

THE EVIDENCE (AMENDMENT) BILL, 2009

**Arrangement of Clauses**

*Clause*

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SENATE

**BILL**

AN ACT to amend the Evidence Act, Chap. 7:02

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## THE EVIDENCE (AMENDMENT) BILL, 2009

**Explanatory Note**

(These notes form no part of the Bill but are intended only to indicate its general purport)

This Bill seeks to amend the Evidence Act, Chap. 7:02, (“the Act”) in order to provide that the contents of a previous inconsistent statement made by a person are admissible in criminal proceedings as evidence of any matter stated, of which oral evidence by that person would be admissible. The Bill also proposes to make provision for the admissibility of video or audio recordings of the voluntary statements of prosecution and defence witnesses, including the accused. Finally, the Bill seeks to abolish the common law rules governing the admissibility of bad character evidence and introduce a rebalanced statutory scheme which would provide for the admissibility of bad character evidence in accordance with prescribed guidelines.

This Bill would be inconsistent with sections 4 and 5 of the Constitution and is therefore required, pursuant to section 13, to be passed by a special majority of three-fifths of all the members of each House of Parliament.

Clause 1 provides the short title of this Act, for which this is the Bill.

Clause 2 provides the commencement provision.

Clause 3 provides that this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.

Clause 4 provides the interpretation provision.

Clause 5 seeks to amend section 13 of the Act. It is proposed that section 13(3) which partially embodies the common law rules relating to the admissibility of bad character evidence in criminal proceedings be repealed. However, where a person has already been charged with an offence before the commencement of this Act, it is proposed that section 13(3) shall continue to apply as if it had not been repealed.

Clause 6 would amend section 15C of the Act to provide that where a person is fearful of giving oral evidence in a matter, a statement made by that person in a document shall be admissible as evidence of any fact of which oral evidence by that person would be admissible.

Clause 7 would amend the Act by inserting after section 15G, sections 15H to 15X.

The proposed section 15H would provide that the contents of a previous inconsistent statement are admissible as evidence of the truth of the matters contained in that statement and not just as tools to challenge the credibility of a witness.

The proposed section 15I would provide for the admissibility of the whole or any part of video or audio recordings of the voluntary statements of prosecution and defence witnesses, including the accused, having regard to prescribed guidelines and where the Court has made a direction that the recording should be admitted as evidence in chief of the witness. At the proposed section 15J certain terms used in sections 15H and 15I are defined.

The proposed section 15K explains what is meant by evidence of a person's bad character and at the proposed section 15L the common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished. This would include the common law rules governing the admissibility of bad character evidence in relation to persons other than the accused. In place of the previous law, a rebalanced statutory scheme would provide for the admissibility of bad character evidence in accordance with prescribed guidelines.

The proposed section 15M would provide for the admissibility of bad character evidence in relation to persons other than the accused. This new statutory scheme seeks to encourage witnesses to give evidence in criminal proceedings by specifying the circumstances in which evidence of a witness's bad character is admissible, by requiring leave of the Court for its admission and by providing that a substantial probative value test must be satisfied. The effect of this provision would be that witnesses will now be better protected from irrelevant and unfair cross-examination on their character.

With respect to the admissibility of bad character evidence of accused persons in criminal proceedings, the proposed section 15N seeks to adopt an inclusionary approach by setting out seven gateways through which evidence of bad character may be admitted against the accused. Each of the last five gateways has an accompanying explanatory and interpretative provision, which are set out at the proposed sections 15O to 15S.

The proposed sections 15T and 15U deal with stopping a case once the evidence is found to be contaminated and with the admissibility of bad character evidence in relation to previous convictions of the accused whilst still a child, respectively.

The proposed section 15V would provide that a reference to the relevance or probative value of evidence in criminal proceedings would be based on the assumption that it is true, save in exceptional circumstances where no Court or jury could reasonably find the evidence to be true.

The proposed section 15W seeks to impose a duty on the Court to give reasons for its rulings on the admissibility of bad character evidence.

The proposed section 15X is a transitional provision which would provide that this Act, upon commencement, shall not apply where a person is charged with an offence and is already brought before a Court.

## **BILL**

AN ACT to amend the Evidence Act, Chap. 7:02

[ , 2009]

WHEREAS it is enacted by section 13(1) of the <sup>Preamble</sup> Constitution that an Act of Parliament to which that section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and, if any Act does so declare, it shall have effect accordingly:

And Whereas it is provided in section 13(2) of the Constitution that an Act of Parliament to which that section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House:

And Whereas it is necessary and expedient that the provisions of this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution:

Enactment	ENACTED by the Parliament of Trinidad and Tobago as follows:—
Short title	<b>1.</b> This Act may be cited as the Evidence (Amendment) Act, 2009.
Commencement	<b>2.</b> This Act shall come into force on a date to be fixed by the President by Proclamation.
Act inconsistent with Constitution	<b>3.</b> This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.
Interpretation Chap. 7:02	<b>4.</b> In this Act, “the Act” means the Evidence Act.
Section 13 amended	<b>5.</b> Section 13 of the Act is amended— <ul style="list-style-type: none"> <li>(a) in subsection (2) by deleting the word “A” and substituting the words “Subject to section 15N, a”;</li> <li>(b) by repealing subsection (3); and</li> <li>(c) by inserting after subsection (4) the following subsection: <p style="margin-left: 40px;">“(5) Notwithstanding the repeal of subsection (3) by the Evidence (Amendment) Act, 2009, where a person has been charged with a criminal offence before the commencement of the amendment Act, subsection (3) shall continue to apply as if it had not been repealed.”</p> </li> </ul>

6. Section 15C of the Act is amended—

Section 15C amended

(a) in subsection (1)—

- (i) in paragraph (d), by deleting the word “or”;
- (ii) in paragraph (e), by deleting the full stop and substituting the words “; or ”;
- (iii) by inserting after paragraph (e), the following paragraph:

“(f) is fearful.”;

(b) in subsection (2), by deleting the words “subsection (1)(e)” and substituting the words “subsections (1)(a), (1)(e) and (1)(f)”; and

(c) by inserting after subsection (4) the following subsection:

“(5) For the purpose of subsection (1)(f) “fearful” is to be construed widely and includes fear of the death or injury of another person or of financial loss.”

7. The Act is amended by inserting after section 15G the following sections:

Sections 15H, 15I, 15J,  
15K, 15L, 15M, 15N,  
15O, 15P, 15Q, 15R,  
15S, 15T, 15U, 15V,  
15W and 15X inserted

15H. (1) Where in criminal proceedings a person gives oral evidence and—

“Admissibility  
of  
inconsistent  
statement

(a) he admits making a previous inconsistent statement; or

(b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7,

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



(2) Where in criminal proceedings evidence of an inconsistent statement made by a person is given under section 15D(1)(c), the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

- Admissibility of evidence by video or audio recording 15I. (1) This section applies where—
- (a) a person, including an accused, is called as a witness in proceedings for an indictable offence or for the summary trial of an indictable offence;
  - (b) the witness claims or has at any time claimed to have witnessed whether visually or in any other way—
    - (i) events alleged by the prosecution to include conduct constituting the offence or part of the offence; or
    - (ii) events closely connected with the offence;
  - (c) the witness has previously given a statement of the events in question, whether in response to questions asked or otherwise;
  - (d) the statement was given at a time when those events were fresh in the witness's memory or would have been assuming the truth of the claim mentioned in paragraph (b);
  - (e) a video or an audio recording was made of the statement;

(f) the Court has made a direction that the video or audio recording should be admitted as evidence in chief of the witness and the direction has not been rescinded; and

(g) the video or audio recording is played in proceedings in accordance with the direction.

(2) A direction under subsection (1)(f)—

(a) may be made in relation to a video or an audio recording given by the accused;

(b) may be made only if it appears to the Court that—

(i) the witness's recollection of the events in question is likely to be significantly better in the video or audio recording than it will be when he gives oral evidence in the proceedings; and

(ii) it is in the interests of justice for the video or audio recording to be admitted, having regard in particular to the matters mentioned in subsection (3).

(3) Those matters are—

(a) the interval between the time of the events in question and the time when the video or audio recording was made;

- (b) any other factors that might affect the reliability of what the witness said in the video or audio recording;
- (c) the quality of the video or audio recording; and
- (d) any views of the witness as to whether his evidence in chief should be given orally or by means of the video or audio recording.

(4) Where, or to the extent that, the witness in his oral evidence in the proceedings asserts the truth of the statements made by him in the video or audio recording, the statements shall be treated as if made by him in that evidence.

(5) The reference in subsection (1)(f) to the admission of a video or an audio recording includes a reference to the admission of any part of that recording.

(6) When considering whether or not any part of a video or an audio recording should be admitted under this section, the Court shall consider—

- (a) whether admitting that part of the recording would carry a risk of prejudice to the accused; and
- (b) whether the interests of justice nevertheless requires that part of the recording to be admitted in view of the desirability of showing the whole, or substantially the whole, of the video or audio recording.

(7) Where a video or an audio recording is admitted under this section, the witness may not give evidence in chief otherwise than by means of the recording as to any matter which, in the opinion of the Court, has been dealt with adequately in the video or audio recording.

(8) A statement made by a witness in a video or an audio recording may be admitted under this section whether or not the statement was made on oath.

Definition of  
certain terms  
used

15J. In sections 15H and 15I—

“audio recording” means any exclusively aural fixation of sounds, regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied;

“oral evidence” includes evidence which, by reason of any disability, disorder or other impairment, a person called as a witness gives in writing or by signs or by way of any device;

“video recording” means any recording, on any medium, from which a moving image may by any means be produced, and includes the accompanying sound-track.

Bad character

15K. (1) Reference to evidence of a person’s bad character is to evidence of, or a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the accused is charged; or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

(2) For the purpose of this section and sections 15L to 15W, “misconduct” includes the commission of an offence or other reprehensible behaviour.

Abolition of  
common law  
rules

15L. (1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to any rule of law under which in criminal proceedings evidence of a person’s reputation is admissible for the purposes of proving his bad character.

Non-accused’s  
bad character

15M. (1) In criminal proceedings evidence of the bad character of a person, other than the accused, is admissible where—

(a) it is important explanatory evidence;

(b) it has substantial probative value in relation to a matter which—

(i) is in issue in the proceedings; and

(ii) is of substantial importance in the context of the case as a whole; or

(c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purpose of subsection (1)(a), evidence is important explanatory evidence if—

- (a) without it, the Court or jury would find it impossible or difficult to understand other evidence in the case; and
- (b) its value in understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purpose of subsection (1)(b), the Court shall have regard, in particular, to the following factors—

- (a) the nature and number of the events to which the evidence relates;
- (b) when those events are alleged to have happened or existed;
- (c) where—
  - (i) the evidence is evidence of a person's misconduct, and
  - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

- (d) where—
  - (i) the evidence is evidence of a person's misconduct;

- (ii) it is suggested that that person is also responsible for the misconduct charged; and
- (iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person, other than the accused, must not be given without leave of the Court.

Accused person's bad character 15N. (1) In criminal proceedings evidence of the accused's bad character is admissible where—

- (a) all parties to the proceedings agree to the evidence being admissible;
- (b) the evidence is adduced by the accused himself or is given in answer to a question asked by him in cross-examination and intended to elicit it;
- (c) it is important explanatory evidence;
- (d) it is relevant to an important matter in issue between the accused and the prosecution;
- (e) it has substantial probative value in relation to an important matter in issue between the accused and a co-accused;

- (f) it is evidence to correct a false impression given by the accused; or
- (g) the accused has made an attack on another person's character.

(2) Sections 15O to 15S contain provisions supplementing subsection (1).

(3) The Court shall not admit evidence under subsections (1)(d) or (1)(g) if, on an application by the accused to exclude it, it appears to the Court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

(4) On an application to exclude evidence under subsection (3) the Court shall have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

Important  
explanatory  
evidence

15O. For the purpose of section 15N(1)(c), evidence is important explanatory evidence if—

- (a) without it, the Court or jury would find it impossible or difficult to understand other evidence in the case; and
- (b) its value in understanding the case as a whole is substantial.

Important  
matter in  
issue  
between the  
accused and  
the  
prosecution

15P. (1) For the purpose of section 15N(1)(d), an important matter in issue between the accused and the prosecution includes—

- (a) the question whether the accused has a propensity to commit offences of the kind with which he is charged, except where his



having such a propensity makes it no more likely that he is guilty of the offence; or

- (b) the question whether the accused has a propensity to be untruthful in any respect.

(2) Where subsection (1)(a) applies, an accused person's propensity to commit offences of the kind with which he is charged may, without prejudice to any other way of doing so, be established by evidence that he has been convicted of—

- (a) an offence of the same description as the one with which he is charged; or
- (b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular accused if the Court is satisfied, by reason of the length of time since his conviction or for any other reason that it would be unjust for the section to apply in his case.

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

- (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms; or
- (b) two offences are of the same category as each other if they belong to the same category of offences.

(5) Only prosecution evidence is admissible under section 15N(1)(d).

Important  
matter in  
issue between  
the accused  
and a  
co-accused

15Q. (1) Evidence which is relevant to the question whether the accused has a propensity to be untruthful is admissible under section 15N(1)(e) only if the nature or conduct of the accused's defence is such as to undermine the co-accused's defence.

(2) Only evidence—

- (a) which is to be, or has been, adduced by the co-accused; or
- (b) which a witness is to be invited to give, or has given, in cross-examination by the co-accused,

is admissible under section 15N(1)(e).

Evidence to  
correct a false  
impression

15R. (1) For the purpose of section 15N(1)(f)—

- (a) the accused gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the Court or jury a false or misleading impression about himself; and
- (b) the evidence to correct such an impression is evidence which has probative value.

(2) An accused is treated as being responsible for the making of an assertion if—

- (a) the assertion is made by the accused in the proceedings, whether or not in evidence given by him;

- (b) the assertion was made by the accused—
  - (i) on being questioned under caution, before charge, about the offence with which he is charged; or
  - (ii) on being charged with the offence or officially informed that he may be prosecuted for it,

and evidence of the assertion is given in the proceedings;

- (c) the assertion is made by a witness called by the accused;
- (d) the assertion is made by a witness in cross-examination in response to a question asked by the accused that is intended to elicit the assertion, or is likely to do so; or
- (e) the assertion was made by a person out of Court, and the accused adduces evidence of it in the proceedings.

(3) An accused who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the Court that an accused, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the Court or jury an impression about himself that is false or misleading, the Court may, if it appears just to do so, treat the accused as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) “conduct” includes appearance or dress.

(6) Evidence is admissible under section 15N(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 15N(1)(f).

Attack on  
another  
person's  
character

15S. (1) For the purpose of section 15N(1)(g), an accused makes an attack on another person's character where—

- (a) he adduces evidence attacking the other person's character;
- (b) he, or by his attorney-at-law, asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so; or
- (c) evidence is given of an imputation about the other person which is made by the accused—
  - (i) on being questioned under caution, before charge, about the offence with which he is charged; or
  - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1)—

“evidence attacking the other person's character” means evidence to the effect that the other person—

- (a) has committed an offence, (whether a different offence from the one with which the accused is charged or the same one); or

(b) has behaved, or is disposed to behave, in a reprehensible way, and

“imputation about the other person” means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 15N(1)(g).

Stopping the case where evidence is contaminated

15T. (1) In criminal proceedings before a judge and jury where—

(a) evidence of an accused’s bad character has been admitted under section 15N(1)(c) to (g); and

(b) the Court is satisfied at any time after the close of the case for the prosecution that—

(i) the evidence is contaminated; and

(ii) the contamination is such that, considering the importance of the evidence to the case against the accused, his conviction of the offence would be unsafe,

the Court may either direct the jury to acquit the accused 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 an accused of an offence; and

(b) the circumstances are such that, apart from this subsection, the accused could if acquitted of that

offence be found guilty of another offence, the accused may not be found guilty of that other offence if the Court is satisfied that the evidence is contaminated as mentioned in subsection (1)(b).

(3) Where—

- (a) a jury is required to determine under section 66 of the Criminal Procedure Act whether an accused Chap. 12:02 did the act charged;
- (b) evidence of the accused's bad character has been admitted under section 15N(1)(c) to (g); and
- (c) the Court is satisfied at any time after the close of the case for the prosecution that—
  - (i) the evidence is contaminated; and
  - (ii) the contamination is such that, considering the importance of the evidence to the case against the accused, a finding that he did the act or made the omission would be unsafe,

the Court may either direct the jury to acquit the accused 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 an accused of an offence or to discharge a jury.

(5) For the purpose of this section a person's evidence is contaminated where—

- (a) as a result of an agreement or understanding between that person and one or more persons; or
- (b) as a result of that person being aware of anything alleged by one or more persons whose evidence may be, or has been, given in the proceedings,

the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

Offences  
committed by  
accused when  
a child

15U. (1) In proceedings for an indictable offence or for the summary trial of an indictable offence, evidence of any previous conviction of the accused for an offence whilst under the age of eighteen is not admissible unless—

- (a) the conviction was in relation to an indictable offence or the summary trial of an indictable offence; and
- (b) the Court is satisfied that the interests of justice require the evidence to be admissible.

(2) Subsection (1) applies in addition to section 15N.

Assumption  
of truth in  
assessment of  
relevance or  
probative  
value

15V. (1) Subject to subsection (2), a reference to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence a Court need not assume that the evidence is true if it appears on the basis of any material before the Court, including any evidence it decides to hear on the matter, that no Court or jury could reasonably find the evidence to be true.

Court's duty to give reasons for rulings 15W. (1) Where the Court makes a relevant ruling—

- (a) it shall state in open Court, but in the absence of the jury, its reasons for the ruling; and
- (b) if it is a Magistrates' Court, it shall cause the ruling and the reasons for it to be entered in the register of the Court's proceedings.

(2) In this section “relevant ruling” means—

- (a) a ruling on whether an item of evidence is evidence of a person's bad character;
- (b) a ruling on whether an item of evidence is admissible under section 15M or 15N [including a ruling on an application under section 15N(3)]; or
- (c) a ruling under section 15T.

Transitional 15X. This Act, upon commencement, shall not apply to a case where a person is charged for an offence and is already brought before a Court.”.

Passed in the Senate this      day of      , 2009.

*Clerk of the Senate*



IT IS HEREBY CERTIFIED that this Act is one the Bill for which has been passed by the Senate and at the final vote thereon the Senate has been supported by the votes of not less than three-fifths of all the members of the Senate, that is to say by the votes of \_\_\_\_\_ members of the Senate.

*Clerk of the Senate*

I confirm the above.

*President of the Senate*

Passed in the House of Representatives this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

*Clerk of the House*

IT IS HEREBY CERTIFIED that this Act is one the Bill for which has been passed by the House of Representatives and at the final vote thereon in the House has been supported by the votes of not less than three-fifths of all the members of the House, that is to say by the votes of \_\_\_\_\_ members of the House.

*Clerk of the House*

I confirm the above.

*Speaker*

No. 6 of 2009

SECOND SESSION  
NINTH PARLIAMENT  
REPUBLIC OF  
TRINIDAD AND TOBAGO

**BILL**

AN ACT to amend the Evidence Act,  
Chap. 7:02

Received and read the

First time .....

Second time .....

Third time .....