The Committee is in the main supportive of the proposed amendments to the Evidence Act introducing legal professional privilege (specifically legal advice privilege) for in-house counsel who are legally qualified, provided they are legal advisors who are professionally qualified, members of professional bodies with disciplinary powers to enforce their rules, and owe a duty to the court[1]. This is premised on the understanding that "qualified legal counsel" who are not advocates and solicitors admitted to the Singapore Bar, but are qualified to practice law in a foreign jurisdiction, would be subject to the foreign jurisdiction's rules governing the profession and the supervision of the relevant organisation with disciplinary powers to enforce these rules[2].

3. There are however two aspects of legal professional privilege under the Evidence Act which ought to be clarified but are not addressed in the proposed amendments. Firstly, there are a number of Singapore statutory provisions which permit non-disclosure of information to a governmental authority by persons "under any statutory obligation to observe secrecy"[3]. In practice, the lack of legislative clarity on the scope of statutory obligations to observe secrecy has made it difficult for lawyers to conclude definitively whether legal professional privilege would be considered as such a statutory obligation when faced with requests by governmental authorities for disclosure of their clients' information. The Law Society's view

---

[1] *New Victoria Hospital v Ryan* [1993] ICR 201, at 203, *R (Prudential plc) v Income Tax Special Commissioner* [2011] 2 WLR 50 (CA) at 43 and 82. and *Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise* (No 2) [1972] 2 QB 102 at 129, [1972] 2 All ER 353 at 376.

[2] In *R (Prudential plc) v Income Tax Special Commissioner* (ibid) at 81, the Court of Appeal recognised the varying treatment of legal professional privilege may depend on what protection is given under the relevant law to work carried out by the relevant person and what activities are protected or regulated in that respect.

[3] See e.g. Section 84 Goods and Services Tax Act; Section 65B Income Tax Act; Section 68 Income Tax Act (only for public officers); Section 46 Postal Services Act; Section 59 Telecommunications Act; Section 88 Customs Act; Section 9 Charities Act.

is that legal professional privilege should be considered as a "statutory obligation to observe secrecy", and, for clarity, this should be expressly stipulated in the relevant legislation. Otherwise, maintaining the status quo would make the extension of legal professional privilege to "qualified legal counsel" meaningless, as practising lawyers do not have clear recourse to legal professional privilege in such cases. On a related note and in the same vein, a lawyer's duty to preserve his client's confidences under Rule 24 of the Legal Profession (Professional Conduct) Rules should also be considered a "statutory obligation to observe secrecy".

4. Secondly, there are other narrower Singapore statutory provisions which exempt solicitors from disclosing privileged communications specifically[4]. With the proposed extension of legal advice privilege to "qualified legal counsel", it is not clear how these statutory provisions would operate as they currently apply only to advocates and solicitors.

5. In light of the concerns highlighted above, the Ministry may wish to consider further amendments to the section 128 of the Act to clarify the scope of this privilege. If section 128 of the Act is amended, it will follow that the new section 128A (which is analogous to section 128) should be correspondingly amended.

Opinion Evidence

6. The Committee is in favour of the proposed amendments to section 47(1) and (2) of the Evidence Act which seek to first, make the test of "substantial assistance" and not "necessity" the overarching basis of admissibility of expert evidence, and second, broaden the types of expert evidence which may be admitted.

7. The Committee is of the view that there is no clear rationale for abrogating the common knowledge rule to allow opinions/statements made by experts on matters not within that expert's instruction/expertise to be admitted as evidence. The common knowledge rule is necessary to prevent parties from calling experts on matters that the Court is competent to decide on without the assistance of expert knowledge, thereby preventing a waste of resources. Where the judges, who are the triers of fact, can form their opinion without the assistance of an expert, the matter in question being within their own experience and knowledge, the opinion evidence of an expert should be inadmissible, so that the integrity of the decision-making process of the tribunal of fact is preserved and seen to be preserved[5]. As such, the Committee is sceptical as to the value of the proposed new section 47(3).

---

[4] See e.g. Sections 8E and 393 Companies Act

[5] See *R v Turner* [1975] QB 834 at 841, where Lawton LJ remarked: "*If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult.* ***The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.***" [emphasis added] See also

Hearsay

8. The Committee is generally in support of the Ministry's intention to retain the hearsay rule, whilst broadening the categories of admissible hearsay evidence subject to an overriding judicial discretion to exclude evidence in the interests of justice. An equal number of our Committee members was actually in favour of a removal of the hearsay rule leaving the Court to accord the evidence only such weight as may be just. Nevertheless, the Committee would like to draw the Ministry's attention to some of the proposed categories of exceptions to the hearsay rule that might potentially be too wide in its application.

9. In the proposed amendments to section 32(1)(b), it is noted that the words "or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him" have been replaced with the following words:

   "... *or any information in market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations,* ***or of a document constituting, or forming part of, the records (whether past or present) of any business that are recorded, owned or kept by any person, body or organisation carrying out the business***;" [emphasis added]

10. The Committee also notes that the Ministry of Law's intention on the 'business statement' exception is to give the Court a discretion to admit all business records produced in the ordinary course of business which appear *prima facie* authentic[6]. However, it is not clear from section 32(1)(b) of the draft Bill how this element of *prima facie* authenticity is introduced in the exception as drafted. Notwithstanding that weight attributed to such hearsay evidence can be challenged, and the Court has discretion to decline to admit such hearsay evidence, the Committee is of the view that the category of business records described by the words in bold reproduced at the preceding paragraph would be potentially too wide if the intention is that all business records described in section 32(1)(b) of the draft Bill are deemed to be *prima facie* authentic. The effect would be to recognise hearsay evidence of all types of business records kept by companies (both local and foreign), including minutes of meetings and compilation of unaudited accounting information, as evidence that is admissible and *prima facie* authentic. The burden would then shift to the party against whom such hearsay evidence is raised to challenge this presumption that the evidence is *prima facie* authentic.

Adrian Keane, James Griffiths, Paul McKeown, *The Modern Law of Evidence* (Oxford University Press, 8th Ed, 2010) at 527

[6] Consultation Paper, para 29(ii), which refers to section 32(1)(b) of the Draft Bill.

11. The new section 32(1)(j)(iii) – (iv) of the draft Bill seeks to introduce as exceptions to the hearsay rule, statements of relevant facts made by a person who cannot be produced as a witness, and it is shown in respect to the person that "*he is outside Singapore and it is not practicable to secure his attendance*" or "*being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so*". The Committee is of the view that these exceptions would introduce a wide range of hearsay evidence given by persons who either simply refuse to attend the trial of the matter, or fall within the broad category of persons whose attendance it is "*not practicable*" to secure. A wide interpretation of these new proposed sub-sections would allow affidavits of foreign witnesses to be admitted, while depriving the opposing party of an opportunity of testing his testimony in cross-examination at trial. Further, with the availability of video-conferencing facilities, the fact that a person is outside Singapore may not be material.

ANNEX B

INFORMATION TECHNOLOGY COMMITTEE'S VIEWS ON PROPOSED AMENDMENTS TO THE EVIDENCE ACT

1. The Information Technology Committee (the "Committee") agrees that it is timely to review the provisions in the Evidence Act (the "Act") concerning the admissibility of computer output as evidence. As correctly pointed out in the TLDG Final Report, in practice this issue has often been managed by ignoring the provisions of section 35 of the Act. The only reported case that discussed section 35 of the Act is *Benedict Ng v Zim* [2010] 2 SLR 860. In this case, the court held that a list of names with some other information in the form of a spreadsheet was generated by a computer system which was not complex. Evidence from an ordinary user would be sufficient to satisfy section 35(1)(c) of the Act.

2. Clearly, as computer output becomes common, reliability of the computer systems is more readily accepted. Repealing sections 35 and 36 of the Act is welcomed and for computer output to be dealt with in a manner similar to other evidence with certain safeguards by way of easily rebuttable presumptions.

3. The Committee's specific comments on the proposed amendments to the Act relating to computer output are as follows:

Definition of 'electronic record'

a. In the Ministry of Law's consultation paper ("Consultation Paper"), the definition has in effect two limbs: (a) a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or transmitted from one information system to another; and (b) has the same meaning as in section 2 of the Electronic Transactions Act 2010 ("ETA"). In section 2 of the ETA, "electronic record" means a record generated, communicated, received or stored by electronic means in an information system or for transmission from one information system to another. Unfortunately the definition in section 2 of the ETA is worded differently, albeit very slightly, and may give rise to unnecessary confusion. Removing the second limb does not detract from the definition, in fact in the TLDG Final Report, the definition of 'electronic record' does not cross-reference to the ETA.

Deletion of paragraph (b) in the *Illustrations* in section 65

b. Illustration (b) has only marginal effect on computer output as evidence, especially when the substantive provision, sub-section (b) of section 65 of the Act remains un-amended. The Committee suggests that Illustration (b) remains un-amended.

New Section 116A

c. Sub-section 116A(1) concerns presumptions that a court shall make in any sort of proceedings. However sub-section 116A(2) only concerns presumptions that a court shall make in civil proceedings only. Sub-section 116A(3) concerns presumptions that a court may make in civil proceedings. The rationale when a court shall or may make presumptions and why certain presumptions only apply to civil but not criminal proceedings is not clear, especially when all the presumptions are rebuttable. The Committee's suggestion is that the various sub-sections be made consistent in that the court 'shall' rather than 'may' make these presumptions and that they apply to all and not just civil proceedings.