CONSULTATION
AMENDMENTS TO THE EVIDENCE ACT

1. The Evidence Act ("**EA**") provides the legislative basis for Singapore's law of evidence. The Ministry of Law ("**MinLaw**") is considering introducing potential amendments to the EA to reform specific areas of the law of evidence, as set out below. The detailed amendments can be found at the draft Evidence (Amendment) Bill ("**Draft Bill**") attached to this consultation paper.

2. MinLaw seeks the views of consultees in respect of these areas of review.

(A) Legal Professional Privilege for In-House Counsel

3. The law recognises that documents and communications between a lawyer and client for the purposes of legal advice are 'privileged', and consequently protected from disclosure in court proceedings. At common law, courts in a number of jurisdictions, such as the United Kingdom and Australia,[1] have, to varying degrees, extended the application of privilege to communications between an in-house counsel and his employer.

4. MinLaw is, at present, considering amending the EA to clarify and to extend the applicability of legal professional privilege to in-house counsel. The proposed amendments in the Draft Bill will allow in-house counsel who are qualified (either in Singapore or another jurisdiction) to have the benefit of legal professional privilege when they act in their capacity as legal advisors and in the context of rendering legal advice, regardless of whether they hold a practicing certificate.

5. To achieve this, a new section 128A (analogous to the present section 128) will be introduced to provide for legal professional privilege for "qualified legal counsel". The term "qualified legal counsel" includes persons who are employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes. It will also include Legal Service Officers posted to a Government ministry or department or a statutory body.

6. The EA will also be amended to make clear that for purposes of legal privilege, references to "advocates and solicitors" in the EA will be deemed to include legal officers from the Attorney-General's Chambers.

7. The relevant proposed amendments to sections 3, 23, 128, 129, 130 and 131 of the EA are set out in the Draft Bill. MinLaw welcomes your views on the above proposed amendments.

[1] See *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102 and *The Attorney General for the Northern Territory of Australia v Kearney* [1985] 158 CLR 500.

(B) Opinion Evidence

8. In Singapore, the admission of expert opinion is regulated by section 47 of the EA. Generally, the rationale for regulating and controlling the admission and use of expert opinion is to minimise the inherent danger that tribunals of fact (in particular, juries) will place undue emphasis on expert opinions and abdicate their ultimate responsibility to draw their own conclusions on all the relevant facts in dispute. Having said that, there is also immense value in receiving objective, unbiased and reliable expert evidence on scientific and technical issues not within the common understanding of the trier of fact. Such evidence assists the trier of fact to interpret the evidence and determine factual issues before it.

9. At present, the anachronistic wording of section 47 admits only opinions on five areas of specialised knowledge, namely "foreign law, science or art, handwriting or finger impressions", and the scope of such opinions are strictly confined to the point of "foreign law, science or art, handwriting or finger impressions". It may be asked if such a strict restriction on the admission of expert opinion is necessary, given especially that in Singapore there is no need to protect a jury from powerful and confusing expert opinions; professional judges are capable of comprehending the subtleties of expert evidence and according the proper weight to such evidence.

10. A suggestion was made by the Law Reform Committee's ("**LRC**") to amend section 47 of the EA in the manner set out in the Draft Bill.

11. The following are the main reasons behind the LRC's proposal to amend section 47:

    (i) The amendments make the test of "assistance" and not "necessity" the overarching basis of admissibility of expert evidence. However, to guard against the danger of letting in too much expert evidence or expert evidence of marginal utility, the assistance which the court expects to derive must be "substantial" and the court must consider it "likely" that the opinion will render the requisite level of assistance.

    (ii) The replacement of specified, enumerated fields of expertise with the general phrase "scientific, technical or other specialised knowledge" will broaden the types of evidence which may be admitted by precluding arguments that expert evidence arising out of fields of expertise not listed in section 47 are ipso facto inadmissible.

    (iii) The new section 47(3) makes clear that the common knowledge rule[2] is no longer in itself a bar to admissibility if the new section 47(1) criteria are otherwise met.

[2] This rule excludes from admissibility expert opinion on matters that a person without instruction/ experience in the area would be able to form a sound judgment on.

12. A further suggestion was also raised by the LRC that the inclusionary rule under the proposed amended section 47 (which will broaden the categories of admissible expert opinion evidence) should perhaps be subject to an express exclusionary discretion permitting the court to exclude otherwise admissible evidence if it is unfairly prejudicial, misleading or confusing, or will lead to an undue waste of judicial time.

13. MinLaw is, at present, considering implementing the proposal suggested by the LRC. As such, MinLaw seeks your views on the proposed amended section 47 in the Draft Bill and whether a discretion should be given to the court to exclude otherwise admissible expert opinion evidence if it is unfairly prejudicial, misleading or confusing, or will lead to an undue waste of judicial time.

(C) Computer Output

14. At present, section 35 of the EA provides that evidence which falls within the ambit of computer output is only admissible if it is relevant *and* if it falls under one of the following three alternative modes of admissibility:

    (i) by way of express agreement between the parties to the proceedings under section 35(1)(*a*) (i.e. the parties do not dispute the authenticity or accuracy of the contents of the evidence);

    (ii) by way of output produced via an "approved process" under section 35(1)(*b*), an "approved process" being a process which has been approved by a certifying authority pursuant to the Evidence (Computer Output) Regulations 1996; or

    (iii) by proof of the proper operation of the computer and the corresponding accuracy of the computer printout under section 35(1)(*c*).

15. Section 36 of the EA further provides that if the court is not satisfied that the computer output sought to be admitted in evidence under section 35 accurately reproduces the relevant contents of the original document, the court has a discretion to call for further evidence.

16. The present sections 35 and 36 of the EA were introduced in 1996 to facilitate the use of information technology and to provide for the admissibility and weight of computer output produced by any computer or network as evidence in both criminal and civil proceedings. It has been more than 10 years since the provisions were introduced. Significant developments in information technology in the past decade have made a review of the provisions necessary.

17. The Technology Law Development Group ("**TLDG**") of the Singapore Academy of Law was tasked in 2003 to review the provisions in the EA that deal with admissibility of computer output as evidence and to make appropriate recommendations. The TLDG noted, *inter alia*, in its Consultation Paper, entitled "Computer Output as Evidence" (September 2003), that the

three modes of admissibility under section 35 of the EA had, instead of facilitating the use of information technology and the admissibility of electronic evidence, made it difficult for parties to admit electronic evidence. In particular, they posed the following difficulties:[3]

(i) Express agreement between the parties (section 35(1)(*a*)) – This is the most cost-effective mode but it presupposes that parties had applied their minds to the problem of the legal admissibility of their electronic records. Where the differences between parties are so great as to give rise to commencement of civil proceedings, it would hardly be expected for the party against who the electronic evidence is to be adduced to consent to its admissibility pursuant to section 35(1)(*a*). This is all the more so for criminal proceedings where it would hardly behove the accused to consent to admissibility of evidence against him.

(ii) Output produced via an "approved process" (section 35(1)(*b*)) – A lot of background work goes into securing the two certificates required to support the admission of the evidence (see sections 35(3) and 35(4)); the first certifying that the process operated by the company or organisation is an approved process and the second certifying that the computer output is obtained from such an approved process. This mode is really only feasible for large corporations and organisations who can afford the comprehensive and relatively costly auditing process.

(iii) Proof of the proper operation of the computer and the corresponding accuracy of the computer printout (section 35(1)(*c*)) – This mode has a rather complicated requirement of requiring the proponent to prove: (a) two negative conditions that there is no reasonable ground for believing that the output is inaccurate because of the improper use of the computer, and that no reason exists to doubt or suspect the truth or reliability of the output; and (b) a positive condition that there is reasonable ground to believe that at all material times the computer was operating properly. These requirements are arguably not easy to apply and it is often difficult to identify and find the right persons to make the prescribed legal declarations (see sections 35(6) and 35(7)).

18. The TLDG noted that in practice the problem is managed in both civil and criminal proceedings not by way of the parties expressly agreeing to admit the evidence, but by disregarding or ignoring the substantive rule in section 35.[4] The TLDG further questioned if computer output should be treated differently from other non-electronic evidence.[5]

19. After a public consultation, the TLDG recommended in its Final Report (December 2004) that fundamental reform be undertaken, such that electronic

[3] See generally the TLDG Consultation Paper at paras 3.24 - 3.28.
[4] TLDG Consultation Paper at para 3.29.
[5] See generally the TLDG Consultation Paper at paras 3.18 - 3.23.

evidence will be admitted under the *same* rules as non-electronic evidence.[6] In this regard, the computer-specific provisions (sections 35 and 36) as well as computer-specific definitions (in section 3) of the EA would be repealed. However, the TLDG also recommended that evidentiary presumptions be introduced (under a new section) with respect to certain classes of reliable electronic records, such as where the evidence in question is stored by a neutral third party and would be difficult to tamper with, so as to facilitate the admissibility of such records. Other consequential amendments will also be made to the EA to facilitate such a non computer-specific approach to admit electronic evidence.

20. MinLaw is, at present, considering implementing the reform suggested by the TLDG, and the Draft Bill adopts in the main the draft provisions proposed by the TLDG in its Final Report. As such, MinLaw seeks your views on the proposed reform to the EA in relation to computer output.

(D) Hearsay

(I) Background

21. The law on hearsay in Singapore is extremely complex, primarily as a result of statutory interaction between the EA, the Criminal Procedure Code ("**CPC**") and the common law. In recent years, the hearsay rule received judicial attention from the Court of Appeal in the case of *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("***Lee Chez Kee***"), wherein VK Rajah JA commented (at [77]) as follows:

> *"I agree that the present statutory framework is not satisfactory. Indeed, quite apart from the different conceptual bases of the admissibility of hearsay evidence in the two Acts, there are several other inconsistencies and problems which arise but do not present themselves for mention before this court in this appeal. Much of the difficulty ... stems from the manner in which statutory provisions were incorporated [in the CPC] in 1976 without careful consideration of the pre-existing legislation in this area. The way forward must surely involve a reconsideration of these principles and their appropriate statutory reformulation. However, until such reformulation is actually realised, the courts will do well to be simply aware of the different conceptual bases underpinning the admissibility of hearsay evidence in both the EA and the CPC, and be equally alive to the problems which might arise as a result."*

22. At common law, statements are considered hearsay evidence when "*they are made out of court adduced to prove the facts contained therein*"[7] and are excluded as inadmissible unless they fall within one of the recognized exceptions.

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[6] See generally the TLDG Final Report at paras 26-35 and the draft amendment Bill in the Appendix to the TLDG Final Report.

[7] See *Lee Chez Kee* at [64].

23. However, in Singapore, the test for what evidence is considered admissible is defined by the EA, under the rubric of relevance. There has been much judicial and academic debate over the conceptual basis, and nature, of the hearsay rule in Singapore. In *Lee Chez Kee*, VK Rajah JA took the view that the EA provided an inclusionary scheme (rather than exclusionary, as at common law) which gave effect to, but was different from, the common law exceptions. Further, VK Rajah JA stated that hearsay is admitted on different conceptual bases under the EA and CPC, and expressed the view that there ought to be cohesive statutory reformulation to address the inconsistencies within the statutory framework.

24. The hearsay rule is applicable in both civil and criminal proceedings, and was introduced to prevent parties from inundating the courts with evidence of doubtful reliability. The draftsman of the EA, Sir James Stephen, was concerned that the abolition 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 unauthorized 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*".[8]

25. In Singapore, the hearsay rule has been relaxed in respect of criminal proceedings by amendments to the CPC in 1976. In contrast, the hearsay rule has not seen similar legislative consideration in the context of civil proceedings. There have been no major reforms to the rules of hearsay in civil proceedings. In light of the Court of Appeal's comments in *Lee Chez Kee* (as well as the weight of academic literature on the subject), it is apposite to examine the law of hearsay at this juncture with a critical eye, with a view of any potential reform to the hearsay rule if need be, especially in respect of civil proceedings.

26. It bears noting that the area of hearsay evidence has been the subject of the LRC's discussions from 2002 to 2007. In 2003, the LRC considered that the ambit of its review ought to be restricted to the hearsay rule in civil proceedings and after substantial consideration of the issue, the LRC issued a final report in 2007, entitled "Reform of Admissibility of Hearsay Evidence in Civil Proceedings" (the "**LRC Hearsay Report**").

27. The LRC Hearsay Report considered that the current law on hearsay in civil proceedings is in need of reform, in order to rationalise and simplify the overly complicated positions. The LRC cited several examples as to how the law of hearsay, as currently contained in the EA, is unsatisfactory:[9]

    (i) It is unclear whether the statutory public document exception embodies the common law in granting a right to inspect the document to persons concerned therein.

[8] Sir James Stephen, *Introduction to the Indian Evidence Act 1872* (upon which the Singapore EA is modelled) at pg 125.
[9] See the LRC Hearsay Report at paras 14 – 17.

(ii) The statutory exceptions in the EA are too narrow in relation to civil proceedings. In particular, the "business statement" exception is seriously limited (see paragraph 29(ii) below).

(iii) Whereas 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. Thus, it could be said that our law has become uneven of even anomalous in applying more liberal hearsay rules in criminal proceedings than in civil proceedings.

(iv) In practice, there are many cases in which proof of witness unavailability is inexcusably ignored or overlooked when hearsay evidence is sought to be admitted under section 32 of the EA.

28. In view of these considerations, jurisdictions have adopted various approaches to the issue of hearsay. For instance, the UK has abolished the hearsay rule for civil proceedings. Australia and New Zealand have, in turn, retained the rule but undertaken comprehensive reforms. MinLaw's intention is to retain the hearsay rule, whilst broadening the categories of admissible hearsay evidence subject to an overriding judicial discretion to exclude such evidence in the interests of justice. These proposed reforms are set out below.

(II) <u>Proposed reform</u>

29. MinLaw is presently studying amending the legal framework for hearsay evidence in three aspects, as follows:

(i) <u>To broaden the recognised statutory exceptions under the EA and to confer greater discretion to the courts to admit evidence falling within the exceptions</u>

At present, the exceptions to hearsay in the EA are framed in a peremptory manner. In particular, evidence of the subject matter described in sections 32(a) to (h) can only be admitted where, apart from satisfying the requirement prescribed in the relevant subsection, it is *additionally* shown that the maker of such statement is dead, incapable of being found or of giving evidence, or that his attendance cannot be procured without unreasonable delay or expense (the "**Availability Proviso**"). Evidence of the subject matter described in sections 32(a) to (h) would presently be excluded in other circumstances, for instance, when the maker of the statement cannot be identified or refuses to give evidence.

Under the Draft Bill, the hearsay exceptions under sections 32(a) to (h) would no longer be subject to satisfaction of the Availability Proviso. The circumstances in the Availability Proviso will themselves now constitute free-standing exceptions to hearsay. The Draft Bill also

introduces a new exception where parties to the proceedings agree to the admission of the hearsay evidence in question.

To prevent abuse of these broadened hearsay exceptions, two measures have been put in place.

First, even if hearsay evidence falls within the statutory exceptions set out in section 32(1) of the Draft Bill, the courts retain a residual discretion to exclude hearsay evidence whose admission would not be in the interests of justice. Where hearsay evidence is admitted, the weight assigned to such evidence will also be at the court's discretion.

Second, save in the case where hearsay evidence is admitted by parties' agreement, a party seeking to rely on hearsay evidence is required to give notice to other parties of his intended adduction of the same, for instance, by providing a brief description of the hearsay evidence in question, and identifying the statutory exception sought to be relied on. These notice requirements will enable adversely affected parties to object to the use of such evidence in a timely fashion. The details of these notice requirements will be respectively set out in subsidiary legislation relating to the CPC (in the context of criminal proceedings) and the Rules of Court (in relation to civil proceedings).

(ii) <u>To broaden the "business statement" exception in section 32(b)</u>

MinLaw notes the LRC's critique of the existing scope of this exception.[10] Existing jurisprudence appears to have limited the scope of section 32(b) along the following lines:

(a) The exception is confined to first-hand reports made by the transactor himself. It does not apply to business records compiled by a third-party record keeper from information supplied by a transactor.

(b) It is unclear whether the exception applies to composite business reports.

(c) As applied to expert reports, the exception is limited to statements of fact (as opposed to opinion) made by these experts in the course of business.

MinLaw's intention is to remove these technical limitations to the scope of the "business statement" exception, and to allow a court the discretion to admit all business records produced in the ordinary course of business which appear *prima facie* authentic (see section 32(1)(*b*) of the Draft Bill). The Draft Bill also clarifies that the "business statement" exception is capable of extending to Government records.

[10] See the LRC's Hearsay Report at para 15.

It would remain open to the party against whom such evidence is raised to challenge the weight which should be attributed to such evidence. Further, the court's discretion to decline to admit such hearsay evidence would also apply to business statements.

(iii) To reconcile the scope of the hearsay exceptions for civil and criminal proceedings

To address the anomaly in the present state of the law of hearsay (see paragraph 27(iii) above), MinLaw's intention is to generally have the same exceptions to hearsay available in both civil and criminal proceedings, and substantively housed in the EA. The current Draft Bill contains only the relevant proposed amendments to the EA. Consequential amendments will also subsequently have to be made to the CPC.

30. MinLaw welcomes your views in relation to the above three areas of reform.

(E) Conclusion

31. MinLaw would like to seek your views and feedback on the proposed areas of review and the Draft Bill.

32. Replies should reach MinLaw by 30 October 2011.