

立法會

Legislative Council

LC Paper No. CB(4)719/18-19
(These minutes have been seen
by the Administration)

Ref: CB4/BC/5/17

Bills Committee on Evidence (Amendment) Bill 2018

**Minutes of the third meeting
held on Tuesday, 13 November 2018, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex**

Members present : Hon CHEUNG Kwok-kwan, JP (Chairman)
Hon James TO Kun-sun
Hon Tommy CHEUNG Yu-yan, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon CHAN Chi-chuen
Hon Kenneth LEUNG
Dr Hon Elizabeth QUAT, BBS, JP
Hon Holden CHOW Ho-ding

Members absent : Hon Dennis KWOK Wing-hang
Dr Hon Junius HO Kwan-yiu, JP
Hon YUNG Hoi-yan

Member attending : Dr Hon Fernando CHEUNG Chiu-hung

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

Attendance by invitation : Agenda Item I
Society for Community Organization

Mr Richard TSOI Yiu-cheong
Community Organizer

Democratic Alliance For The Betterment And
Progress of Hong Kong

Mr IP Chun-yuen
司法及法律事務副發言人

Liberal Party

Mr Alan HOO, SC
Vice Party Chair

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

Action

I. Meeting with deputations/individuals and 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) and CB(4)196/18-19(01)]

Discussion

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

2. The Bills Committee received views from three deputations on the Evidence (Amendment) Bill 2018 ("the Bill"). The major views expressed were summarized as follows:

- (a) two deputations indicated their support for the Bill and urged for its early passage. One of the deputations was concerned about the protection offered to vulnerable witnesses under the Bill and whether the Bill could address the technology advancement in electronic communications. Concerns were also raised as to whether the Bill could strike a fair balance between the rights of the defendant and that of the victim. The deputations also called on the Administration to take heed of the views of The Law Society of Hong Kong to further improve the drafting of the Bill; and
- (b) another deputation expressed deep concern that the admission of hearsay evidence without cross-examination of the declarant might deprive defendant of a fair trial, and queried the rationale for proposing the new sections 55O(1)(c) and (e). Noting that the Administration did not implement the recommendation made by the Law Reform Commission of Hong Kong ("LRC") in its Report on Arrest that section 78 of the Police and Criminal Evidence Act 1984 ("PACE") in England and Wales should be adopted in Hong Kong to expressly provide for the court's power to exclude unfair evidence (including evidence of confessions), the deputation suggested deferring the Bill's commencement date until the passage of comprehensive legislation in Hong Kong similar to PACE.

3. In response, the Administration said that the rights of different parties to the proceedings would be balanced under the Bill to ensure the fairness of the trial. To this end, it was important to ensure hearsay evidence that was both relevant and reliable might be admissible in the proceedings, and that would not only benefit the prosecution but also the defence. Besides, a number of built-in safeguards had been put in place in the Bills to prevent possible miscarriage of justice. As an ultimate safeguard to protect the integrity of the proceedings, the court must direct acquittal of the accused where the court considered that it would be unsafe to convict the accused.

4. The Administration added that the Bill was drafted in a technologically neutral way such that the admissibility of hearsay evidence would not be dependent on the form which might change by advancement in technology. As regards the condition of necessity under the Bill, it would only be satisfied where the declarant was genuinely unable to provide testimony of hearsay evidence and not merely unwilling to do so. For the condition proposed in the new section 55O(1)(c), it would be necessary to show that it was not reasonably practicable to secure the declarant's attendance at the proceedings, or to make the declarant available for examination and cross-examination in another competent manner in the proceedings.

5. Since the Bill was not aimed at dealing with a confession made by an accused (the admissibility of which under common law rules were preserved) but a hearsay statement made otherwise than by a person while giving oral evidence in the proceedings, the Administration took the view that it was not necessary to defer commencement of the Bill until the passage in Hong Kong of legislation similar to PACE.

Follow-up actions to be taken by the Administration

6. The Administration was requested to:

- (a) provide a consolidated response to the deputations' views and suggestions on the Bill;
- (b) in respect of the condition of necessity under the new section 55O, provide examples or case law to illustrate the situations in which the new sections 55O(1)(c) and 55O(1)(e) apply and address a member's concern about the admission of hearsay evidence without cross-examination of the declarant in those situations;

- (c) in respect of the recommendations for reforming the hearsay rule in criminal proceedings, provide a comparison between the English model and the New Zealand Law Commission model and the justifications for adopting a modified version of the New Zealand Law Commission model as the proposed model of reform to be adopted in Hong Kong; and
- (d) provide relevant cases from New Zealand demonstrating if there were any difficulties encountered by the courts there in the course of implementing the New Zealand Law Commission model in admitting hearsay evidence, with a view to facilitating members' understanding of the areas requiring particular attention if the modified New Zealand Law Commission model was to be adopted in Hong Kong.

(Post-meeting note: The English and Chinese versions of the Administration's written response were issued to members vide LC Paper No. CB(4)253/18-19(02) on 3 and 4 December 2018 respectively.)

II. Any other business

Date of next meeting

- 7. Members noted that the next meeting of the Bills Committee would be held on Monday, 10 December 2018 at 4:30 pm.
- 8. There being no other business, the meeting ended at 6:25 pm.

Council Business Division 4
Legislative Council Secretariat
3 April 2019

**Proceedings of the third meeting of
Bills Committee on Evidence (Amendment) Bill 2018
on Tuesday, 13 November 2018, at 4:30 pm
in Conference Room 1 of the Legislative Council Complex**

Running Time	Speaker	Subject(s)	Action required
<i>Agenda Item I – Meeting with deputations/individuals and the Administration</i>			
000720 – 001108	Chairman	Opening remarks	
001109 – 001507	Chairman Society for Community Organization	Presentation of views	
001508 – 001830	Chairman Democratic Alliance For The Betterment And Progress of Hong Kong	Presentation of views	
001831 – 002255	Chairman Liberal Party	Presentation of views	
002256 – 003206	Chairman Administration	The Administration's response to the deputation's views.	
003207 – 003710	Chairman Mr Kenneth LEUNG Administration	Mr LEUNG enquired and the Administration responded regarding: (a) whether taking evidence from witnesses outside Hong Kong by video link would be considered as a "competent manner in the proceedings" under the proposed section 55O(1)(c)(ii); and (b) the arrangements for examination and cross-examination of the witness who gave evidence in connection with the hearsay evidence in proceedings.	
003711 – 004540	Chairman Mr James TO Liberal Party Administration	At the invitation of Mr TO, the deputation of Liberal Party further elaborated his views on the proposed sections 55O(1)(c) and (e). Mr TO requested the Administration to provide examples or case law to illustrate the situations in which sections 55O(1)(c) and 55O(1)(e) applied and address his concern about the admission of hearsay evidence without cross-examination of the	Admin (paragraph 4(b) of the minutes referred)

Running Time	Speaker	Subject(s)	Action required
		declarant in those situations.	
004541 – 005330	Chairman Dr Fernando CHEUNG Administration	<p>Noting the withdrawal of prosecution against the defendant in a sexual offence case which occurred at a residential care home for persons with disabilities, Dr CHEUNG welcomed the proposed reform to the hearsay rule in Hong Kong to enhance protection for mentally incapacitated persons and vulnerable witnesses in criminal proceedings.</p> <p>Dr CHEUNG's concern and the Administration's response about the proposed section 55O(1)(e) which dealt with the situation where the declarant would be entitled to refuse to give evidence in proceedings on the ground of self-incrimination.</p>	
005331 – 010007	Chairman Mr Paul TSE Administration	<p>Mr TSE enquired whether it was the intention of reform to change the system to benefit the prosecution more, and whether it was necessary in Hong Kong compared with other jurisdictions.</p> <p>The Administration advised that it proposed to introduce the Evidence (Amendment) Bill 2018 ("the Bill") with a view to rationalizing the present law relating to hearsay evidence in criminal proceedings. The Administration stressed that the object of the Bill was not to deprive the right of the defendant to a fair trial, but to ensure that relevant and reliable evidence could be admissible in criminal proceedings, thereby avoiding injustice and conviction of the innocent.</p>	
010008 – 010505	Chairman Mr Holden CHOW Administration	<p>Mr CHOW enquired whether the Administration would take on board the suggestion of The Law Society of Hong Kong to include "the absence of cross-examination of the declarant at trial" as a factor in assessing admissibility of hearsay evidence.</p> <p>The Administration advised that:</p> <p>(a) the absence of cross-examination was a matter which was relevant to the weight to be given to the evidence, rather than its admissibility. Since it was obvious that there would be no opportunity to cross-examine the declarant at trial, it would be circular to single out "inability to cross-examine" as a factor in assessing</p>	

Running Time	Speaker	Subject(s)	Action required
		<p>admissibility of hearsay evidence;</p> <p>(b) to address the concern of the two legal professional bodies, the absence of cross-examination had been expressly provided for in section 55Q(5)(e) as one of the factors for the court to consider whether it would be unsafe to convict the accused of an offence; and</p> <p>(c) sufficient built-in safeguards, including section 55Q(5)(e), had been incorporated in the Bill to ensure a fair trial.</p>	
010506 – 011534	Chairman Mr Paul TSE Administration Liberal Party Society for Community Organization	<p>Mr TSE's enquiry and the Administration's response regarding research into the New Zealand case law with respect to the impact of implementing the New Zealand Law Commission model in admitting hearsay evidence on the prosecution work.</p> <p>At the invitation of Mr TSE, some deputations further expressed their views on/suggestions to the Bill.</p> <p>Mr TSE requested the Administration to:</p> <p>(a) in respect of the recommendations for reforming the hearsay rule in criminal proceedings, provide a comparison between the English model and the New Zealand Law Commission model and the justifications for adopting a modified version of the New Zealand Law Commission model as the proposed model for reform to be adopted in Hong Kong; and</p> <p>(b) provide relevant cases in New Zealand demonstrating if there were any difficulties encountered by the courts there in the course of implementing the New Zealand Law Commission model in admitting hearsay evidence, with a view to facilitating members' understanding of the areas requiring particular attention if the modified New Zealand Law Commission model was to be adopted in Hong Kong.</p>	Admin (paragraphs 4(c) and (d) of the minutes referred)

011535 – 012236	Chairman Dr Fernando CHEUNG Administration	<p>Dr CHEUNG pointed out that some declarants might be unfit to be a witness and cross-examined because of his/her physical or mental conditions. An exclusion of the hearsay evidence in this category might lead to injustice.</p> <p>Dr CHEUNG followed up on his enquiry about the new section 55O(1)(e) and queried whether this section would be too loose to invite abuse that compromised the integrity of the trial process. The Administration responded that LRC had set out a case in the Report to illustrate the need to propose section 55O(1)(e) as one of the necessity conditions, so that the hearsay evidence given by an accomplice of an accused who was not prosecuted in the same proceedings might be admissible with a view to ensuring fairness in the trial.</p>	
012237 – 012348	Chairman Mr Holden CHOW Administration	<p>Mr CHOW sought clarifications from the Administration about the meaning of the proposed section 55O(1)(e), and the Administration's response.</p>	
012349 – 013042	Chairman Dr Fernando CHEUNG Administration	<p>Expressing his concern over the proposed section 55O(1)(e), Dr CHEUNG asked the Administration to further explain whether the built-in safeguards incorporated in the Bill, including sections 55P and 55Q, would be sufficient to prevent possible miscarriages of justice.</p> <p>The Administration responded that:</p> <p>(a) in addition to the conditions of necessity and threshold reliability provided for in the proposed sections 55O and 55P of the Bill, section 55Q acted as an ultimate safeguard to the Bill by requiring the court to direct a verdict of acquittal of the accused where the court considered that it would be unsafe to convict the accused; and</p> <p>(b) there were other safeguards in criminal proceedings to ensure the fairness of the trial. In relation to standard of proof, the prosecution was required to prove an offence beyond reasonable doubt. The new section 55O(4) introduced an additional threshold before the court might grant permission to admit hearsay evidence. The standard of proof required to prove that</p>	

		the condition of necessity be satisfied was higher if the applicant was the prosecution (i.e. beyond reasonable doubt) compared with that if the applicant was the accused (i.e. on the balance of probabilities).	
013043 – 013845	Chairman Mr Paul TSE Administration	<p>In response to Mr TSE's enquiry, the Administration advised that the New Zealand Law Commission model did not preserve any of the common law exceptions to the hearsay rule. The current approach of retaining certain common law rules relating to hearsay evidence in the Bill was proposed with reference to the English model which also adopted the option of preserving some common law exceptions. One of the advantages of this option was that it did not preclude Hong Kong courts from developing jurisprudence in this area of law. After careful consideration of the cases of other common law jurisdictions, LRC recommended that only those common law exceptions now provided for in the new Schedule 2 under Division 5 of the new Part IVA in clause 5 of the Bill should be preserved. The Department of Justice agreed with the LRC's recommendations and therefore proposed to reform the hearsay rule by way of the Bill to implement the recommendations of LRC.</p> <p>Mr TSE's further enquiry and the Administration's response about the policy intent of the Bill.</p>	
013846 – 014501	Chairman Mr Holden CHOW Administration	Mr CHOW was concerned whether the perceived effect of the proposed relaxation of the rule against hearsay in criminal proceedings was such that the chance of convicting the accused would become higher. The Administration replied that the purpose of the Bill was not to make a conviction either easier or more difficult, but to ensure that evidence which ought to be considered by the court was admissible. The admission of hearsay evidence under the new law could be incriminating or exonerating as the case might be.	
014502 – 015749	Chairman Dr Fernando CHEUNG Liberal Party Administration	<p>Dr CHEUNG reiterated his support for the early passage of the Bill.</p> <p>The deputation of Liberal Party expressed his view that the proposed sections 55O(1)(c) and (e) were not necessary.</p> <p>Dr CHEUNG's enquiry and the Administration's response regarding the suggestions given by the relevant concern groups on arrangements relating</p>	

		to cross-examination for enhancing the protection to vulnerable witnesses.	
<i>Agenda Item II –Any other business</i>			
015750 – 015815	Chairman	Date of next meeting Closing remarks	

Council Business Division 4
Legislative Council Secretariat
3 April 2019