LEGISLATIVE COUNCIL
OFFICIAL REPORT

RECORTYS OIKOIL
Y CHOONCEIL SLATTYSSAGH

PROCEEDINGS

DAALTYN

HANSARD

Douglas, Tuesday, 23rd October 2018

All published Official Reports can be found on the Tynwald website:

www.tynwald.org.im/business/hansard

Supplementary material provided subsequent to a sitting is also published to the website as a Hansard Appendix. Reports, maps and other documents referred to in the course of debates may be consulted on application to the Tynwald Library or the Clerk of Tynwald's Office.

Volume 136, No. 1

ISSN 1742-2272

Published by the Office of the Clerk of Tynwald, Legislative Buildings, Finch Road, Douglas, Isle of Man, IM1 3PW.

Present:

The President of Tynwald (Hon. S C Rodan)

The Lord Bishop of Sodor and Man (The Rt Rev. P A Eagles),
The Attorney General (Mr J L M Quinn QC),
Miss T M August-Hanson, Mr D C Cretney, Mr T M Crookall, Mr R W Henderson,
Mrs M M Hendy, Mrs K A Lord-Brennan, Mrs J P Poole-Wilson and Mrs K Sharpe
with Mr J D C King, Clerk of the Council.

Business transacted

Order of the Day 3

1. Criminal Evidence Bill 2018 – Second Reading approved 3

Criminal Evidence Bill 2018 – Clauses considered 6

2. Motion for leave to introduce – A Bill to amend the Legislation Act 2015 – Motion carried ... 20

The Council adjourned at 12.20 p.m. 30

Legislative Council

The Council met at 10.30 a.m.

[MR PRESIDENT *in the Chair*]

The President: Moghrey mie, good morning, Hon. Members.

Members: Moghrey mie, Mr President.

The President: The Lord Bishop will lead us in prayer.

PRAYERS
The Lord Bishop

Order of the Day

1. Criminal Evidence Bill 2018 –
Second Reading approved

The Attorney General to move:

That the Criminal Evidence Bill be read a second time.

The President: Good morning, Hon. Members, again.

We resume our new session of this particular Branch of Tynwald and this is the first session we have a new Messenger, Dot Peverall, who will be joining us on a permanent basis.

Item 1 on the Order Paper the Criminal Evidence Bill 2018, Second Reading. I call on her Majesty's Attorney General to move.

The Attorney General: Thank you, Mr President and Hon Members.

This is one of two Bills which deal reactively to issues which have arisen in the Island's courts in the recent past. The other Bill, Mr President, is the Contempt of Court Bill which I trust will be before this Council very shortly. Both Bills are moved by me as being of national importance, falling into the categories of good governance and public safety. The relation to this Bill, the Criminal Evidence Bill, as I explained at the First Reading, it is necessary because of the difficulties that arose in the prosecution of a case named *Attorney General v Frank Thomas*, when on 9th April 2018 His Honour Deemster Montgomerie ruled that a text message and its content was an implied assertion and was inadmissible, hearsay evidence.

This ruling resulted in difficulties being identified concerning the future admissibility of telephone messages, which difficulties may well undermine the successful prosecution of many types of criminal offences. His Honour Deemster Montgomerie, in so ruling, relied upon the House of Lords case *R v Kearley* of 1992. To address these difficulties the Criminal Evidence Bill 2018 provisions

derived from the corresponding provisions of Part 11 of the Criminal Justice Act 2003 (of Parliament), which deals in a more consistent and logical way with the admissibility of hearsay evidence in criminal proceedings.

Hearsay evidence had previously been inadmissible in criminal proceedings, not for the most part because of statutory prohibitions on it being used, but rather because of a series of judge-made rules reacting to the question of whether evidence should be admitted in particular circumstances. The late and learned Lord Cooke of Thorndon, a distinguished jurist from New Zealand who served as a member of the Appellate Committee of the House of Lords after being President of the New Zealand Court of Appeal – which was then that country's highest court – observed, during the passage of the corresponding provisions in the UK through the House of Lords in 2003: 'that the provisions we are considering today were the result of "a failure by the English courts to redress a mischief of their own creation"'.

He went on:

> The rule excluding hearsay evidence and some of the exceptions to it are entirely a creation of the courts over the centuries. Parliament never enacted such a rule. It might have been thought that, just as a rule was developed, so the courts would have accepted responsibility to modify it in the direction favoured by virtually all who have examined the subject in any depth—namely, by placing more weight on reliability rather than technicality. Instead, there has been in England and Wales much ossification—largely, I regret to say, achieved by the Appellate Committee of your Lordships' House, which has insisted on a strict bar even on hearsay of unquestionably high reliability, subject only to a list of exceptions now declared closed.

Lord Cooke then dealt with the case which shows perhaps the most significant example of the mischief created by the hearsay rule in recent time. He said this:

> Notorious examples of that approach are well known to all criminal lawyers and may be found in all criminal textbooks. It is enough for me to give but one. In 1992, in the case of Kearley, the Appellate Committee held that, on a charge of drug dealing, police evidence was inadmissible that, within a few hours, some 20 customers or would-be customers had called at or telephoned the accused's flat seeking supplies, some of them asking for him personally. That decision was by a majority of three to two, with powerful dissenting speeches.

Lord Cooke's mention of the decision in *Kearley* is of particular relevance because the rule which it contains on the general inadmissibility of phone records in drug-dealing cases has the capacity to create very serious difficulties for one of the major areas of criminal law on the Island. Without dealers' phone records being admitted there is a real risk that the guilty will walk free on the basis of a rule which is judge-made and comes from a very different time.

Rather than simply making the records of messages to and from drug dealers' mobile phones admissible the decision was made to apply the whole of Part 11 of the Criminal Justice Act 2003 to the Island and therefore to restate entirely the law relating to hearsay in criminal proceedings.

Mr President, I beg to move that the Criminal Evidence Bill 2018 be read a second time.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

Mr President, Members of the Legislative Council, I second this Bill.

It has been described as representing a rebalancing of the scales between the Crown and the defence by getting rid of artificiality in relation to the admission of hearsay evidence. It also extends the circumstances in which the previous conviction of the defendant – commonly known as 'bad character' – can be admitted. However, this is balanced by increased judicial discretion to exclude evidence which would tend to be more prejudiced than probative. The content and aim of this Bill has stood the test of time in England for over 15 years now.

How many times have we all heard: 'Objection! Hearsay!'? And in fact some classes of hearsay evidence have always been admitted in criminal proceedings, most notably confessions made by defendants in interview and business records.

The first application that was referred to the full Court of Appeal in England by the Registrar of Criminal Appeals in relation to hearsay provisions in the Criminal Justice Act 2003 (of Parliament) concerning bad character, was the *Crown v Richard James Joyce and James Paul Joyce* on 27th June 2005 before a court over which Lord Justice Rose presided. On the day of 23rd July 2004 in Kirkby, two undisguised men approached a home, one holding a loaded shotgun. They got out of the car and fired three or four times at the windows before returning to the car and driving away. Richard and James Joyce were convicted of possessing a firearm with intent to cause fear of violence. A further count of possessing a firearm when prohibited remained on file. Richard Joyce was sentenced to seven years' imprisonment and James Joyce, to eight years.

Richard was also remitted to the magistrates' court for driving whilst disqualified and he failed to answer bail and he was tried and sentenced in his absence. The trial judge in Liverpool exercised his new powers under section 119 of the Criminal Justice Act 2003 by admitting three respective witness statements that had been retracted by their respective makers following intimidation. Each gave evidence before the jury that their initial statement was wrong and that they were mistaken when identifying the applicants.

It was submitted that, on behalf of both defendants, the evidence by the retracted witness statements was unconvincing and the defence asked that the judge direct an acquittal. The judge refused and left the decision to the jury saying the identifications were made in broad daylight, by people who knew the applicants. The appeal against conviction failed and the Court of Appeal properly took the view that the trial judge was the best person to evaluate the competing interests of the Crown in admitting, and the defence in seeking, to exclude the evidence.

Relying on the terms of their original witness statements, alongside other supporting evidence, sufficed to prove the guilt of the applicants of this offence. Hearsay testimony is usually barred because defendants have the right to cross-examine witnesses, which they cannot do if the speaker is not in court, but other appropriate safeguards can be put in place to enable the evidence to be properly evaluated even in the absence of the maker of the statement.

As Her Majesty's Attorney General says, Parliament has never passed such an Act that precludes hearsay evidence from being admissible in court. Historically, Parliament has prioritised high-level reliability over technicalities. Removing the technical barriers may provide a far more comprehensive picture of a case, giving rise to clarity which will enable the right judgment to be made.

By way of addition to what the learned Attorney General has said in relation to Lord Cooke, he believed that it is not the role of a judge or a Deemster to mould society. In his text and speeches he said that other forces should lie at the root of social change. 'The role of a judge', he said, 'has an identifying and balancing function that cannot be minimised' – but of a parliament's role, word for word he said, 'A nation cannot cast adrift from its own foundations'.

The situation we are currently faced with in the existing hearsay rules has been likened to a maths teacher telling you that you are wrong because the equation process was not followed, even if you may have stumbled on to the correct final answer. I would like to suggest that this Bill will make admissible strong evidence in favour of all victims of crime – rebalancing between defendants and victims and making the trial process less of an intellectual game; instead, it will be better grounded in reality and reflective of modern-day needs.

Thank you, Mr President.

The President: Now, does any other Hon. Member wish to speak at this stage? No? Mr Attorney, is there anything you wish to add?

The Attorney General: Just briefly, Mr President, to thank the Hon. Member for her detailed support to this Bill and for acting as seconder. And to thank her for the obvious detailed consideration which she has given to the matter and for her informative statement which I am confident will assist Hon. Members in their consideration of the Bill as it moves on.

Thank you, Mr President.

The President: Hon. Members, I put the motion that the Criminal Evidence Bill 2018 be read for the second time. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Criminal Evidence Bill 2018 –
Clauses considered

The President: We move on to the clauses and I understand, Mr Attorney, you would wish to move these in groups, (**The Attorney General:** Yes.) which you will indicate as we move along.

Mr Attorney.

The Attorney General: Certainly, Mr President.

Firstly, with your consent, I propose to move clauses 1 to 3 which form Part 1 of the Bill, together.

The President: Is that agreed, Hon. Members?

Members: Agreed.

The Attorney General: Clause 1, Mr President, provides for the short title of the resulting Act. Clause 2, for the making of an Appointed Day Order for the commencement of the Act; and clause 3 with the interpretation of certain terms used throughout the Bill.

Mr President, Hon. Members, I beg to move that clauses 1 to 3 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put the motion that clauses 1 to 3 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 4.

The Attorney General: Mr President, we then come to Part 2 which contains the new rules on the admissibility of hearsay evidence. Part 2 mirrors the structure of Part 11 of the Criminal Justice Act 2003 so far as it is relevant to this jurisdiction. In my subsequent speeches today any reference to the 2003 Act is a reference to the UK Criminal Justice Act 2003. The Bill deals both with the issue of admissibility of evidence of a person's bad character and also the admissibility of hearsay evidence.

So we then consider clause 4 which defines what is meant by evidence of 'bad character' for the purposes of Division 1 of the Part. Importantly, the definition explicitly excludes evidence which has either to do with the alleged facts of the offence with which the defendant is charged, or is evidence of misconduct in connection with the investigation or prosecution of the offence – for example, by way of obstruction of the investigation or attempting to nobble a jury.

Mr President, I beg to move that clause 4 stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: Mrs Lord-Brennan.

Mrs Lord-Brennan: Thank you, Mr President.

I wondered if the learned Attorney can comment on the definition of 'misconduct' further. I do not think I can see a definition in here and it does seem quite vague.

Is that something that they have in the UK version, and do we need it here?

The President: Mr Attorney.

The Attorney General: Mr President

The Attorney General: If I may, with your leave refer to my drafter, if that is possible, sir, who will have looked at that issue?

The President: Yes. Good morning, if you could just please identify yourself for the purposes of the record?

Mr Connell: Indeed, Mr President.

Howard Connell, Legislative Drafter in the Attorney General's Chambers.

The answer to the question is 'no', misconduct is not defined because it takes a number of different forms and the minute you define it you run the risk of excluding something that ought, on reflection, to be within its scope.

It is understood by judges and there is 15 years of case law. I could bore you with loads and loads of examples from here but I shall not. It is precisely because we have copied the English legislation verbatim. Any English authorities on the construction of these words will be relied upon by the Manx lawyers.

Does that help you, madam?

Mrs Lord-Brennan: It does.

The President: Thank you for your assistance, Mr Connell.

Mr Attorney.

The Attorney General: Mr President, if I could also help Hon. Members by referring them to clause 16 which we will consider later, which makes reference to a definition of misconduct, saying that means 'the commission of an offence or other reprehensible behaviour'. So again some guidance is given there.

Thank you.

The President: Mr Attorney.

The Attorney General: So with that, Mr President, I beg to move that clause 4 do stand part of the Bill.

The President: I put the motion that clause 4 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 5, sir.

Attorney General: Yes, thank you, Mr President.

In order for the Bill to restate the rules on the admissibility of evidence of bad character it must first abolish the common law rules, and clause 5 of the Bill does that, subject only to an exception for the common law about the admissibility of public records, and evidence of reputation as evidence of bad character.

Mr President, I beg to move that clause 5 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.
I would like to second and reserve my remarks.

The President: I put the motion that clause 5 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.
Clause 6.

The Attorney General: Thank you, Mr President.
Clause 6 replicates section 100 of the 2003 Act. In order for evidence of the bad character of a person other than the defendant to be admitted, it must satisfy one of three criteria set out in subsection (1) of the clause, namely that:

(a) it is important explanatory evidence,
(b) it has substantial probative value in relation to a matter which—
(i) is a matter 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.

Subsections (2) and (3) explain the meaning of the conditions in paragraphs (a) and (b) of subsection (1). By way of example, where a defendant is charged with handling stolen goods, it will be in issue that the goods have in fact been stolen. Without proof of that, there is no possibility of convicting the handler. That might involve questioning a person who would otherwise have been a co-accused to prove that he was convicted on an earlier occasion of the theft in which the goods were stolen.
Subsection (4) makes it clear that evidence of the bad character of a person other than the defendant must not be adduced without the leave of the court.
Mr President, I beg to move that clause 6 stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks, Mr President.

The President: I put the motion that clause 6 stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.
Clause 7.

The Attorney General: Thank you, Mr President, Hon. Members.
Clause 7 deals, in a similar fashion to clause 6, with the defendant's own bad character. However, the range of circumstances under which the evidence may be admitted is wider than those in clause 6. The seven gateways in this clause include three which are specific to defendants, namely:

a. the evidence is adduced by the defendant or is given in answer to a question asked by the defendant in cross-examination which is intended to elicit it;
b. it is evidence to correct a false impression given by the defendant; or
c. the defendant has made an attack on another's character.

The first of these rather speaks for itself and arises where a defendant has put his own character in issue, either by mentioning it in the witness box or deliberately putting a question to another witness to elicit that same information.
The second arises where a defendant who has some previous convictions – albeit perhaps for a different character – represents himself or herself as a person of previous good character, or perhaps suggests, correctly, that he has no previous convictions for sexual offences, but omits to

mention previous convictions for dishonesty. In these circumstances the evidence of bad character becomes admissible.

The third, rather more straightforward case, in which a defendant's character becomes admissible, is where he or she attacks the character of another person. Here, the previous case law relating to the proviso in subsection 1 of the Criminal Evidence Act 1946, which replicates verbatim the text of section 1 of the Criminal Evidence Act 1898 (of Parliament).

Clauses 8 to 12 supplement the provisions of clause 7(1) and I shall turn to them in a moment.

Mr President, I beg to move that clause 7 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: I put the motion that clause 7 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 8, sir.

The Attorney General: With your permission, Mr President, I shall speak to clauses 8 to 12 together because each of these defines a concept which is used in clause 7.

The President: Is that agreed?

Members: Agreed.

The Attorney General: Clause 8 defines the concept of 'important explanatory evidence', for the purposes of clause 7(1)(c).

Clause 9 defines 'matter in issue between the defendant and the prosecutor', for the purposes of clause 7(1)(d).

Clause 10 defines 'matter in issue between the defendant and a co-defendant' for the purposes of Clause 7(1)(e).

Clause 11 defines 'evidence to correct a false impression', used in clause 7(1)(f).

Clause 12 defines 'attack on another person's character'.

Mr President, I beg to move that clauses 8 to 12 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: Mrs Poole-Wilson.

Mrs Poole-Wilson: Yes, thank you, Mr President.

I had a couple of questions on those clauses which I wondered if the learned Attorney might be able to assist with.

The first question is clause 9(4)(b), which provides when it comes to defining categories of offences. In that clause it says that offences will be prescribed for the purposes of this section by an order made by the Department of Home Affairs. So my first question is: whether there is any indication or guidance on when such an order may be made?

The second question I had relates to clause 12, the 'attack on another person's character'. I wondered whether the learned Attorney could assist by putting on the record information that we have been given in explanatory notes regarding the line between where a defendant accuses a

witness of lying, as opposed to suggesting a witness may be mistaken in their recall of events. So my understanding – and I just wondered whether the Attorney could help with this – is that if a defendant accuses a witness of lying, that amounts to an attack on that person's character, but it would not stop them if they wanted to question a witness's version at recall of events and suggests that the witness might be mistaken. It would not stop the defendant being able to do that in their own defence.

I hope that makes sense.

The President: Mr Attorney.

The Attorney General: Yes, thank you, Mr President; and I thank Mrs Poole-Wilson for her questions.

I cannot say with any certainty when an order may be made under clause 9(4), but certainly we will be asking the Department to deal with this as a matter of some urgency.

With reference to clause 12: again, I thank her for her very helpful comments and explanation with which I would not take any issue. Certainly, the mere fact of accusing a defendant of lying would not necessarily be of any prejudice because of course that may well simply be in the context of the evidence of a case where the person who is attacked may well be lying. So I think the explanatory memorandum which I am more than happy to put on record, says:

> Clause 12 deals with an 'attack on another person's character' and with evidence that becomes admissible as a result of the defendant attacking another person's character (see clause 7(1)(g)). A defendant attacks another person's character if he gives evidence that they committed an offence (either the one charged or a different one) or have behaved in a reprehensible way: (see clause 7(1)(a) and 7(2)). This is similar to the definition of evidence of bad character in clause 3, but it also includes evidence relating to the facts of the offence charged and its investigation and prosecution. Thus, a defendant would be attacking a prosecution witness if he claimed that they were lying in their version of events or adduced evidence of their previous misconduct to undermine their credibility. But a suggestion that a witness is mistaken is not intended to engage this provision.

I think that is helpful clarification.

Thank you, Mr President.

The President: With that, I put the motion that clauses 8 to 12 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 13.

The Attorney General: Mr President, Hon. Members, clause 13 contains a very important safeguard which empowers the trial Deemster to stop a jury trial in its tracks where evidence has been adduced under one of paragraphs (c) to (g) of clause 7(1), but the Deemster later concludes that the evidence so admitted is contaminated and the extent of the contamination is such that any resulting conviction would be unsafe. Subsection (4) makes it clear that the powers to stop proceedings under the provisions of the clause do not limit any other power a Deemster has to stop a trial.

Mr President, I beg to move that clause 13 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put the motion that clause 13 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 14.

The Attorney General: Mr President, Hon. Members, I next turn to clause 14. Since the rulings which are given under clause 7, other than possibly those under clause 7(1)(g), will normally be given at or before the start of the defendant's trial, the assessment of the relevance or probative value of the evidence to be adduced is necessarily speculative. Clause 14 therefore provides that in evaluating the evidence which would form part of the case if it were admitted, it is to be assumed to be true unless there is clear evidence before the court that no court or jury could reasonably find it to be true.

Mr President, I beg to move that clause 14 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: I put clause 14 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 15.

The Attorney General: Mr President, clause 15 requires the court to give reasons for: (a) any rulings under the Bill about whether any item of evidence is evidence of a person's bad character; and (b) any ruling about the admissibility of evidence under clause 6 or clause 7.

Mr President, I beg to move that clause 15 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 15. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 16.

The Attorney General: Mr President, clause 16 provides definitions for some of the terms used in the Division.

I beg to move that clause 16 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: I put clause 16. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 17.

The Attorney General: Mr President, Hon. Members, we now come to Division 2 of this Part which deals with hearsay evidence in some detail, in part restating the common law exceptions to the general rule under which hearsay evidence is inadmissible in criminal proceedings. The Division effectively constitutes an overarching code on the admissibility of hearsay evidence, although some existing statutory provisions in the area are retained as free-standing rules.

Clause 17(1) provides four bases for hearsay to be admissible, namely: (a) a provision of the Division or other statutory provision makes it admissible; (b) any of the previous common law rules

preserved by clause 21 makes it admissible; (c) all parties in the case agree that it should be admitted; or (d) the court is satisfied in the interests of justice that it should be admitted.

Clause 17(3) makes it clear that nothing in the Division prevents a court from excluding a piece of evidence on grounds which do not relate to the fact that it is hearsay. For example, a Deemster may take the view, although it would otherwise be admissible, a piece of evidence is more prejudicial than probative and may therefore determine not to admit it in any event.

Mr President, I beg to move that clause 17 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put the motion that clause 17 do stand part of the Bill. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 18.

The Attorney General: Mr President, Hon. Members, clause 18 deals with the concepts of 'statements' and 'matters stated' for the purpose of this Division of Part 2.

Mr President, I beg to move that clause 18 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 18. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 19.

The Attorney General: Mr President, Hon. Members, we come then to the principal categories of admissibility of hearsay evidence which are set out in clauses 19 to 23.

Clause 19 deals with circumstances in which a witness is unavailable to give evidence either because the witness is dead, unfit to give evidence because of bodily or mental condition, outside the Island in circumstances where his or her attendance cannot reasonably be secured, cannot be found, or has been placed in a state of fear such that he or she will not give evidence. 'Fear' in this context is given a very wide meaning. This is often a factor leading to the collapse of trials, but there are appropriate safeguards within the section, in subsection (4), to ensure that leave to adduce hearsay evidence in reliance on the basis that the maker is fearful is given only in appropriate circumstances.

Mr President, I beg to move that clause 19 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 19. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 20.

The Attorney General: Mr President, one of the long-standing exceptions to the hearsay rule relates to documents which are generated in the course of a trade, business or performance of an official function by one person relying on information given him by another, for example, a registrar of births and deaths; and clause 20 maintains this rule.

Mr President, I beg to move that clause 20 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 20. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 21.

The Attorney General: Mr President, clause 21 preserves what might charitably be described as a rag bag of common law exceptions from the general hearsay rule. They were the product of judicial creativity in particular circumstances where it was recognised that the normal hearsay rule would work injustice and be completely impracticable.

Mr President, I beg to move that clause 21 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 21. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 22.

The Attorney General: Mr President, with your permission, I will deal with clauses 22 and 23 together.

The President: Agreed?

Members: Agreed.

The Attorney General: The former deals with the status and admissibility of previous inconsistent statements by a witness and the latter with previous consistent statements which are admitted to dispel a suggestion that a witness is making his evidence up late in the day. Both reflect existing rules of law.

Mr President, I beg to move that clauses 22 and 23 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clauses 22 and 23. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 24.

The Attorney General: Mr President, and Hon. Members, the abolition of the general rule on inadmissibility of hearsay gives rise to a further issue for consideration, namely what to do about multiple hearsay where, for example, A, who saw what happened, tells B, who in turn tells C, and the only person in a position to give evidence now is C who has his story from someone who could only give hearsay evidence himself or herself.

Clause 24 permits the evidence to be admitted but only on the basis that either: (a) one of the statements in question is admissible under the rules in clauses 20, 22 or 23; or (b) the parties agree;

or (c) the court is satisfied that the evidential value is so high that the interests of justice require the evidence to be admissible.

Mr President, I beg to move that clause 24 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 24. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 25.

The Attorney General: Mr President, Hon. Members, clause 25 deals with exhibits admitted into evidence under clause 22 or 23 and provides that unless the Deemster considers it appropriate, or the parties agree, the exhibit should not accompany the jury when they retire.

I beg to move that clause 25 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 25. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 26.

The Attorney General: Mr President, and Hon. Members, clause 26 makes it clear that a statement can be admitted in evidence under clauses 19, 22 or 23 if, but only if, the person who made it had the required capability – that is he or she must be capable of understanding questions put to him or her about the matters in issue and giving answers to those questions which can be understood. A similar rule applies in relation to evidence furnished under clause 20 but in modified form to address the fact that the provider of the information may not be readily identified. In such a case the court has to be satisfied that the provider of the information did not lack the required capability.

Finally, subsection (4) makes it plain that proceedings to determine the admissibility of evidence to which clause 26 applies are to take place in the absence of the jury, that expert evidence may be received for the purpose of determining the issue and that the party seeking to rely on the evidence has the burden of proving its admissibility.

Mr President, I beg to move that clause 26 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 26. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 27.

The Attorney General: Mr President, clause 27 deals with the important issue of credibility. Precisely because the new rules admit material which would not have previously been admitted, it is important to balance the scales by affording the court the opportunity to examine the reliability of the evidence which is admitted under the new rules.

Mr President, I beg to move that clause 27 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 27. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 28.

The Attorney General: Mr President, clauses 28 and 29 both deal with circumstances where a Deemster may stop the proceedings. I would ask your permission to speak to both of them if I may?

The President: Clauses 28 and 29 together – is that agreed?

Members: Agreed.

The Attorney General: Clause 28 deals with the situation where a Deemster concludes that the case relies in whole or in part upon hearsay evidence, but the Deemster finds the hearsay evidence unconvincing to the point where any resulting conviction would be unsafe. In such circumstances the Deemster may discharge the jury and, if appropriate, order a retrial.

Clause 29 deals with the court's general discretion to exclude hearsay evidence where, although admissible, the case for excluding the evidence, including the likelihood that to admit it would cause an undue waste of time, substantially outweighs that for admitting it. Finally, subsection (2) of the clause makes it clear that nothing in this particular Division limits or otherwise affects the court's power to exclude evidence.

Mr President, I beg to move that clauses 28 and 29 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: I put clauses 28 and 29. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 30.

The Attorney General: Mr President, clause 30 deals with the use of analyses and other information prepared by one person as the basis for an expert's report. If the conditions which are set out in subsection (1) of the clause are satisfied, the expert may base his or her opinion on the content of the material prepared by the other person and that material becomes admissible evidence in the proceedings.

Mr President, I beg to move that clause 30 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 30. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 31.

The Attorney General: Mr President, clause 31 deals with the admissibility of a confession by one defendant in the case of his or her co-accused. It is open to the court or any other party to assert

that the confession was the product of oppression or was, in the circumstances, unreliable. If that should be the case, the party seeking to adduce the confession in evidence has to demonstrate that it is more likely than not that the confession was not the product of oppression, or is not unreliable. This clause effectively dispenses with one of the absurdities of the law of hearsay, namely that a defendant's confession can only be looked at in determining *that* defendant's guilt, and not that of the co-accused.

Mr President, I beg to move that clause 31 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: Mrs Lord-Brennan.

Mrs Lord-Brennan: Thank you, Mr President.

I just wondered out of curiosity if the reverse would also be true? I do not know whether that takes place somewhere – elsewhere – but if the accused person was to say actually the co-accused, that was unfounded, or that was not right, whether that would fall under this; or whether the admissibility of that would be treated in a different way?

The President: Mr Attorney.

The Attorney General: Sorry, could I just ask through you, Mr President, could you repeat that? I just got a bit lost with what we were reversing there, actually.

Mrs Lord-Brennan: Well, if evidence of a confession is given by an accused person, I wondered if evidence could be admissible if say a co-accused or an accused person was not confessing, as such, but was saying actually the co-accused, that is wrong. So it is not a confession, it is saying that perhaps they were not correctly accused.

The Attorney General: Right. Mr President, certainly that co-accused could be compelled to give evidence in the trial and his evidence would be tested by the jury.

I do not know whether it is really a question of hearsay evidence, it would mean that he would be put to proof when called to give evidence.

Mrs Lord-Brennan: Okay, so not just about being accused though, it could be that you had somebody who is accused and they have the co-accused, and perhaps they said, 'Actually, I don't think that this person is …' they are not guilty, or they have been wrongly accused. I guess this is what I am getting at.

Would that evidence be able to come out there, or is that for somewhere else?

The Attorney General: Mr President, that evidence would certainly be available to the court and would and could be brought out.

The President: Thank you.

With that, I put clause 31. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 32.

The Attorney General: Mr President, Hon. Members, clause 32 deals with evidence produced by a machine, but which necessarily depends on the accuracy of information supplied to it by a human being. Clearly, a machine cannot give oral evidence itself, and the information upon which it relies

must be proved separately. Subsection (2) makes an important qualification: the clause does not affect the normal presumption that, in the absence of contrary evidence, a mechanical device, such as a breathalyser, is working properly.

Mr President, I beg to move that clause 32 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: I put clause 32. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 33.

The Attorney General: Mr President and Hon. Members, clause 33 addresses the question of evidence to be given at a retrial in the Court of General Gaol Delivery. If evidence was given orally at the first trial, it must be given in that way in the second unless one of three conditions is met, namely: the parties agree; secondly, the conditions in clause 19 are met; or thirdly, the witness is unavailable otherwise than in circumstances mentioned in clause 19(2), but the court decides that it is in the interests of justice of it to be admitted.

Mr President, I beg to move that clause 33 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 33. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 34.

The Attorney General: Mr President, and Hon. Members, clause 34 deals with the ways in which the content of statements in documents can be proved: either the document, a copy or an extract may be admitted provided it is authenticated in a manner approved by the court. There are numerous circumstances in which it is desirable that a transcript or a redacted copy of a document should be admitted, and this clause permits this to happen.

Mr President, I beg to move that clause 34 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 34. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 35.

The Attorney General: Mr President, clause 35 defines certain terms used for the purposes of the Division and also makes it clear that where a defendant is charged with two or more offences, the Division applies as if each were charged in separate proceedings.

Mr President, I beg to move that clause 35 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.
I would like to second and reserve my remarks.

The President: I put clause 35. Those in favour, say aye; against, no. The ayes have it. The ayes have it.
Clause 36.

The Attorney General: Mr President, and Hon. Members, we come to Division 3 of this Part. With your leave, Mr President, I propose to deal with clauses 36 and 37 together.

The President: Agreed?

Members: Agreed.

The Attorney General: Clause 36 deals with the admissibility of a video recording which has been created before a trial, of a witness's evidence in criminal proceedings relating to an offence which is triable on information. The witness must adopt the video recording for it to be admitted. The clause does not apply to a recording of a statement made by a defendant.
Clause 37 contains supplementary provisions about the admission of video recordings under clause 36.
Mr President, I beg to move that clauses 36 and 37 do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.
I would like to second and reserve my remarks.

The President: I put clauses 36 and 37. Those in favour, say aye; against, no. The ayes have it. The ayes have it.
Clause 38.

The Attorney General: Mr President, clause 38 legislates a long-standing rule about the use by a witness of contemporaneous notes to refresh his or her memory of events. It also deals with the use of a transcript of an earlier oral statement.
Mr President, I beg to move that clause 38 stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.
I would like to second and reserve my remarks.

The President: I put clause 38. Those in favour, say aye; against, no. The ayes have it. The ayes have it.
Clause 39.

The Attorney General: Mr President, and Hon. Members, clause 39 deals with the interpretation of certain terms used in Division 3; and I beg to move that it do stand part of the Bill.

The President: Miss August-Hanson.

Miss August-Hanson: I would like to second and reserve my remarks.

The President: I put clause 39. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

Clause 40.

The Attorney General: Mr President, and Hon. Members, we come finally to clause 40 which repeals statutory provisions relating to and dealing with admissibility of certain classes of evidence in criminal proceedings. The provisions repealed are replaced by provisions in the Bill.

Before moving the adoption of this clause, sir, I am aware that my hon. friend Mrs Poole-Wilson will move an amendment, with your leave.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to second and reserve my remarks.

The President: Mrs Poole-Wilson.

Mrs Poole-Wilson: Thank you, Mr President.

I wish to move an amendment to clause 40, and that is the amendment that Hon. Members of Council have in front of them, namely that after line 17 we include a subsection (c) which states sections 1 to 6 of the Criminal Justice Act 1991, and the definition of 'confession' in section 10 of that Act is added to clause 40.

This amendment arises because as this Bill in front of us effectively completely rewrites the provisions relating to the admission of hearsay, it needs to repeal *all* of the previous provisions dealing with it. That includes sections 1 to 6 of the Criminal Justice Act 1991. The Criminal Justice Act 1991 replicated provisions formerly contained in the Criminal Justice Act 1988 (of Parliament) and the provisions of Part 11 of the Criminal Justice Act 2003 (of Parliament) which are mirrored in this Bill before us repealed the 1988 Act provisions. So in enacting a Manx version of Part 11 of the 2003 Act of Parliament there needs to be a corresponding repeal in the Bill before us.

So I beg to move the amendment standing in my name.

Amendment to clause 40
Page 37, after line 17 add –
«(c) sections 1 to 6 of the Criminal Justice Act 1991, and the definition of 'confession' in section 10 of that Act.».

The President: Mr Henderson.

Mr Henderson: Gura mie eu, Eaghtyrane.

I beg to second and reserve my remarks.

The President: In that case, I put the amendment. Those in favour of the amendment to clause 40, as moved, say aye; against, no. The ayes have it. The ayes have it.

Clause 40, as amended. Those in favour, say aye; against, no. The ayes have it. The ayes have it.

That concludes our consideration of the clauses stage of the Criminal Evidence Bill.

2. Motion for leave to introduce –
A Bill to amend the Legislation Act 2015 –
Motion carried

Mrs Lord-Brennan to move:

That leave be given to introduce a Bill to amend the Legislation Act 2015 to enable Tynwald to require expiry provisions in secondary legislation; and for connected purposes.

The President: Thank you, Hon. Members, we turn now to Item 2 on our Order Paper, which is a motion seeking leave to introduce. I call on the mover, Mrs Lord-Brennan.

Mrs Lord-Brennan: Thank you, Mr President.

Today, I am seeking leave from this Hon. Council to introduce a Bill to amend the Legislation Act 2015. I am seeking leave so that I can continue further consultation with Tynwald Members about this process. My intention is to make amendment – and I am doing this as a Tynwald Member through this Branch – so that Tynwald Members have a further option available when considering and voting upon secondary legislation.

Before I set out how I envisage this working I will explain why, as I see it, there is a bit of challenge that requires a change to the legislative process. Hon. Members are of course aware that before Tynwald sittings there are two weeks to consider secondary legislation before they are voted on in Tynwald Court. There is a high proportion tabled for affirmative resolution each month and a great deal of detail to read in a short time, and this is set to become more complex.

Members, both here and in the other place, also know and have quite rightly been given advance notice by Government that as we deal with Brexit, in the readiness of that and the aftermath, we will need to act swiftly to put in place legislation required. Much of the substance will come as secondary legislation, which of course holds the same weight as primary legislation, although it does go through a much simpler process. It is simpler because it is faster and because when it reaches our parliament from the Departments, we can only really vote to approve – that is, give it the green light; or vote against – the red light, if you will. So our choice is a binary one.

We cannot amend secondary legislation in a Tynwald sitting. It does not pass through the processes of primary legislation, although some pieces may be approaching the length of a Bill. It is, in some ways, an all-or-nothing affair unless a delay is caused, and I feel that in some instances the perceived pressures will be such that to delay may seem problematic, because there will be an urgency to put the Island in the best position we can to ensure that we are ready for the challenges ahead. This will mean we will be asked to legislate quickly, and it is something that will be very important to do.

We can perhaps recall pieces of secondary legislation in recent months where we might have wished to have a different, more helpful process apply. Therefore I think that at the very least, we might need a third option, which I will describe to you as the 'amber light'.

It would work as follows: when a piece of secondary legislation is moved in Tynwald, instead of only being able to vote 'yes' or 'no', any Tynwald Member could move that some conditionality be attached, and that the secondary piece of legislation be approved for a time period before it will need to be brought back for parliamentary approval. The method for ensuring this is that it would otherwise expire. Effectively a sunset clause, it is a form of saying 'yes, but …'. It says, 'If you must have this legislation, if we must have it now …' the approval is granted, but it needs to be brought back before the Court, say in two years' time. The way I imagine this would be for it to work over a longer time period to see how things play out with how the legislation works.

I imagine this option would not be exercised frequently, but selectively, and would give comfort to Members and to Government when otherwise the only other option really would be to vote against or vote for, and still have some reservations. It could be used in situations where we need to

move things along, but we actually need a little bit more time to consider what might be needed in the medium term. In this way I think it could be helpful to parliament and to Government.

The benefit of this is that there would be time to see how the legislation is working, if it is the right option and if changes are needed, with the security that the clock is ticking before it will be brought before the Court again. The legislation may be fine, with no change needed, but we must be mindful that much of the legislation we will be asked to approve will be sourced from EU legislation that has been adopted for the UK and then we will seek to put it on our statutory books. We might wish to have chance to reflect on that, when under less pressure, and consider a fully Manx solution or a solution from elsewhere – there is no reason why not. We might find that taking on everything that is put before us from EU-sourced law is not always essential in the longer term.

Hon. Members, with this idea it is not enough to simply set an expiry clause; it must also trigger something else. So I should say now – and I appreciate this may need to be dealt with in legislation or in other ways, perhaps Standing Orders – that I would propose that in applying the 'amber light', as I have described it, a process where the secondary legislation is referred to a Committee – who may or may not offer a short report – is brought in.

Also, in items where the amber light is applied, they could be kept on an online list and also appear as a notice on the Tynwald Order Paper when they are, for example, say six months or even more from expiry, so Members in the future are aware and on notice when they are due to be brought back to the Court. This allows a timeframe and a process to assess if there are any issues with the legislation that need remedying, and how it is working in practice.

This process I hope would offer comfort for Members who have reservations about a piece of secondary legislation and think we may just need to keep an eye on how it may work over the medium term, whilst also being helpful for Government when there is a pressing need to seek parliamentary approval quickly, it is really important to move fast. Overall, I feel that we need to vote as we feel comfortable, not only because there is a sense of urgency to get things done, and that is why this proposed mechanism I see as being a safety catch, which on some occasions might be helpful.

I have consulted with the drafters – just in initial conversations – who have confirmed that pursuing another option apart from voting for or against a piece of secondary legislation, does indeed require amendment of the Legislation Act. I have spoken to some other Tynwald Members and I have had some indications that there is some open-mindedness to this, and part of what I am doing here is so that I can continue to have these conversations with a view to gaining some consensus. Overridingly, I would like to say that I do not think it matters who does this but it is what is done that matters, concerning secondary legislation.

I am bringing the motion in this Branch as a Tynwald Member because I am a Legislative Council Member; if I was in the other place then I would be doing it there. I think it is just something that we need to consider, about how we handle secondary legislation.

I am also quite happy that if I am given leave with this today, for the idea to be picked up and run with any other efforts around secondary legislation. It is not something that I feel desperately attached to that I must do myself. I think it is important to have it as an option for Tynwald Members, which is why I am asking for leave to progress it.

With that, I beg to move.

The President: Mr Cretney.

Mr Cretney: Yes, I am happy to second, Mr President, on the basis that I think most Members would acknowledge that secondary legislation would benefit from improved process. The Hon. Member has been open enough to say that she does not necessarily believe she is the only person that can do this but that others putting their minds to improving the scrutiny process of secondary legislation would be a good thing; and I certainly agree with that.

The President: Now, opportunity for further debate.
Yes, Mrs Sharpe.

Mrs Sharpe: Thank you, Mr President.

I would like to support Mrs Lord-Brennan in bringing this concept before this Chamber for discussion. As I am sure Hon. Members will be aware, there has been much recent debate in the UK regarding expiry provisions, or sunset clauses, in secondary legislation. From what I understand, Mr President, it is estimated that between 800 and 1,000 pieces of legislation will be required in order to update British legislation due to Brexit. In order to comply in a timely fashion, part of the UK's EU Withdrawal Bill sought to delegate powers to the UK Government to make secondary legislation – a legislative shift which has become increasingly popular since the 1970s.

During the drawing-up of the Bill, however, the House of Lords Select Committee on the Constitution expressed concern about such delegated powers, arguing that an appropriate balance between the urgency required to ensure legal continuity and stability on the one hand, and meaningful parliamentary scrutiny and control of the executive on the other, be found. To this end, one of the Committee's recommendations was to insert a sunset clause into the EU Withdrawal Act, section 8, clause (8) under which the power to make secondary legislation expires two years after exit day.

I would argue that the Isle of Man is in the same position: we too face a mountain of legislation which must be dealt with before Brexit and using secondary legislation will help move through this. However, I believe it is equally important that Tynwald will be given the chance, for example two years after Brexit, for Members to review decisions made by the current administration.

Thank you.

The President: Thank you.
Mr Henderson.

Mr Henderson: Eaghtyrane, I have a few queries for the Hon. Member, Mrs Lord-Brennan.

With regard to leave to introduce, I will fully support that as it is a Member's right to do so in this place, and correct under our Standing Orders. So I have got no problem with supporting that.

However, I just want the Hon. Member to re-explain the substance of her amber light proposal – what it is that, if enacted, her Bill will actually cause to happen. From the explanation we have had, it looks as if it is up to an individual Tynwald Member if they wish to apply the amber light situation in a Tynwald debate on a particular piece of secondary legislation, but it is not a compulsory situation – if I have got that right. But I would just like that explaining so that we know what we are talking about here. And then if somebody does move to have the amber light situation applied to a piece of secondary legislation, which may well be some form of EU legislation – or appertaining to EU legislation, or UK-EU legislation post-Brexit – we need to know what the effect is of having done so. Presumably they will have to effect a majority vote in Tynwald to achieve the amber light. So we need some clarification on that.

In discussing those points, Eaghtyrane, what does concern me is the fact that at times my view is, whether we like it or not, Government needs to react very quickly to situations, or emerging situations, certainly of an international nature. I am a little concerned that the option to apply an amber brake to it may well cause a real issue for the Government, which may well be acting in the best interests of the Island on international matters. I wonder if the Hon. Member could comment on that particular point whereby there may be some urgent need to pass secondary legislation in the best interests of the Island, or to address a rising constitutional issue, and a stalling mechanism may frustrate that and put us in a more difficult situation than that which we are trying to fix. So I would be interested for some commentary on that.

Eaghtyrane, following on from that I would make the further observations that I note the Hon. Member has said that, if given leave to introduce, she will be consulting with Tynwald Members, etc. in progressing her ideas and working up a legislative draft; which is fine. However, I

would have to say that I would doubly urge the Hon. Member to consult effectively with other Tynwald Members and with the Council of Ministers, and with legislative drafters and others, so that they fully understand what the intentions of this are so that it is not seen as an effective power grab by Legislative Council; or some other kind of interference – and these are my thoughts, Eaghtyrane – that has the potential for others maybe to see that we are interfering in the process of this, that and the other.

I think it is vitally important that a full consultation process is undertaken. I know this takes time and it is a considerable effort, having been through the situation many times myself, but nonetheless with regard to this and the fact we are starting some possible legislation off here in Legislative Council, I have no doubt that will raise eyes and ears in another place.

So it is critical that the Hon. Member, in my view, discusses fully with the Members of the House of Keys and Council of Ministers, exactly what our intentions are in that they are a helpful progression in looking at secondary legislation, and that it is nothing to do with a possible perception of interference or a possible perception of a power grab, or Legislative Council trying to frustrate the work of the other place.

It is being moved with the best of intentions and a pragmatic approach to address … Other House of Keys' Members have expressed the same thing, so it is addressing their concerns too. I understand that there is a possible initiative to look at this from a completely different angle which may well have a considerable impact on the progression of secondary legislation, far more so than what the Hon. Member, Mrs Lord-Brennan, is proposing today.

So I would urge the Hon. Member to proceed with thoughtfulness, consultation, and see what that draws together so that then everybody understands what it is that she is trying to do.

Gura mie eu, Eaghtyrane.

The President: I call Mrs Poole-Wilson.

Mrs Poole-Wilson: Thank you, Mr President.

I also welcome the Hon. Member's motion today and an opportunity for this Council to have this discussion this morning.

I would tend to agree that my short experience in Tynwald has shown that there are some challenges with our secondary legislation process as it stands. Mrs Lord-Brennan has outlined a number of them but we do have a lot of secondary legislation subject to affirmative procedure. We do have a relatively short timescale to absorb the detail of that secondary legislation and then if there are questions or issues about some of that secondary legislation we are left with a very binary choice, as Mrs Lord-Brennan explained, without the ability to amend.

The challenge has been ably outlined by Mrs Sharpe around Brexit, but even before Brexit we have seen this challenge in our Tynwald proceedings, as we use secondary legislation more and more to deliver quite complex and detailed pieces of law that are not subject to the process that we have followed this morning on the Criminal Evidence Bill, where we get to look at the legislation line-by-line, debate it, ask questions and if necessary move amendments to enhance the law – so that what we are bringing into effect is the best possible legislation that we can bring into effect. So I welcome the idea that we discuss this.

My personal perspective in talking to a number of Members of Tynwald – not only in this place but in the other place – is that it is increasingly recognised that this is a challenge for us. I think that consensus that we do have a challenge here – and there are options, or there should be options to try and improve the process – is one where I certainly am hearing consensus and helpful discussion, both with Members of this Council and Members of the Keys. I see Mrs Lord-Brennan's motion today as part of that.

I think I heard, but perhaps Mrs Lord-Brennan could confirm when she responds, that it would absolutely be her intention to see her motion and her suggestion as part of all suggestions that might be discussed around how we can best improve our secondary legislation programme. I think it is important, because what we are trying to do is strike the balance, as Mr Henderson and

Mrs Sharpe said, between the need sometimes for Government, the executive, to move quickly and bring in secondary legislation in a very quick way, but not at the expense of giving that secondary legislation – quite significant, impactful legislation at times – due parliamentary scrutiny. That is the balance, I think, that we should strive to achieve.

It might be difficult to find a perfect solution but I think we would fail, all of us, as Members of Tynwald if we do not address our minds to this, look at different options and work together to try and improve the process that we currently have.

That is why I will support Mrs Lord-Brennan's motion today, and I support it in the knowledge that I think she does bring it with the best of intentions; she does bring it, mindful of other discussions that may take place; she does bring it, mindful of the need to consult and to find solutions that are workable, practicable and that, as I say, seek to strike an appropriate balance between executive imperative at times, but not losing the *very* important role of parliamentary scrutiny.

Thank you, Mr President.

The President: Thank you, very much.

Mrs Hendy.

Mrs Hendy: Thank you, Mr President.

I am aware that secondary legislation is a very important tool that we have, in order to take matters forward in effecting sound and good legislation. I am also aware, having worked on the other side of the table within Government and having drafted secondary legislation that then goes forward, you as an officer are wary that it is either going to go through in its entirety, but there is no opportunity at the moment for it to be tweaked or amended that would enable a very sensible and nimble process to be effected. So I welcome this mover today.

The way this matter might go forward, as some of my hon. colleagues have pointed out, is going to have to be very carefully exercised, including debate in another place when we all meet. But I do think if the intention of this is that we can take measures forward and avoid delay, but maybe take some clauses out in secondary legislation for further examination – if I am understanding the mover today – this is the intention: to actually make it a clearer and more transparent process and improve the capabilities of secondary legislation, while enabling further scrutiny to take place of certain elements within a secondary legislation aspect. I welcome this. I would support this measure, as long as it is carefully exercised and inclusive.

Thank you.

The President: Lord Bishop.

The Lord Bishop: Thank you, Mr President.

I am not sure that I have strong views on this, other than to say that I am very taken by the concept of an amber light, but I think I am taken by the concept of an amber light probably because I am not a professional politician, if I am allowed to say that. It strikes me that many things that sit within the world of politics and decision-making are much more comfortable with an amber light than with a red or a green one.

The truth is, however, that in the end decisions have to be made and the balance clearly that needs to be struck is between scrutiny on the one hand and practical requirement on the other. So I think in principle I would be willing to support this because of the underlying sentiment and thought behind it. But I suppose my other concern would simply be that it does not introduce into political discussion an element of provisionality that works in a sort of reverse engineering, whereby you can say that actually the decision we are about to make may not matter quite so much because we can always tweak it later on through the amber light process in secondary legislation.

I think I would be slightly concerned if that took, as it were, some of the steam, and some of the passion, and some of the strength out of the discussion of the issue itself. In other words we have, if

this were to go through, an expedient to which we can resort; but I would not wish that actually to be flagged up at this first stage of the discussion and I think the wording of much of this would need to be very precisely constructed.

With those caveats in mind, which I think overlap with some of what my colleague, Mr Henderson has said, I would be happy I think in principle to support.

Thank you.

The President: Mr Henderson.

Mr Henderson: Gura mie eu, Eaghtyrane.

I would just like to ask the hon. mover if she could tell us, or will she be finding out, has any other jurisdiction progressed this idea? Or, if she has not looked into that for now, would she give a commitment that she would be looking into it in the progression of consultative process and Bill construction to have a look at any other countries, inasmuch as how they manage their secondary legislation?

The President: I will give the mover, if she wishes this opportunity at this moment, to comment on what has been said. I will give her the right of reply at the end, but it might be helpful if you deal with some of the points that have come up so far.

Mrs Lord-Brennan: Thank you, Mr President; and I welcome all the comments and the questions that have come along so far.

If I deal with the Hon. Member, Mr Henderson's questions first. First of all, I think the entire notion behind what I am suggesting is that it would not cause a delay. At the moment, we can say 'yes' or 'no' – and 'no' might cause a delay and that might not be ideal at all. So where there is a need to legislate urgently, this would still attach some scrutiny to that, but at the same time allow us to crack on and do things. So I am not concerned about this slowing anything down. It is exactly the opposite really, it would allow us to carry on but still have some assessment of reviewing the legislation again. So I think it would be helpful in that way.

I think that the second comment was how it would work in Tynwald and, yes, it would be voted on so there would be the chance that Tynwald would vote on whether this option is used. I think it is important that Tynwald Members have that within their decision and their power. So it would be voted on and it would not apply to everything, which is the other key point. What I am suggesting is not something that would be attached to a group of legislation or just attached to legislation to do with Brexit. It would not be automatic; it would be another option that a Tynwald Member could move for in that sitting. So I think it is selective in that way.

To address the comments about interference – which I think is really good to talk about now – and I suppose whether or not the Legislative Council should be doing this, and how it may be perceived, I think it is helpful to have a bit of openness about that. I think that what I am proposing about how we address secondary legislation – in fact I am certain that it is going to come up in other ways, from other places; so what I am proposing with this is that it could just be a lever that fits into other efforts elsewhere. This will clearly not succeed without consensus and the Keys would need to take it forward.

I really see this about process. I am somebody who is interested in the process and the detail, and actually many people will not be interested in this because they will just move on. There is a difference between what we do in the Legislative Council and what happens in the other place, and this really concerns the details. So I am going to keep talking to other Tynwald Members.

I have spoken to the Chief Minister and I have spoken to the Minister for the Department of Environment, Food and Agriculture who have, in the first instance, indicated an open-mindedness to what I am suggesting. So I am happy to continue these conversations and if there is consensus that can be built then that is excellent. If somebody was to turn round and say actually instead of the Legislative Council or you doing this, there is another way, I am totally happy for that as well. So if it

could dovetail with other efforts then at least we have got the ball rolling here and we have had a conversation about it for an issue that we know could do with being addressed. So I am happy to keep the conversations going. I hope that answers the question.

I welcome Mrs Poole-Wilson's support and she also said that it is important we get consensus. I totally agree. The benefit of us discussing some of this today is that we are doing it about a certain process; we are not doing it in the context of a broader Bill, an enabling Bill. We are not doing it about one particular issue, we are getting to talk about the process – and the benefit is that we can discuss this here, not under pressure in another situation.

I think part of my intention of what I am doing today is actually it starts a conversation, or a discussion, about how we approach secondary legislation. We have had a bit of that, but it brings it out again.

So I take on board the cautions and the need to get a consensus. I welcome the support and I will keep those conversations going. I think I have said before that I am really happy if somebody else wanted to progress this in a different way, I am very happy about that, and I am happy for it to fit in with other efforts to do with how secondary legislation is handled.

I appreciate Mrs Hendy's support, and she has also reiterated about how we need to have some clarity about how it might allow for further scrutiny of certain elements. I think with that, it is really the amber light is just a way of flagging, 'Okay, yes, but we want to have another look at it'. It could just be some parts of it, and it might just be a general, 'We'll see if this fits down the line'. So I think what I am providing for is that the wording would be developed so it could pin that down exactly. Obviously I am in the early stages here, so I think there is definitely still scope for that to work.

To respond to the Lord Bishop's comments about the element of provisionality and how that might work in the opposite way, I think that is really important to consider because if this was to turn out to be something that was used all the time, that would be a problem. If it was never going to be used it would be a problem, but for us to assess that we need to have an ability for it to be exercised in the first place. So I take on board the comments and the concerns about how it would be used there and I totally agree it would be not ideal if it was something that became an expedient thing to do in itself. So again, I agree that the precise wording is important.

And perhaps, Mr President, I am not sure if I could ask Mr Henderson if I have addressed his final point or not? I am sorry, I may have not addressed his final question.

The President: Yes, Mr Henderson, if you wish to come back at this stage?

Mr Henderson: Gura mie eu, Eaghtyrane. Yes, I am most displeased. *(Laughter)*

Joking aside, Eaghtyrane, the only matter outstanding is the issue of what actually this causes to happen. So perhaps if I could advance an example: I am the Chief Minister in Tynwald moving a Brexit secondary legislation Order, it is 100 pages thick. Members are justifiably concerned about it but can see the urgency of it. The Hon. Member, Mrs Lord-Brennan, jumps up and moves to move her amber scenario situation on that Order. Tynwald votes to accept the amber light.

What happens to me, as the Chief Minister, with my Brexit Order of 100 pages? Does that still get voted on and goes through and becomes law, as it were, and continues – but something happens in the background whereby it has got to come back again and get some sort of examination in the background? But the legislation is still advanced, though, and whatever it is intended to do to cause to happen, that happens – but there is a check in the background, if I have got it right? So we see that everything it intended to do, it has done, and there have been no hiccups, and it can be brought back to be amended.

I would just like Mrs Lord-Brennan to explain what it does to my Brexit Order. I think I will have a clearer picture of it then.

Mrs Lord-Brennan: Thank you, Mr President; and I thank the hon. questioner.

In my proposal, that Order would get approved and then it would also have attached to it a condition where it would need to be brought back to the Court again at a later date. It would also, with that approval, after it was voted on, trigger a process where it was referred to a Committee.

I am not sure about where that would go – the details – and that is exactly the sort of thing that you need to talk about and have the engagement over, so that the legislation could be effectively kept an eye on and then at some point reported back as to … 'There were concerns at that time in the sitting; were they valid? Do we need to look at it again? Actually, is it fine? Was there something that was found out, that actually this really is not working well? And isn't it great that we have captured it so we know that we can bring it back?'

So it would trigger the process to review, but it would still get approval first so it would still become law, and then it would allow for that review to be captured and it would have a timescale where it would come back on to the Tynwald Order Paper that would be known in advance for Tynwald Members. So I think that is the thing: it does not just disappear, it brings it back to the attention of Members again, but over a medium time.

The President: Thank you.

Mrs Poole-Wilson.

Mrs Poole-Wilson: Thank you, Mr President.

Just to add at this stage that I think the discussion we are having is exactly the sort of discussions that should be going on. I think if Members of Tynwald can see there are problems with the current situation, the challenge for us is to find the right solutions to address the situation. The obvious solution would be to front load the scrutiny, because then you would knock out the point the Lord Bishop raised, about is there an element of provisionality? However, we know that is probably highly difficult in practice because of volume, complexity, resource and other reasons.

So if it becomes too difficult to front load scrutiny … And there are other questions as well, there are questions about should we triage better our secondary legislation? Should we have as much of it coming through for affirmative procedure in Tynwald? So there are different aspects to this that I think are important they are discussed and explored fully in the round, in order that the solutions absolutely improve the situation and do not give rise to other problems.

There is just one other interesting point that the Lord Bishop's comment made me start thinking about, and that is one of the justifications sometimes for bringing certain things through as secondary legislation is that it is easy to change it. We can be nimble. We can bring it in today knowing that if we find there are problems with it, it is easier to change that secondary legislation than to change primary legislation.

So I hear the provisionality point which I think is an important one to air and it is a good thing that we start talking about it. You could argue there is a sort of existing provisionality that sits across secondary legislation because it is relatively easier to make the change. But these are all the discussions that I think are so helpful for us to have, not just in this Council but with Members in the other place to develop our thinking and to work towards sensible improvements.

Thank you.

The President: Miss August-Hanson.

Miss August-Hanson: Thank you, Mr President.

I would like to support my colleague in the Legislative Council, Mrs Lord-Brennan, as well in relation to this. I do believe it is about efficiency and effectiveness and it is not about delay.

A balance, like Mrs Poole-Wilson has said, that needs to be struck between speed and proper scrutiny of secondary legislation. Sunset clauses, in my understanding, are included in legislation when it is felt that parliament should have the chance to decide on its merits after a fixed period. So, for example, just in its extreme if we go back to the European Union and Trade Bill, I feel that the benefits of sunset clauses are twofold: first, that it sets the timetable for the process of the

transposition of EU secondary legislation into domestic law, which provides a level of legal certainty; and I have actually found that it is described as an alarm clock as well, creating incentive for comprehensive legislative evaluation of delegated powers that minimises any risk of abuse – not to say that there would be, but it minimises any risk.

In my view, as a Member of Tynwald and a member of parliament, I believe that Members should be able to be given sufficient opportunity to scrutinise that secondary legislation whether it is about Brexit or not and I have found that – alongside other Members of Legislative Council, and certainly talked about it with Members of another place as well – pretty much from the moment that I got in and was elected.

I do have a couple of questions. You mentioned, Mrs Lord-Brennan, dovetailing with any other efforts. Are you aware of any other workstreams that might well be going on? I just wondered that.

Also, what exactly it will provide us with in terms of this amber situation: what exactly would it provide us with that we do not already have in Standing Orders, which you have explained to some extent? I just wanted some absolute clarity on that, if that is all right?

I was going to ask a question about conditionality as well, which I think is rather a good idea, but I think that the hon. questioner, Mr Henderson, has been given his answer by the hon. mover, so I feel quite comfortable with that now.

I do think that there is a positive benefit in improving our ability to address secondary legislation; it is just about how we do it, I suppose. And it is about Tynwald as a whole, not about Legislative Council in any way separate from Keys, it is about all of us together finding a more beneficial way forward.

Thank you, Mr President.

The President: Does any other Member wish to speak in the debate? In that case, just before I ask the mover to sum up, I wonder if she might comment on the following.

Part of the case for this legislation that is being made is that, in Tynwald Court, Members only have the opportunity to vote for or against the secondary legislation in its entirety. Of course there is a third option that if a flaw or a concern has been raised the legislation can be withdrawn altogether. However, in recent years it has been perfectly possible for a Member raising a concern to move – while they cannot move an amendment – that the secondary legislation be referred to a Standing Committee of Tynwald for examination and report. That could be time-limited and it could address the particular concern raised, or a number of concerns.

Now, not a lot of comment has been made this morning about that particular mechanism and I just wondered what the mover thought about it and whether it would still apply, and how relevant it might be in the issue before us this morning as an alternative to an expiry clause. Clearly if legislation does not go through with a clean bill of health in Tynwald and concerns have been raised such as to warrant a sunset clause, or for it to come back – which could be thought of as giving the benefit of the doubt to the mover. There are concerns, but it is urgent so we will let it go through, but you have got to come back; and whether in the interim it has been before a Scrutiny Committee of some sort, which you touched upon, or not.

If there are concerns though, it could be argued that they ought to be dealt with at the time and referral to a Standing Committee with an instruction to report in a timely fashion could be seen as another way of doing this. So I just wondered if the Member might comment in her summing up.

Mrs Lord-Brennan.

Mrs Lord-Brennan: Thank you, Mr President.

I think in short answer, yes, those things that you have mentioned there could still apply and it is very important that the option for Tynwald Members to be able to refer to a Standing Committee of Tynwald a piece of secondary legislation. So I would imagine that still stands.

The case where there is more time pressure, and we are dealing with month-to-month sittings, could mean that another option might also be helpful. I suppose the main thing would be that it would be down to Tynwald Members to decide what option they would like to choose.

I think sometimes we are dealing with different things. If somebody wants to move to refer something to a Standing Committee they could be delving into the deeper substance of what has been put before the Court. If somebody in the round felt, 'Okay, in principle this looks fine and we feel happy overall, but I feel it is something that we need to maybe keep an eye on, or look over how it works over the longer term' – that is where my suggestion would come in. So it would not take away anything that would already be available in Standing Orders, but it would offer something different I think in terms of a time imperative.

So it would add to it really; not be an alternative. It would be a different option that Members can avail themselves of and could be voted on in Tynwald under time pressure. But I thank Mr President for drawing out some of the other options that are available under Standing Orders and all those are very important too.

Mr President, if you will permit me, I have remembered one of the questions that the Hon. Member of Council, Mr Henderson had, so if I can address that before I address the final question?

The President: Yes, of course, you can sum up in any way you wish – the whole debate – by all means.

Mrs Lord-Brennan: Thank you.

The Hon. Member, Mr Henderson asked if I would be in part of the consultation be looking at what they do elsewhere in other jurisdictions, (**Mr Henderson:** Yes.) to do with the handling of secondary legislation. I will be happy to look at that, I think it is really useful to have a comparison.

Part of the work that I have done on that so far in bringing myself up to speed on how we handle secondary legislation – which has actually interested me since I became elected, too – I noticed that we have a different process here, that Mrs Poole-Wilson has mentioned, insofar as we do not have much going on in terms of the pre-legislative process, so the pre- scrutiny process for all secondary legislation. I think there are going to be other things that need to be addressed, certainly aside from what I am suggesting. So in terms of what happens elsewhere, what will commonly happen in Scotland and in Northern Ireland and Wales, and the House of Commons – the Houses of Parliament, I should say – is that there will be a committee stage before secondary legislation is voted on, or debated. We do not have that. What I am looking for is something else that we can get comfort from and use to have some scrutiny and feel comfortable with the decisions that are made. So that is one example of something that happens elsewhere.

In other places, too, they have a much longer time period to review papers before they are voted on and debated on. It could be up to 40 sitting days – it is longer elsewhere, and in the Scottish Parliament up to 40 days. So I am quite happy to look at this in the context of how we deal with secondary legislation, notwithstanding the fact that I am dealing with one isolated issue which I think could be a very helpful one in the coming months.

I suppose that links in with the Hon. Member, Miss August-Hanson asking about how I see this dovetailing with other efforts and if I am aware of any other workstreams. I suppose I have to say formally and officially, no, but I do know that I think there is a wish to see things done differently; and if what I am proposing can be a lever in that and be used by other people who share similar concerns, I am not going to be precious about this. I will be quite happy for it to go into other efforts. I hope that answers.

The other question was: what would it provide that we do not already have in Standing Orders? Well, in Standing Orders we have got the measures that Mr President has mentioned too, but what we do not have is a third option of saying, 'Yes, we will approve it, but we still want to keep an eye on it; we still want to look at it and we want it to be bought back'. So it gives a bit of a weight behind the conditionality … And remember, I do not think this is going to be used all the time – if it was, that would be a problem. But if a Tynwald Member felt really strongly that this needed to be looked at … we really need to see how this goes. And also, instead of looking at orders that are perhaps 14 pages long – as we deal with – we could be looking at something which is 40 pages long just for one item. We just might want a bit of comfort.

So, change to the Legislation Act does something that Standing Orders does not, in that by providing for an expiry of the legislation it gives a bit of energy and a bit of momentum and saying 'Okay, we will approve this, but we think it is important enough to watch how it goes and to put a bit of process around how we watch it, and for it to be brought back'.

So with that, Mr President, I beg to move.

The President: The motion before the Council is that leave be given to introduce a Bill to amend the Legislation Act 2015 to enable Tynwald to require expiry provisions in secondary legislation and for connected purposes. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.

Thank you, Hon. Members, that concludes business this morning. Council will meet next on 30th October here in our own Chamber. I declare this session adjourned.

The Council adjourned at 12.20 p.m.