

# 立法會 *Legislative Council*

LC Paper No. CB(4)707/18-19  
(These minutes have been  
seen by the Administration)

Ref: CB4/BC/5/17

## **Bills Committee on Evidence (Amendment) Bill 2018**

**Minutes of the second meeting  
held on Thursday, 18 October 2018 at 10:45 am  
in Conference Room 3 of the Legislative Council Complex**

**Members present :** Hon CHEUNG Kwok-kwan, JP (Chairman)  
Hon Tommy CHEUNG Yu-yan, GBS, JP  
Hon Paul TSE Wai-chun, JP  
Hon CHAN Chi-chuen  
Hon Kenneth LEUNG  
Hon Dennis KWOK Wing-hang  
Dr Hon Elizabeth QUAT, BBS, JP  
Dr Hon Junius HO Kwan-yiu, JP  
Hon Holden CHOW Ho-ding

**Members absent :** Hon James TO Kun-sun  
Hon YUNG Hoi-yan

**Public officers attending :** Agenda Item I  
  
Mr Wesley WONG Wai-chung, SC, JP  
Solicitor General  
  
Ms Diana LAM  
Assistant Solicitor General  
(Policy Affairs)(Acting)  
  
Mr Richard MA  
Senior Government Counsel

Miss Selina LAU  
Senior Government Counsel

Miss Cindy CHEUK  
Senior Government Counsel

Mr Ivan LEUNG  
Public Prosecutor

**Clerk in attendance :** Ms Sophie LAU  
Chief Council Secretary (4)2

**Staff in attendance :** Ms Rachel DAI  
Assistant Legal Adviser 2

Ms Jacqueline LAW  
Council Secretary (4)2

Miss Mandy LAM  
Legislative Assistant (4)2

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## Action

### **I. Meeting with the Administration**

[File Ref: LP 5019/16C, LC Paper Nos.: CB(3)731/17-18, LS81/17-18, CB(4)1601/17-18(01) – (04)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

### Clause-by-clause examination of the Bill

2. The Bills Committee commenced clause-by-clause examination of the Chinese text of the Evidence (Amendment) Bill 2018 ("the Bill"). The Bills Committee examined up to section 55N in clause 5 of the Bill before the end of the meeting.

## **II. Any other business**

### Invitation of public views

3. Members agreed to receive public views on the Bill at the next meeting to be held on 13 November 2018 at 4:30 pm.
4. There being no other business, the meeting ended at 12:39 pm.

Council Business Division 4  
Legislative Council Secretariat  
2 April 2019

**Proceedings of the second meeting of  
Bills Committee on Evidence (Amendment) Bill 2018  
on Thursday, 18 October 2018 at 10:45 am  
in Conference Room 3 of the Legislative Council Complex**

<b>Running Time</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
<i>Agenda Item I – Meeting with the Administration</i>			
000523 – 000740	Chairman	Opening remarks	
000741 – 001527	Chairman Administration	Briefing by the Administration on the Evidence (Amendment) Bill 2018 ("the Bill").	
001528 – 002132	Chairman Mr Tommy CHEUNG Administration	<p>Mr CHEUNG was concerned that while the common law rule relating to the admissibility of confessions made by an accused would be preserved in the new Schedule 2 under Division 5 of the new Part IVA in clause 5 of the Bill, the Administration did not implement the recommendation made by the Law Reform Commission of Hong Kong ("LRC") in its Report on Arrest in 1992 that section 78 of the Police and Criminal Evidence Act 1984 ("PACE") should be adopted in Hong Kong to expressly provide for the court's power to exclude unfair evidence (including evidence of confessions).</p> <p>The Administration explained that section 78 of PACE empowered the court to exercise discretion to exclude evidence (including hearsay evidence) should its probative value be outweighed by its prejudicial effect. However, it was already an established rule of common law that the court had such discretion already to exclude evidence the prejudicial value of which was greater than its probative value. A judgment handed down by the Court of Final Appeal ("CFA") in 2000 affirmed this rule as being part of the common law of Hong Kong. Neither the CFA nor the lower courts had encountered difficulties in applying this common law rule. As such, the Administration considered it not necessary to codify such rule by way of enactment in the proposed Bill.</p>	
002133 – 002413	Chairman Mr Kenneth LEUNG Administration	Mr LEUNG enquired about the definition of "declarant" proposed in section 55C in clause 5 of the Bill in the context of a scenario where multiple hearsay might be involved. The Administration explained that the issue was addressed by way of section 55V of multiple hearsay in mind.	

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002414 – 002826	Chairman Mr Dennis KWOK Administration	<p>While expressing the legal profession's support for the Bill, Mr KWOK asked whether the Bill had addressed the concern of the Hong Kong Bar Association ("the Bar Association") on the condition of threshold reliability.</p> <p>The Administration responded that it had taken on board certain matters or suggested amendments raised by the Bar Association in its submission. As regards the Bar Association's suggestion to include "the absence of cross-examination of the declarant at trial" as a factor in assessing the threshold reliability under the proposed section 55P in clause 5 of the Bill, the Administration considered it not appropriate as it was obvious that, due to the very nature of hearsay evidence, there would not be any opportunity to cross-examine the declarant at trial. Also, the circumstances provided in the proposed section 55P under which the condition of threshold reliability was satisfied in respect of any hearsay evidence in criminal proceedings served as adequate safeguard. The Administration therefore took the view that it was not appropriate to include the absence of cross-examination in the proposed section 55P as a factor to be considered in assessing the threshold reliability and also the admissibility of the hearsay evidence.</p>	
002827 – 003716	Chairman Mr Paul TSE Administration	<p>Mr TSE indicated his in-principle support for the Bill.</p> <p>Mr TSE enquired and the Administration responded regarding Mr TSE's suggestion to codify the common law rule in relation to the admissibility of admissions and confessions made by an accused in the principal legislation by way of enactment. In gist, the Administration explained that the common law jurisprudence in this regard was rich and elaborate. Experience did not suggest that either the courts or criminal law practitioners encountered difficulties such that codification would be called for.</p> <p>Mr TSE further enquired and the Administration responded regarding the rationale for the differences in the proposed standard of proof applied to the prosecution and defence to prove that the condition of necessity was satisfied. The Administration explained that this, as a general principle, was applicable to criminal proceedings</p>	

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		and there was no reason to depart therefrom.	
003717 – 004126	Chairman Mr Holden CHOW Administration	<p>In reply to Mr CHOW's enquiry, the Administration advised that it did not have the specific information in respect of the number of past cases where the declarant, as proposed in sections 55O(1)(c)(i) and (ii) in clause 5 of the Bill, was outside Hong Kong and it was not reasonably practicable to secure the declarant's attendance at the proceedings or to make the declarant available for examination or cross-examination in another competent manner in the proceedings.</p> <p>The Administration's further explanation on the rationale for proposing the new section 55O(1)(c)(ii).</p>	
004127 –0 10907	Chairman Mr Kenneth LEUNG Administration Assistant Legal Adviser 2 ("ALA2")	<p>Briefing by the Administration on its response to the letter dated 21 September 2018 from Assistant Legal Adviser to the Department of Justice ("ALA2's letter") [LC Paper Nos. CB(4)1601/17-18(02) and (03)].</p> <p>Referring to the drafting issue raised in the ALA2's letter, the Administration advised that it would consider proposing an amendment to the Chinese equivalent of "verbal" in the definition of "statement" in the proposed section 55C of the Bill.</p>	
010908 – 011818	Chairman Mr Holden CHOW Administration	<p>Mr CHOW's enquiry about the examples of "all reasonable steps" appearing in the proposed section 55O(1)(d). The Administration's response in this regard.</p> <p>In response to Mr CHOW's further enquiry regarding paragraph 9 of the Administration's response to the ALA2's letter [LC Paper No. CB(4) 1601/17-18(03)], the Administration advised that although English case law suggested that the expense and inconvenience of securing a witness's attendance was a relevant consideration for the test of "reasonably practicable", as the case authorities showed, in practice, the English courts would nevertheless consider whether it was reasonably practicable to make the declarant available to give evidence in another competent manner such as by video link. The Administration stressed that the steps which an applicant was expected to take to find the declarant must be reasonable having regard to all relevant circumstances and must be</p>	

Running Time	Speaker	Subject(s)	Action required
		considered on a case-by-case basis. It was not practicable to set out all relevant factors in an exhaustive manner.	
011819 – 012126	Chairman Administration	<p>Commencement of clause-by-clause examination of the Bill</p> <p><b>Long title of the Bill</b></p> <p><b>Part 1: Preliminary</b></p> <p><u>Clause 1</u></p> <p>Members raised no questions.</p> <p><b>Part 2: Amendments to Evidence Ordinance</b></p> <p><u>Clauses 2 to 4</u></p> <p>Members raised no questions</p>	
012127 – 012313	Chairman Administration Mr Kenneth LEUNG	<p><u>Clause 5</u></p> <p>In reply to Mr LEUNG's enquiry, the Administration advised that sections 46 to 55B of Part IV of the Evidence Ordinance (Cap. 8) dealt with the admissibility of hearsay evidence in civil proceedings. It was therefore appropriate to add Part IVA after section 55B of Cap. 8 to provide for the rules and principles for admissibility of hearsay evidence in criminal proceedings.</p>	
012314 – 012555	Chairman Administration	<p><u>Division 1 – General</u></p> <p><i>Sections 55C and 55D</i></p> <p>Members raised no questions.</p>	
012556 – 013043	Chairman Administration Mr Kenneth LEUNG	<p><i>Section 55E</i></p> <p>In response to Mr LEUNG's enquiry regarding the proposed section 55E(3)(a), the Administration advised that this section referred to the criminal proceedings to be handled in the Magistracy. The meanings of "complaint" and "information" in this context were well-established. The Administration elaborated that both the terms "complaint" and "information" were adopted in the Magistrates Ordinance (Cap. 227). They referred</p>	

Running Time	Speaker	Subject(s)	Action required
		to the manner in which criminal proceedings might formally be commenced at the magistracy level. The Administration further elaborated that the word "indictment" was used in the proposed section 55E(3)(b) when referring to criminal proceedings proceeded for trial before the District Court and the Court of First Instance. The operation of the proposed sections 55E(3)(a) and (b) should not be a problem for criminal law practitioners.	
013044 – 013145	Chairman Administration	<i>Sections 55F and 55G</i>  Members raised no questions.	
013146 – 013425	Chairman Administration	<u>Division 2 – Admission of Hearsay Evidence by Agreement of Parties</u>  <i>Section 55H</i>  Members raised no questions.	
013426 – 014631	Chairman Administration Mr Kenneth LEUNG Mr Holden CHOW	<u>Division 3 – Admission of Hearsay Evidence not Opposed by Other Parties</u>  <i>Section 55I</i>  Mr LEUNG's enquiry and the Administration's response regarding the mechanism proposed under section 55I as compared to the established practice in respect of the requirement on notice to be given by a party who proposed to adduce evidence in proceedings.  In reply to Mr CHOW's enquiry, the Administration elaborated on the 28-day time limit for giving a hearsay evidence notice prescribed under the proposed section 55I(b).  <i>Sections 55J to 55L</i>  Members raised no questions.	
014632 – 014936	Chairman Administration Mr Kenneth LEUNG	<u>Division 4 – Admission of Hearsay Evidence with Permission of Court</u>  <i>Section 55M</i>  In reply to Mr LEUNG's question, the Administration elaborated on the meaning of "probative value" and "prejudicial effect" in the	



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		proposed section 55M(2)(f).	
014937 – 015654	Chairman Administration ALA2	<p><i>Section 55N</i></p> <p>In response to ALA2's enquiry regarding the application of the new sections 55L and 55N(2), the Administration advised that the new section 55L proposed that a party intended to adduce hearsay evidence in proceedings by giving a hearsay evidence notice under the new section 55I, or a party opposed to the admission of hearsay evidence by giving an opposition notice under the new section 55K might apply to the court to shorten or extend the prescribed time limit. On the other hand, the new section 55N(2) sought to provide that a party who had not given a hearsay evidence notice might still apply to the court for permission to admit the hearsay evidence on specified grounds. Since such an application under the new section 55N(2) might have prejudicial effect on each other party to the proceedings, more stringent conditions had to be satisfied as proposed under this section before the court might allow such application.</p>	
<i>Agenda Item II –Any other business</i>			
015655 – 015743	Chairman	<p>Discussion on invitation of public views on the Bill and date of next meeting</p> <p>Closing remarks</p>	