

CAYMAN ISLANDS



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**A BILL FOR A LAW TO AMEND THE EVIDENCE LAW (2018  
REVISION) TO MODERNIZE THE LAW IN RESPECT OF THE RULES  
OF HEARSAY EVIDENCE AND WITNESS STATEMENTS; AND FOR  
INCIDENTAL AND CONNECTED PURPOSES**

**THE EVIDENCE (AMENDMENT) BILL, 2018**

**MEMORANDUM OF OBJECTS AND REASONS**

This Bill seeks to amend the Evidence Law (2018 Revision) (referred to as the principal Law) to modernize the rules in respect of hearsay evidence and witness statements and for incidental and connected purposes.

Clause 1 provides for the short title to the legislation.

Clause 2 amends section 18 of the principal Law by repealing paragraph (b) to modernize the principal Law with respect to the prosecution's ability to comment where an accused person does not give evidence (draw an adverse inference). It will correct the inequity in the principal Law which permits the Judge and defence counsel to comment where an adverse inference may be drawn but prohibits the prosecution from doing so. It also amends paragraph (d) to provide that a defendant who chooses to attack the character of any person who is not called as witnesses (and who is not therefore in a position to defend themselves against any such attack) or a defendant who chooses to attack the character of any other person (including those called as witnesses) with the intention of not himself giving evidence in order to shield his own bad character from exposure may have their own bad character exposed to the tribunal of fact.

Clause 3 amends section 33 of the principal Law to provide a definition for the word "fear" in circumstances where the Court has to consider admitting the statement of a person who is said to be in "fear". It provides that fear must be widely construed and "includes fear of the death or injury of another person or of financial loss".

Clause 4 amends the principal Law by inserting new provisions, sections 33A-33H, to deal with the use of documents to refresh memory; inconsistent statements; previous statements of a witness; additional requirement for admissibility of multiple hearsay statements; documents produced as exhibits; credibility, stopping the case where evidence is unconvincing and the court's general discretion to exclude evidence. These provisions will bring the principal Law in line with the recent developments in these areas.

The proposed section 33A provides for a statutory mechanism to enable a witness, whilst giving evidence, to refresh their memory from their previous statement. This is particularly helpful where there has been a long passage of time between the incident they seek to recall and the trial.

The proposed section 33B provides that where a person has made a previous inconsistent statement, the contents (if admitted) are admissible for the purposes of proving the truth of that statement. Currently, a previous inconsistent statement could only be used to impugn the credibility of a witness. This provision statutorily removes the rule.

The proposed section 33C provides for other circumstances in which a previous statement may be admissible to prove the truth of its contents for e.g. where a witness is accused of a recent fabrication. This provision also statutorily removes the rule that a previous inconsistent statement could only be used to impugn the credibility of a witness.

The proposed section 33D provides for additional requirements for admissibility of multiple hearsay statements, being statements, not made in oral evidence, that are relied on as evidence of a matter stated in it. The section defines a hearsay statement and provides that a hearsay statement may only be used where it is admissible under section 33B or 33C, all parties agree and to include it would be interests of justice.

The proposed section 33E provides for the use of documents produced as exhibits and that they may only accompany the jury for its deliberations where the court considers it appropriate or all the parties to the proceedings agree that it should accompany the jury.

The proposed section 33F provides for the issue of credibility to apply where certain statements are admitted in the absence of oral testimony.

The proposed section 33G provides for the court to stop the case where the evidence is unconvincing.

The proposed section 33H provides for the court to have a general discretion to exclude evidence.

Clause 5 provides for transitional provisions.

**THE EVIDENCE (AMENDMENT) BILL, 2018**

**ARRANGEMENT OF CLAUSES**

1. Short title
2. Amendment of section 18 of the Evidence Law (2018 Revision) - accused persons, etc., as competent witnesses
3. Amendment of section 33 - proof in criminal proceedings by written statement
4. Insertion of new sections 33A-33H - use of documents to refresh memory; inconsistent statements; other previous statements of witness; additional requirement for admissibility of multiple hearsay statements; documents produced as exhibits; credibility, stopping the case where evidence is unconvincing; court's general discretion to exclude evidence
5. Transitional provisions

CAYMAN ISLANDS

**A BILL FOR A LAW TO AMEND THE EVIDENCE LAW (2018 REVISION) TO MODERNIZE THE LAW IN RESPECT OF THE RULES OF HEARSAY EVIDENCE AND WITNESS STATEMENTS; AND FOR INCIDENTAL AND CONNECTED PURPOSES**

ENACTED by the Legislature of the Cayman Islands.

1. This Law may be cited as the Evidence (Amendment) Law, 2018. Short title
  
2. The Evidence Law (2018 Revision), in this Law referred to as the “principal Law”, is amended in section 18 - Amendment of section 18 of the Evidence Law (2018 Revision) - accused persons, etc., as competent witnesses
  - (a) by repealing paragraph (b); and
  - (b) in paragraph (d)(ii) by deleting the words “of the prosecutor or the witnesses for the prosecution” and substituting the words “of any other person, in which case evidence tending to show that he has committed, been convicted, or been charged with any offence other than that with which he is charged, or is of bad character, may be adduced whether or not he has given evidence in his own defence”.
  
3. The principal Law is amended in section 33(3) as follows - Amendment of section 33 - proof in criminal proceedings by written statement
  - (a) in paragraph (a) by deleting the word “and”;
  - (b) in paragraph (b) by deleting the full stop and substituting the word “; and”;

(c) by inserting after paragraph (b), the following paragraph -

“(c) for the purposes of paragraph (b), fear is to be widely construed and includes fear of the death or injury of another person or of financial loss.”.

Insertion of sections 33A – 33H - use of documents to refresh memory; inconsistent statements; other previous statements of witness; additional requirement for admissibility of multiple hearsay statements; documents produced as exhibits; credibility, stopping the case where evidence is unconvincing; court’s general discretion to exclude evidence

4. The principal Law is amended by inserting after section 33 the following sections -

“Use of documents to refresh memory 33A. (1) A person giving oral evidence in criminal proceedings about any matter may, at any stage in the course of doing so, refresh his memory of it from a document made or verified by him at an earlier time if -

- (a) that person states in the person’s oral evidence that the document records the person’s recollection of the matter at that earlier time; and
- (b) that person’s recollection of the matter is likely to have been significantly better at that time than it is at the time of the person’s oral evidence.

(2) Where -

- (a) a person giving oral evidence in criminal proceedings about any matter has previously given an oral account of which a sound or video recording was made, and that person states in that evidence that the account represented that person’s recollection of the matter at the time;
- (b) that person’s recollection of the matter is likely to have been significantly better at the time of the previous account than it is at the time of that person’s oral evidence; and
- (c) a transcript has been made of the sound or video recording,

that person may, at any stage in the course of giving that person’s evidence, refresh that person’s memory of the matter from that transcript.

Inconsistent statements

33B.(1) If in criminal proceedings a person gives oral evidence and -

- (a) that person admits making a previous inconsistent statement; or
- (b) a previous inconsistent statement made by that person is proved to have been made by virtue of section 4,

the statement is admissible as evidence of any matter stated of which oral evidence by that person would be admissible.

(2) If in criminal proceedings evidence of an inconsistent statement by any person is proved by virtue of section 33F(1)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

Other previous statements of witness

33C.(1) Where a person is called to give evidence in criminal proceedings and a previous statement by that person is admitted as evidence to rebut a suggestion that that person's oral evidence has been fabricated, that statement is admissible as evidence of any matter stated of which oral evidence by that person would be admissible.

(2) A statement made by a person in a document -

- (a) which is used by that person to refresh that person's memory while giving evidence;
- (b) on which that person is cross-examined; and
- (c) which as a consequence is received in evidence in the proceedings,

is admissible as evidence of any matter stated of which oral evidence by that person would be admissible.

(3) A previous statement by a person is admissible as evidence of any matter stated of which oral evidence by that person would be admissible, if -

- (a) any of the following three conditions is satisfied -
  - (i) that the statement identifies or

describes another person, object or place;

(ii) the statement was made by the person when the matters stated were fresh in that person's memory but that person does not remember them, and cannot reasonably be expected to remember them well enough to give oral evidence of them in the proceedings; or

(iii) that person claims to be the person against whom an offence has been committed and the offence is one to which the proceedings relate and the statement consists of a complaint made by that person (whether to a person in authority or not) about conduct which would, if proved, constitute the offence or part of the offence and the complaint was not made as a result of a threat or a promise, and before the statement is adduced that person gives oral evidence in connection with its subject matter; and

(b) while giving evidence that person indicates that to the best of that person's belief that person made the statement, and that to the best of that person's belief it states the truth.

(4) For the purposes of subsection (3) the fact that the complaint was elicited (for example, by a leading question) is irrelevant unless a threat or a promise was involved.

Additional  
requirement  
for  
admissibility  
of multiple  
hearsay  
statement

33D. (1) A hearsay statement is not admissible to prove the fact that an earlier hearsay statement was made unless -

(a) either of the statements is admissible under section 33B or 33C;

(b) all parties to the proceedings agree; or

(c) the court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose.

(2) In this section “hearsay statement” means a statement, not made in oral evidence, that is relied on as evidence of a matter stated in it.

Documents  
produced as  
exhibits

33E. (1) If on a trial before a judge and jury for an offence-

- (a) a statement made in a document is admitted in evidence under section 33B or 33C, and
- (b) the document or a copy of it is produced as an exhibit.

that exhibit shall not accompany the jury when they retire to consider their verdict unless the court considers it appropriate, or all the parties to the proceedings agree that it should accompany the jury.

Credibility

33F. (1) Where in criminal proceedings a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated and the maker of the statement does not give oral evidence in connection with the subject matter of the statement, in such a case -

- (a) any evidence which (if the person had given such evidence) would have been admissible as relevant to that person’s credibility as a witness is admissible in the proceedings;
- (b) evidence may with the court’s leave be given of any matter which (if the person had given such evidence) could have been put to that person in cross-examination as relevant to that person’s credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and
- (c) evidence tending to prove that the person made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that person to be contradictory.

(2) If as a result of evidence admitted under this section an allegation is made against the maker of a statement, the court may permit a party to lead additional evidence of such description as the court may specify for the purposes of denying or answering the allegation.

Stopping the case where evidence is unconvincing

33G. (1) If during a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that -

- (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings; and
- (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, the defendant's conviction of the offence would be unsafe,

the court shall either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

(2) Where -

- (a) a jury is directed under subsection (1) to acquit a defendant of an offence; and
- (b) the circumstances are such that, apart from this subsection, the defendant could if acquitted of that offence be found guilty of another offence,

the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in subsection (1) in respect of it.

(3) If -

- (a) a jury is required to determine under section 158 of the Criminal Procedure Code (2017 Revision) whether a person charged on an indictment with an offence did the act or made the omission charged; and
- (b) pursuant to subsection (1), the court is satisfied at any time after the close of the case for the prosecution that -
  - (i) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings; and
  - (ii) the evidence provided by the statement

is so unconvincing that, considering its importance to the case against the person, a finding that he did the act or made the omission would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a rehearing, discharge the jury.

(4) This section does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury.

Court's  
general  
discretion to  
exclude  
evidence

33H. (1) The court may, in criminal proceedings, refuse to admit a statement as evidence of a matter stated if -

- (a) the statement was made otherwise than in oral evidence in the proceedings; and
- (b) the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

(2) Nothing in this section prejudices the power of a court under section 40 of this Law (exclusion of unfair evidence) or any other power of a court to exclude evidence at its discretion (whether by preventing questions from being put or otherwise).”.

5. (1) Where, at the date of commencement of this Law, any trial or any proceedings in respect of an offence are pending before a court, the trial or proceedings shall, on and after that date, be dealt with in all respects under the new Law (irrespective of when the offence was committed) and the provisions of the new Law are to apply accordingly.

Transitional provisions

(2) In this section “new Law” means the Evidence Law (2018 Revision) as amended by this Law.

2018 Revision

Passed by the Legislative Assembly the       day of       , 2018.

Speaker.

Clerk of the Legislative Assembly.