

**立法會**  
**Legislative Council**

Ref: CB1/BC/4/00/2

**Bills Committee on  
Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Verbatim transcript of meeting  
held on Monday, 8 October 2001, at 8:30 am  
in Conference Room A of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai, (Chairman)  
Hon Margaret NG, (Deputy Chairman)  
Hon Eric LI Ka-cheung, JP  
Dr Hon David LI Kwok-po, GBS, JP  
Hon NG Leung-sing, JP  
Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Hon Ambrose LAU Hon-chuen, GBS, JP  
Hon Henry WU King-cheong, BBS  
Hon Audrey EU Yuet-mee, SC, JP
- Members absent** : Hon Albert HO Chun-yan  
Hon James TO Kun-sun  
Hon Bernard CHAN  
Hon Jasper TSANG Yok-sing, JP  
Hon Abraham SHEK Lai-him, JP
- Public officers attending** : Miss AU King-chi  
Deputy Secretary for Financial Services
- Miss Vivian LAU  
Principal Assistant Secretary for Financial Services
- Mr Frank TSANG  
Assistant Secretary for Financial Services
- Ms Sherman CHAN  
Senior Assistant Law Draftsman
- Mr Michael LAM  
Senior Government Counsel

Ms Beverly YAN  
Senior Government Counsel

**Attendance by invitation** : Mr Andrew PROCTER  
Executive Director, Intermediaries and Investment  
Products, Securities and Futures Commission

Mrs Alexa LAM  
Executive Director and Chief Counsel, Securities and  
Futures Commission

Mr Joe KENNY  
Consultant, Securities and Futures Commission

Mr Andrew YOUNG  
Legal Consultant, Securities and Futures Commission

**Clerk in attendance** : Ms Connie SZETO  
Chief Assistant Secretary (1)4

**Staff in attendance** : Mr LEE Yu-sung  
Senior Assistant Legal Adviser

Mr KAU Kin-wah  
Assistant Legal Adviser 6

Mr S C TSANG  
Senior Assistant Secretary (1)7

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1 **主席：**

2  
3 我們邀請政府的代表進入會議室。各位同事，我們今天的討論由第  
4 XVI部第366條開始。我們今天同樣是先討論這部的英文本，然後才討論這  
5 部的中文本。就第366條，請問政府為何採用“shall not suffer...”的字眼？  
6 “Suffer”這個字是甚麼意思呢？

7  
8 **財經事務局副局長區璟智女士：**

9  
10 請陳律師解釋。“Suffer”這個字的中文翻譯是“容受”。

11  
12 **高級助理法律草擬專員陳子敏律師：**

13  
14 其實在香港的法例上，亦經常出現這個字眼。正如副局長剛才解  
15 釋，這個字的中文翻譯是“容受”，隱含着一個較為被動而不大主動的意思，  
16 亦是指有關人在知情的情況下，容許一些事情發生。在類似的保密條文內，  
17 採用這個字眼的情況亦很普遍。

18  
19 **Chairman:**

20  
21 Page 2.

22  
23 **副主席：**

24  
25 主席，既然你剛才提到中文本，我亦希望就此提問。這個字眼可譯  
26 作“容受”嗎？對於“suffer”這個字的意思，我是十分明白的，因為我們每個  
27 人也曾suffer。但對於“容受”方面.....應該是採用這個字眼嗎？這是我們發  
28 明的字眼，還是慣用的字眼呢？

29  
30 **高級助理法律草擬專員陳子敏律師：**

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1  
2 我們向來也是把“suffer”譯作“容受”的，即使是前雙語立法諮詢委員  
3 會，也是採取這個詞語作為中文的翻譯的。

4  
5 **副主席：**

6  
7 但這個字眼是我們發明的，而不是中文的運用上原來已存有這個詞  
8 語，對嗎？

9  
10 **主席：**

11  
12 林先生。

13  
14 **高級政府律師林少忠先生：**

15  
16 多謝主席。“容受”這個詞語字典也有收錄，解作容納、忍受，與英  
17 文“suffer”、“tolerate”的意思是相對應的。雙語法例諮詢委員會在1992年的  
18 會議上曾就這個問題進行討論，並採納了“容受”作為“suffer”的對應詞。

19  
20 **主席：**

21  
22 但在語文運用上，“tolerate”這個字眼是否較“suffer”這個字眼易於  
23 明白呢？“Suffer”這個字是否法律上的特定用語呢？

24  
25 **高級助理法律草擬專員陳子敏女士：**

26  
27 或許我可嘗試解釋。在普通法中，經常會採用“suffer”這個字眼，而  
28 採用“tolerate”這個字眼的情況反而較少。據我們所知，亦有相當數目的case  
29 law可以支持這個字眼的解釋。

30

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1 **主席：**

2

3 好的，謝謝。對於Page 2，各位有沒有問題？

4

5 **副主席：**

6

7 主席，就“suffer”這個字眼，“suffer”跟“allow”有沒有分別？

8

9 **主席：**

10

11 “Permit”便相等於“allow”的意思，對嗎？

12

13 **副主席：**

14

15 不是，我是希望瞭解“suffer”跟“allow”的意思有甚麼分別。

16

17 **高級助理法律草擬專員陳子敏女士：**

18

19 根據我的印象，這兩個字眼應該是有所分別的。“Allow”的意思是  
20 較為直接的，而“suffer”的意思則不是那麼直接。各位議員是否希望改用  
21 “allow”呢？

22

23 **副主席：**

24

25 如果“suffer or permit”跟“allow”是沒有分別，或“suffer”沒有增加  
26 “permit”的意思，那麼我便寧願不採用“suffer”這個字眼。原因不是我不明白  
27 “suffer”這個字，而是我不能容忍採用“容受”這個用詞。

28

29 **主席：**

30

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1 我不甚明白妳的意思。

2  
3 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
4 **Securities and Futures Commission:**

5  
6 I think one difference that we would normally understand, which comes from using  
7 “suffer” rather than “allow” is that if there is a situation in which someone has gained access  
8 to these records, because we are not to suffer it, we should actually take positive steps to try  
9 and address it. In other words, “allow” and “permit” are closer and more analogous terms in  
10 that context, whereas “suffer” we would understand to mean that we should, for example, take  
11 injunctive action to prevent further disclosure – that sort of thing. I think there is a slight  
12 difference in nuance and emphasis that comes with “suffer”: In other words, not just sit back  
13 and accept, but actually try and do something positive about it.

14  
15 **主席：**

16  
17 對於Page 2，各位有沒有問題？

18  
19 各位同事，我們現正討論第XVI部。有關文件的編號是立法會  
20 CB(1)2140/00-01號文件。如果各位對Page 2沒有問題，接着是討論Page 3、  
21 4 and 5。對於這部分，我希望提出一個問題。《銀行業條例》是否訂有相類  
22 的provision，容許金管局向證監會作出通知？

23  
24 **財經事務局副局長區環智女士：**

25  
26 《銀行業條例》應該是訂有類似的條款的。

27  
28 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
29 **Securities and Futures Commission:**

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1           In fact, Chairman, that is why we move the proposals to make sure that the gateway  
2 from the Monetary Authority, for example, to the SFC, is wider than which exists at the  
3 moment. At the moment it is expressed in terms of deposit takers. In the future it is a  
4 slightly wider expression, to make sure there is a proper flow of information in two directions.

5  
6 ***Dr Hon David LI Kwok-po, GBS, JP:***

7  
8           Mr Chairman, Clause 366(3)(f) in (i)(A), rather than “...any business of an exempt  
9 person which constitutes a regulated activity for which the exempt person is exempt”,  
10 “exempt person” is now changed to “registered institution”.

11  
12 ***Chairman:***

13  
14           In the last meeting they decided that.

15  
16 ***Dr Hon David LI Kwok-po, GBS, JP:***

17  
18           Yes. They decided to change it, but here it has not been changed.

19  
20 ***Mr Andrew PROCTER, Executive Director, Intermediaries Products, Securities and***  
21 ***Futures Commission:***

22  
23           It will be caught up.

24  
25 ***Dr Hon David LI Kwok-po, GBS, JP:***

26  
27           You’ll catch up. That’s good.

28  
29 ***高級助理法律草擬專員陳子敏女士 :***

30

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1           主席，我希望就有關安排作出解釋。這是我們作出的第一批修訂。  
2 為貫徹一致，我們希望待我們作出第二次修訂時，才一併顯示有關修訂。  
3 謝謝。

4  
5 **Dr Hon David LI Kwok-po, GBS, JP:**

6  
7           I see. Thank you.

8  
9 **余若薇議員：**

10  
11           英文本的Page 5，即第366條第(3)(f)(i)(B)款，可否採用較易明白的  
12 寫法呢？因為現時的“...of which the associated entity is the associated entity...”寫法令  
13 人感到奇怪。

14  
15 **主席：**

16  
17           陳律師，這個寫法有沒有改善的空間？

18  
19 **高級助理法律草擬專員陳子敏女士：**

20  
21           我們稍後可就這個問題再作研究。我們最主要是希望確保所指的  
22 “associated entity”，是該intermediary的associated entity，因為有關實體可  
23 能是數個intermediaries的associated entity。我們就這個問題再作研究吧。

24  
25 **主席：**

26  
27           我再重申，我們現時會先審議條文的英文本，因為我們在較遲時間  
28 才取得條文的中文本。對於Page 6，各位有沒有問題？

29  
30 **副主席：**



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1  
2 主席，載於這頁開始部分的第(3)(f)(ii)款提及第(5)款，而載於這頁  
3 的第(g)段亦有提及第(5)款。It refers to the opinion of the Commission – if the  
4 condition specified in sub-section (5) is satisfied, then a disclosure can be made. And you  
5 see this running through (g). I am not sure that on going to page 10, where you do have sub-  
6 clause (5); it explains what the conditions are. Although I have no problem with condition  
7 (b), I think condition (a) is very subjective and I read “it is desirable or expedient that the  
8 information should be disclosed pursuant to subsection (3)(f), (g) or (h) in the interest of the  
9 investing public or in the public interest.” I mean this is public interest and interest of the  
10 investing public. Why do we have it so subjective?

11  
12 **主席：**

13  
14 副局長，請講。

15  
16 **財經事務局副局長區璟智女士：**

17  
18 證監會作為市場的前線監管機構，擁有有關資料。所以，相信證監  
19 會最能明白，這些資料對其他監管機構，不論是在香港或海外的有關執法  
20 或推行類似工作的機構，是否有影響和有效用。若不把這項責任賦予證監  
21 會，我實在不知道把這項責任賦予哪個機構，才是最適合的做法。一方面，  
22 這個做法可維持證監會的靈活性；另一方面，正如主席剛才提及，其他監  
23 管機構亦有制定類似的條款，訂明在合乎公眾利益的情況下，有關機構亦  
24 可作出這些披露。相信SFC的同事稍後亦可就此作出補充。

25  
26 **主席：**

27  
28 對於載於Page 6和7的第(g)段，我希望提出另一個問題。該段所訂  
29 的其中一些是個人，而另一些是機構。對於這段所訂的個人，意思是很清  
30 楚的，包括特首、財政司司長等。但對於這段所訂的機構，如果當局把這

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1 些資料向一間機構披露，需否訂明應向該機構的某人或某名負責人作出披  
2 露呢，例如Chief Executive of the recognized exchanges等？否則，若該機構  
3 的某名人士取得有關資料，他也可能不知道他有否責任把這些資料保密。

4  
5 **財經事務局副局長區璟智女士：**

6  
7 舉例來說，就MPFA而言，便要視乎MPFA本身的法例把有關權力或  
8 功能賦予哪些人士。條例草案這項條款明顯地列明“The Authority”，即有關  
9 機構。所以，情況便因機構而異。當然，每間機構亦可能訂有轉授權力的  
10 安排，或指明哪些決定應由哪個階層的人士作出等。交易所的情況也是一  
11 樣。交易所在執行有關的規章時，亦不能由某一個人負責，而是要視乎不  
12 同事情的層次而定。

13  
14 我相信證監會亦有實際的工作經驗，瞭解該會向這些機構提供資料  
15 時，有關機構亦可能訂有內部的監管措施，規定有關資料應向哪些人士提  
16 供，以及這些人士會如何使用這些資料。因為條例草案亦訂有條款，指明  
17 若證監會向某人提供資料，該人不可向其他人士披露。例如第(7)款亦清楚  
18 訂明，對於證監會提供的資料，有關人士在甚麼情況下才可向其他人士披  
19 露。

20  
21 **主席：**

22  
23 我並非不接受妳的解釋，但問題在於這條款的一致性。第366(3)(g)  
24 條第(i)至(xvi)款載列的，實際上大部分也是個人，而只有(ii)、(iii)款不是  
25 個人。我不清楚MPFA的Authority是指個人還是機構，因為在某些情況下，  
26 “Authority”一詞是指個人，但在另一些情況下，卻是指機構。

27  
28 **財經事務局副局長區璟智女士：**

29  
30 這是指機構。我相信對於第(vii)、(viii)和(x)款，應是根據有關機構

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1 法例上的定義。

2

3 **主席：**

4

5 但我相信第(viii)款所指的應該是個人。

6

7 **財經事務局副局長區璟智女士：**

8

9 對，第(viii)款所指的應該是個人。所以，便要視乎有關法例本身，  
10 把有關權力授予哪些人士而定。至於較後的部分，我想請SFC的同事解釋。

11

12 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
13 **Securities and Futures Commission:**

14

15 Mr Chairman, I think your concern is a very real one, and what we try to do to  
16 address it is a twofold approach. First of all, with organizations like the Insurance Authority,  
17 the MPFA and the exchanges – and for these purposes “the exchange” includes everyone from  
18 (xii) to (xvi) – we have agreements in place in the form of memorandum of understanding as  
19 to how we exchange information and to whom the information is passed. There are key  
20 contact people within the organization.

21

22 That is the first point of trying to control the use of information and the  
23 dissemination of information within those organizations; but whenever a release is made - at  
24 the moment it is under section 59 of the SFCO – to an organization like this, it is always  
25 clearly labelled as a release under that section, and it always comes with conditions as to the  
26 use that can be made of that information. So we will say “The information is provided under  
27 this section. It is for this purpose, and this is the way in which we permit you to use it”.  
28 One clear thing is that they are not to disseminate it to others outside the organization, without  
29 our consent, for example; but even within the organization we quite commonly place  
30 restrictions on the use and disclosure of that information within the organization itself.

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1  
2           Sometimes, as we have had recently, the exchange will come back to us and say:  
3           “You have given information to the Chief Executive of the exchange. We think that would  
4 be valuable information for the clearing house. Would you permit us to give it to the  
5 clearing house Chief Executive?” We do, if we think it is appropriate. As your question  
6 implies, it is clear that these organizations do not simply exist as an individual; there is a need  
7 for several people, often, within an organization, to have access to the relevant information,  
8 but what we try and do through those two mechanisms is to restrict the use of the information,  
9 and restrict the disclosure and dissemination within the organization as best we can.

10  
11 ***Deputy Chairman:***

12  
13           Mr Chairman, I may be revisiting old grounds, but it seems that our comment on  
14 the last occasion was not at all taken into any kind of consideration. I mean, here are very  
15 draconian sanctions against disclosure, unauthorized disclosure of information. This is in  
16 the context of people being compelled to give you quite a lot of information, as we shall see  
17 in Part XV.

18  
19           On the one hand, you require people to give you a great deal of information, and  
20 very sensitive information, and very update information. So it stands to reason that having  
21 required people to give you all that information, you then say the information will be kept  
22 confidential, and therefore you have a sanction against your own people from disclosing it.  
23 Now, that is fine. Then you have this loophole which says that if the Commission sees fit, it  
24 can disseminate the information to a whole list of people, a lot of which we do not know, I  
25 mean the limit of this disclosure.

26  
27           I am also shocked to hear that this opinion can be a totally subjective opinion  
28 simply because the Commission knows everything. Is it right or is it true, first of all, that in  
29 the opinion of the Commission, it has no restriction, no objective criterion about it? If it is  
30 not, then what is your objective criterion? If there is not, then can you build into it some

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1 sort of objective criteria. Otherwise I do not see your justification.

2  
3 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
4 ***Securities and Futures Commission:***

5  
6 Just on the first part of that, I recall the comments that were made last time about  
7 the length of the list in sub-section (g). In fact the Deputy Chairman and I had a discussion  
8 about it. I think we still would say that those on the list, although it appears to be a long list  
9 of 16, represent a reasonable list. It is the list that is necessary in order to give effect to  
10 proper regulation in the financial sector in Hong Kong. It is a long list of 16, but it is not the  
11 world at large, so I do not think it was a case of not taking the comments into account. We  
12 did actually look into it, because ironically we have added one. In fact there are 17 now.  
13 The Official Receiver is there. We do think it is an appropriate list, just in terms of the  
14 information that we get and what information we would need to be in a position to share with  
15 others in Hong Kong.

16  
17 **主席：**

18  
19 余若薇議員，請講。

20  
21 ***Hon Audrey EU Yuet-mee, SC, JP:***

22  
23 Mr Chairman, I take the point that you have made earlier, and I think maybe  
24 something can be done in relation to subsection (7), because subsection (7) imposes various  
25 conditions to persons who receive the information. In other words, you cannot onward  
26 disclose it to somebody else. Then if you look at page 12 it says "...shall not disclose...", and  
27 I am looking at the bit just before the footnote. It says "...shall not disclose the information  
28 or any part thereof to any other person".

29  
30 That would suggest that it is to any other organization, because if you talk about

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1 disclosure of information, say to the stock exchange, and then the stock exchange “shall not  
2 disclose the information or any part thereof to any other person” – and that would suggest  
3 somebody outside the stock exchange, but there is no control over the disclosure of the  
4 information to people within the stock exchange. That is really the point you are making, It  
5 may be that some extra conditions can be worked out in sub-clause (7) to make sure that when  
6 information is disclosed to an organization, as opposed to just a person like an inspector, then  
7 there would be some conditions imposed on the level of people to whom the information  
8 could be released, because as drafted, subsection (7) only prohibits disclosure outside the  
9 organization.

10  
11 What I am suggesting is that there should be some limit to disclosure, even within  
12 the same organization, to people to whom the Commission consents for disclosure, to whom it  
13 is necessary, and things of that sort. It has to be high level. Maybe that could take care of  
14 the point, Mr Chairman, that you were making, and maybe that would go to alleviate the point  
15 that the Vice Chairman is concerned about.

16  
17 **財經事務局副局長區璟智女士：**

18  
19 據我的理解，即使屬同一個機構的人士，亦不可取得有關資料。證  
20 監會每次亦會清楚指明，向哪名人士提供資料。若該名人士希望把有關資  
21 料交給B君或C君，他必須事先取得證監會的同意。證監會發出的函件亦會  
22 清楚指明，向哪些人士提供有關資料，並清楚指明有關的用途。所以，即  
23 使有關人屬同一間機構，取得資料的人亦不能隨意向他發放資料。

24  
25 **主席：**

26  
27 副局長，現在的問題是妳剛才提出的運作情況，是條例草案沒有訂  
28 明的。就我們而言，對於條例草案並沒有訂明的限制，我們不能作出任何  
29 假設。既然條例草案沒有訂明限制，我們只可假設並無任何限制。所以，  
30 政府與我們的假設是有所不同的。從政府的角度來看，證監會認為有關的

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1 運作情況十分清楚，但對於我們來說，雖然有關條款訂明，證監會可向  
2 recognized exchange company的行政總裁提供資料，並訂明有關資料是  
3 restricted的，但若該公司的清潔女工偶然發現有關資料，並把資料向其他  
4 人披露，那怎麼辦呢？

5

6 ***Hon Audrey EU Yuet-mee, SC, JP:***

7

8 Mr Chairman, the alternative is to add to page 7, to say that before you refer to the  
9 institutions, before you say “a recognized exchange company”, you just say “to named  
10 persons within a recognized exchange company”. That is the alternative way of doing it, so  
11 that it makes clear that when you disclose information, it can only be to named persons within  
12 an organization.

13

14 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
15 ***Securities and Futures Commission:***

16

17 That formulation is a little different from what was suggested when the suggestion  
18 was first made. It was then more in terms of “You shall not disclose it except as is necessary  
19 within the organization”. I think if you get to the point of named persons within an  
20 organization it would be a very cumbersome process of back and forth between us and an  
21 organization. People would have to come back very frequently in some cases. What we  
22 typically do is, we do impose conditions of exactly the sort that you described in the first  
23 instance, as I explained earlier, but the conditions are effectively to provide the information in  
24 the first instance to a named individual, and say to that individual so as to ensure that the  
25 disclosure and dissemination of the information is restricted to those who need to use the  
26 information for the purpose for which it is released. So it is in those more general terms,  
27 rather than naming individuals. I can see the attractiveness of trying to name individuals. I  
28 would just be concerned about the practicality of doing it on a name-by-name basis.

29

30 ***Hon Audrey EU Yuet-mee, SC, JP:***

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1  
2           Mr Chairman, I do not agree that it is cumbersome, if you compare it with the  
3 importance of keeping it confidential, because basically you are talking about very  
4 confidential information which is released for a specific purpose. In order, for example, to  
5 trace whether an offence is committed – namely whether that condition is breached – you  
6 would need to know who are the persons to whom this very privileged information is  
7 disclosed. So there is every operational reason to know the persons to whom such  
8 information is disclosed. To say you can only disclose it to named individuals in a  
9 recognized exchange company certainly sounds much more reasonable in terms of keeping  
10 the secret, and much better than my original suggestion, which was to add in an extra  
11 condition at the end, to say “You can’t release it to anybody except when certain conditions  
12 are satisfied”.

13  
14 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
15 ***Securities and Futures Commission:***

16  
17           I think it is a question of degree and balance, and I do not suggest that one answer  
18 is clearly wrong or right. I just think the alternative that I suggested is the better and more  
19 practical one, but I certainly see the strength of what you are saying. There is no question  
20 that if there was a leak, you would need to go to the point of saying “Who had access to the  
21 information?” Of course naming people does not preclude other people getting it, but it is a  
22 start.

23  
24 ***Chairman:***

25  
26           Margaret.

27  
28 ***Deputy Chairman:***

29  
30           I think one way or another it seems to me that if you have taken that point on board,



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1 it should have been reflected in some sort of amendment in this section itself. You can do it  
2 two ways. You can either say “named persons” so that the disclosure is limited, or you can  
3 say “conditions” and you indicate somewhere that the conditions would include the kind of  
4 person within the organization who may have access to the information. But whichever it is,  
5 it must be incorporated into the primary legislation, because unless you do this it has no legal  
6 effect, and the balance within the legislation is not achieved.

7  
8 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
9 ***Securities and Futures Commission:***

10  
11 I take your point. In fact we have discussed whether or not we need to expressly  
12 refer to the imposition of conditions in this section, and we are not for a moment disagreeing  
13 with you about the importance of it; and certainly we always do impose conditions in the  
14 course of making a release. I do not think there is any difficulty in saying in the section that  
15 we can impose those conditions.

16  
17 I think even in the absence of that, the fact of conditions is not without legal effect.  
18 It is the conditions on which the information is released, and in fact if you look at the section  
19 as a whole, the onward release of information by someone would have to be judged according  
20 to whether it was consistent with conditions or consent. So it does have some real effect,  
21 even in the absence of the reference to conditions finding its way into the section. For our  
22 part we do not have any difficulty in including in the section that the information release can  
23 be subject to conditions. That is actually the practice, and we agree with you entirely that  
24 that is necessary in order to safeguard the use of the information.

25  
26 ***Deputy Chairman:***

27  
28 I am sorry. You mean you can fit it in, or you cannot?

29  
30 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***

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1 *securities and Futures Commission:*

2

3 I think we can. I do not see any difficulty.

4

5 *Deputy Chairman:*

6

7 Then let us see it. I mean, do not let us waste time arguing about it, because it  
8 may well be that once you show it to us we will all be very happy about it.

9

10 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
11 *Securities and Futures Commission:*

12

13 Yes. It is the practice in any event. It would just reflect the practice.

14

15 *Chairman:*

16

17 Okay, then we will appreciate it if you reflect the practice in the legislation. 胡經  
18 昌議員。

19

20 *胡經昌議員：*

21

22 主席，既然證監會願意在條例草案中訂明這點，我不再追問了。

23

24 *主席：*

25

26 那麼，我們待當局訂明這點後再討論這個問題吧。對於第7和8頁，  
27 各位有沒有問題？

28

29 *Deputy Chairman:*

30

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1           主席，about sub-section (h)(ii)(B) on page 8, the second part of it, does this part,  
2 “with a view to its taking...”, apply to (B) only, or does it apply also to the Hong Kong  
3 Society of Accountants as stated in (A) as well?

4  
5 **財經事務局副局長區璟智女士：**

6  
7           兩者皆適用。

8  
9 **Deputy Chairman:**

10  
11           It now looks as if it is only under (B).

12  
13 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
14 **Securities and Futures Commission:**

15  
16           You mean it is a question of setting out?

17  
18 **Deputy Chairman:**

19  
20           Yes.

21  
22 **財經事務局副局長區璟智女士：**

23  
24           我相信問題在於這部分擺放的位置。若我們把這部分放在較凸出的  
25 位置，便會較為清楚。

26  
27 **Deputy Chairman:**

28  
29           Yes, that is what I am asking. Thank you.

30

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1 *Miss AU King-chi, Deputy Secretary for Financial Services:*

2  
3 Thank you.

4  
5 **主席：**

6  
7 接着是討論第9頁。對於第9頁第(j)(iii)款，就我記憶所及，在過往  
8 的會議上有人曾經就這部分提問。當局現在仍然採用“the police”這個寫  
9 法，是否合適呢？因為一名警員與the Commissioner of Police是有很大區別  
10 的。

11  
12 *Deputy Chairman:*

13  
14 Have you checked whether in other legislation you use just “the police”?

15  
16 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
17 *Securities and Futures Commission:*

18  
19 It is the existing law, but I think your point is obviously one that has to be checked.  
20 I do not know the answer myself.

21  
22 **財經事務局副局長區環智女士：**

23  
24 其實這個情況跟ICAC的情況相同。證監會不是向一名人士提供資  
25 料，而是向有關機構提供資料。這機構便是指在有關法例下有權行使該機  
26 構的權力的有關人士。

27  
28 *Deputy Chairman:*

29  
30 Yes. The ICAC is a statutory body. But “the police” is not. I do not think

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1 there is a legal entity known as “the police”.

2  
3 **財經事務局副局長區璟智女士：**

4  
5 或許我們稍後可翻查有關條例，找出有關條例採用何種方式訂明警  
6 方的職權範圍吧。

7  
8 **主席：**

9  
10 我相信很多人亦曾提出這個問題。警務處處長跟一名負責執行巡羅  
11 任務的警員是有很大分別的。當證監會向那名執行巡羅任務的警員提供資  
12 料時，該名警員可能會向其他人披露有關資料，藉以收取利益。當然，收  
13 取利益是不合法的，但這類事情實在很容易發生。

14  
15 好了，接着是討論第10、11和12頁。胡經昌議員，請講。

16  
17 **胡經昌議員：**

18  
19 主席，我們剛才提到有關機構在secrecy方面，應由個人還是由整間  
20 機構負責的問題。載於第11頁的sub-clause(6)提到“regulatory organization or  
21 companies inspector outside Hong Kong”。這個情況跟我們剛才討論的情況  
22 是否相同呢？我們剛才提到，對於在香港的機構，當局會進行監察，以免  
23 有關人在該機構內胡亂披露有關資料。但在這個情況下，有關人在香港以  
24 外地方，當局會採取甚麼處理方法呢？

25  
26 **財經事務局副局長區璟智女士：**

27  
28 就這方面，我相信有3項各位也會特別留意到的所謂制衡措施。第一，  
29 有關機構的功能必須跟證監會或有關市場規管機構的功能類似。第二，  
30 有關機構本身必須訂有足夠的保密條款。我相信證監會向這些機構提供資

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1 料前，亦會考慮規管有關機構的法例有否制訂類似條例草案第366條的條  
2 款。另外，證監會亦須把有關機構的名稱刊憲，以提高透明度，讓大家也  
3 可知道這款所指的是甚麼機構。

4  
5 **胡經昌議員：**

6  
7 主席，第366(3)條第(a)、(b)、(c)、(d)至(g)段的內容，均包括recognized  
8 exchange company及recognized clearing house等。第(j)段所指的機構是否亦  
9 包括這些機構呢？如果是，既然我們剛才亦關注到這些設於香港的機構有  
10 責任把資料保密的問題，我們應否同時關注到這些設於海外的有關機構的  
11 情況呢？如果這些海外機構是指有關監管當局，情況便有所不同，但如果  
12 所指的是第(a)至(g)段所訂的機構，我們便需要慎重考慮了。

13  
14 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
15 **Securities and Futures Commission:**

16  
17 It is the same situation so far as we were discussing a moment ago – the question of  
18 conditions restricting circulation of information within an organization. It is the same point.  
19 At the moment we deal with it in exactly the same way. We impose conditions on release.  
20 So when we look at the other sections to determine how we express the point about the  
21 conditions of release, it would also apply here as well.

22  
23 **胡經昌議員：**

24  
25 就設於香港的機構，例如一間stock exchange取得有關資料，我們尚  
26 可研究如何進行監管，但若設於海外的機構把取得的資料在內部輾轉流  
27 傳，會否出現問題呢？

28  
29 **財經事務局副局長區璟智女士：**

30

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1 對於這個問題，我們稍後作出修訂時會一併考慮。

2  
3 **主席：**

4  
5 對於Page 12、13、14和15，各位有沒有問題？

6  
7 **副主席：**

8  
9 主席，對於第(9)款所訂有關罰則的問題，我曾針對其他部分提問。  
10 對於披露不應披露的資料的行為，很多其他條例也有提到。這款所訂的罰  
11 則，跟就其他種類的披露所訂的罰則是否一致？

12  
13 **財經事務局副局長區璟智女士：**

14  
15 就我記憶所及，在討論第XI或XII部時，副主席也曾提出類似的問  
16 題。或許我們把有關資料一併交給大家吧。我們會向大家提供有關數個類  
17 似罪行的資料，讓各位可作出比較。

18  
19 **副主席：**

20  
21 好的。我要求的是parity。如果有關人因披露了一些不應披露的資  
22 料而受到懲罰，當局在制訂罰則時，便需要考慮這個行為的嚴重性。如果  
23 對於一些十分重要資料的披露行為，有關懲罰的嚴厲程度也只是這款所訂  
24 的一半，我相信這款便沒有作用了。謝謝

25  
26 **財經事務局副局長區璟智女士：**

27  
28 我希望提出一點，由於其他類似這條條例草案的法例可能是訂於十  
29 多年前，而我們亦希望藉着這個機會就這方面作出更新，所以這款所訂的  
30 罰則，可能較其他條例所訂的罰則高吧，但此刻我也不能肯定這點。

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1

2 **副主席：**

3

4 我不是指這款所訂的罰則必定是不妥善。我只是希望政府可進行這  
5 項exercise，以研究香港的法律是否公平而已。

6

7 **主席：**

8

9 就我記憶所及，有一、兩條其他法例亦訂明，泄露資料的行為會招  
10 致監禁的懲罰。

11

12 **副主席：**

13

14 那便要視乎所泄露的是甚麼資料了。

15

16 **財經事務局副局長區璟智女士：**

17

18 我們可翻查近期通過的法例有否制訂類似的安排。

19

20 **主席：**

21

22 接着是討論第15、16、17、18和19頁。

23

24 **副主席：**

25

26 主席，我不大明白第366(12)條。根據這條，財政司司長須進行甚麼  
27 工作？ What is the kind of situation this is supposed to address?

28

29 **財經事務局副局長區璟智女士：**

30



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1 或許我可舉例說明這點。我們去年年底成立了程序覆檢委員會，而  
2 該委員會的秘書處則由財經事務局的官員負責。秘書處在安排服務時須要  
3 把有關資料保密及確保有關程序的獨立，但有關法例卻沒有訂明哪些人士  
4 可以負責程序覆檢委員會秘書處的工作。

5  
6 後來我們運用類似第(x)款的條文，向財政司司長提交一、兩名財經  
7 事務局的同事的名字，並表示由於他們需要負責程序覆檢委員會秘書處的  
8 工作，而證監會亦希望向他們提供一些資料，方便他們把資料發放給會員。  
9 在這種情況下，我們便行使了這項權力。財政司司長亦同意授權某些人士  
10 接受證監會所提供的資料，因為他們需要從事這類工作。如果財經事務局  
11 沒有提出這些人的名單，證監會便不可向他們提供資料。

12  
13 **副主席：**

14  
15 主席，我明白這個情況與第7頁第(x)款所訂的情況呼應。其實這種  
16 情況也不是經常出現的，對嗎？就我記憶所及，我們也曾討論到，財政司  
17 司長在第366(12)條下可向哪些人授權的問題。在某程度上，這項授權需否  
18 具透明度，讓公眾知道這款所指的是哪些人呢？例如財政司司長應有方法  
19 update有關名單，或當他需要在名單上加入名字時，應刊登憲報等。

20  
21 **財經事務局副局長區璟智女士：**

22  
23 我認為這個做法沒有問題。

24  
25 **副主席：**

26  
27 妳們考慮如何處理吧。

28  
29 **財經事務局副局長區璟智女士：**

30

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1 我們或可把最新的名單上載到我們的網站或SFC的網站。

2  
3 **副主席：**

4  
5 請政府在第7頁第(x)款反映這個做法吧。

6  
7 **主席：**

8  
9 法律顧問。

10  
11 **助理法律顧問顧建華先生：**

12  
13 多謝主席。

14  
15 我希望請政府澄清，載於第18頁第(b)(iii)款的情況，現時是由哪項  
16 條文涵蓋。

17  
18 **財經事務局副局長區環智女士：**

19  
20 請SFC的同事解釋這點。

21  
22 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
23 **Securities and Futures Commission:**

24  
25 Mr Chairman, may I assist with this point?

26  
27 **Chairman:**

28  
29 Yes, please.

30

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1 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
2 **Securities and Futures Commission:**

3  
4 Sub-clause (11) was introduced before sub-clause (7) was refined, and upon  
5 ensuring that disclosures made pursuant to subsection (1) and the opening line of subclause  
6 (7), it appears to us that everybody who is specified in what was subclause (11) is now  
7 covered, whether it is a person who is subject to the exercise of, for example, Part VIII  
8 powers, or whether it is a person who has received material and can actually make an appeal;  
9 or a disciplinary proceeding. All of these, in our view, are covered. The specific answer to  
10 your question I think is that it is subclause 7(b)(iii) on page 13.

11

12 **主席：**

13

14 Page 13，法律顧問，請你研究這部分吧。

15

16 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
17 **Securities and Futures Commission:**

18

19 That is where someone who is the subject of disciplinary action.

20

21 **Chairman:**

22

23 You do not agree? Please explain your point here.

24

25 **Mr KAU Kin-wah, Assistant Legal Adviser :**

26

27 Thank you, what I am thinking about is the situation when the solicitor or counsel  
28 appears together with the concerned person, before the Commission. The disclosure is not  
29 by the person who is counsel or solicitor, but the disclosure is the Commission to the counsel  
30 or solicitor on behalf of the person against whom the Commission is thinking of exercising its

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1 power under Part 9.

2  
3 That may be a rather fine distinction, but nevertheless I think it exists, because the  
4 Commission is not disclosing information to that counsel or solicitor for the purpose of  
5 seeking advice; nor was the disclosure for the purpose of enabling that person to obtain advice.  
6 Simply it is in the situation where the counsel or solicitor is making representation on behalf  
7 of the concerned person. I think there is a real distinction.

8  
9 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
10 ***Securities and Futures Commission:***

11  
12 I do not think that is right, actually. I do not see any difficulty then subsequently  
13 in the person who is affected by the inquiry and their solicitor or legal adviser, or other  
14 professional adviser for that matter, discussing the information which would in fact have been  
15 a disclosure made under subsection (1) to both of them at the same time. I do not see  
16 anything in the section that would prohibit that. Obviously as a matter of common sense it  
17 should not – and I do not see anything that does. They will have both got it and heard it  
18 from the Commission.

19  
20 **主席：**

21  
22 好的，請法律顧問繼續研究這個問題吧。接着是討論載於Page 20  
23 的第367條——Avoidance of Conflict of Interests。由於證監會內部設有non-  
24 executive director，證監會現時已就Declaration of Interest設有較完整的規  
25 範，對嗎？

26  
27 **財經事務局副局長區璟智女士：**

28  
29 主席，事實上第367條是涵蓋執行董事和非執行董事的。但因行政  
30 上的需要，非執行董事可能需要填寫一些form，但這是額外的情況。

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1

2 **主席：**

3

4 但一般來說，就access to information方面，non-executive director擁  
5 有的權力是甚麼level呢，是policy level還是case level呢？

6

7 **財經事務局副局長區璟智女士：**

8

9 對於這個問題，請SFC的同事Mrs Lam或Andrew解釋。

10

11 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
12 **Securities and Futures Commission:**

13

14 It depends on what matters come to the Commission. Certainly, for example, one  
15 matter that always goes to the Commission is a referral of an insider dealing case to the  
16 Financial Secretary. So they get very detailed information about a particular case there. At  
17 the moment, each month they get a detailed report on the circumstances of intermediaries in  
18 Hong Kong, their financial circumstances. So they do get specific information about  
19 individual firms, individual registrants, as part of both their decision-making requirements  
20 and just general information about the state of the industry and the market.

21

22 **Chairman:**

23

24 So in such a case who would decide to which non-executive director it goes?

25

26 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Futures Products,**  
27 **Securities and Futures Commission:**

28

29 There is a table of declared interests, and the Commission has to scan papers before  
30 they are disseminated to its members, to make sure that there is nothing on the face of it that

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1 would suggest that a particular Commission member should not receive a particular paper.  
2 From time to time we do in fact have to withhold papers from non-executive directors,  
3 because it is clear on the face of the paper that they have a conflict. In other situations,  
4 though, it is the fact that the conflict is not clear on the face of the paper. So what they have  
5 to do is say, typically: "I've looked at the paper. I have a conflict of interest. I've  
6 returned the paper to the Commission". They then remove themselves from the meeting for  
7 the purpose of that discussion of that point.

8

9 **主席：**

10

11 我相信這便是現有的做法。接着是討論Page 20、21、22和23。各位  
12 有沒有問題？

13

14 **Deputy Chairman:**

15

16 The first question: who is the kind of person you have in mind? Secondly, when  
17 you say "shall not incur any civil liability" do you mean that he does not, that no civil liability  
18 is incurred?

19

20 **Miss AU King-chi, Deputy Secretary for Financial Services:**

21

22 "A person" refers to anybody who is performing a function under this ordinance.  
23 That is my reading of it.

24

25 **Deputy Chairman:**

26

27 What kind of people do you have in mind?

28

29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
30 **Securities and Futures Commission:**

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1  
2           They are typically going to be Commission staff, but they may be people who are  
3 appointed by the Commission to perform inspections; for example, auditors who are  
4 appointed under Part VI to do an inspection of a firm of intermediaries. They would be  
5 performing a function for the Commission. So it is wider than Commission staff. There  
6 could also be delegations to non-Commission staff to sit on committees, for example.

7  
8           If you had, let us say, the Committee on Unit Trusts, which is a delegated  
9 committee of the Commission, they get information about applicants for fund management to  
10 the public in Hong Kong; they are asked to make decisions. So this would apply to them as  
11 a person who was asked to perform a function under the ordinance of authorizing for public  
12 offering of the product in Hong Kong. That would be another kind of example. So it can  
13 be either committees, or individuals, or the Commission staff itself.

14  
15 ***Deputy Chairman:***

16  
17           What are the civil liabilities that you are protecting them from?

18  
19 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
20 ***Securities and Futures Commission:***

21  
22           Well, I can imagine allegations, for example, that a committee had performed its  
23 duties negligently, so there clearly could be an allegation of negligence. There may be  
24 allegations in performing a function. For example, a Commission staff member who asked a  
25 certain question in an examination of someone in the course of an investigation may face an  
26 allegation of defamation because of the way the question was framed. I cannot imagine very  
27 often that the Commission staff would be subject to allegations of breach of contract, but  
28 auditors who are required or are permitted to disclose information to the Commission might  
29 otherwise find themselves subject to an action for breach of contract or breach of  
30 confidentiality. A bank, for example, which is subject to producing documents under a notice

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1 might otherwise have found itself sued by its client for breach of bankers' confidentiality  
2 requirements. Those are the sorts of things.

3  
4 ***Deputy Chairman:***

5  
6 Okay. I do not know if "shall not incur any civil liability" is the right way to  
7 express it. Is that the usual way we express it, that no civil liability arises?

8  
9 ***Hon Audrey EU Yuet-mee, SC, JP:***

10

11 Mr Chairman, my concern initially when I read this section – and I remember  
12 raising a similar question before – was whether this is good policy, to exempt somebody from  
13 civil liability, just on the basis of good faith. What if the person is grossly negligent and  
14 incompetent? It seems to be almost a charter for gross negligence. If the Commission staff  
15 relies on this immunity, he can be as negligent as he wishes, as reckless as he wishes, and he  
16 will be protected. It does not seem to be right.

17

18 I know there are similar sorts of exemptions, for example, in relation sometimes to  
19 directors; but there is always a due diligence requirement – which is missing. I remember  
20 raising this point before, and that is the thing that causes my concern, rather than the drafting.  
21 I think Andrew just now mentioned the question of an auditor. Subclause (2), where it says:  
22 "Nothing in subsection (1) applies to a person appointed as an auditor under section 149".  
23 What is the scope of this particular subsection?

24

25 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
26 ***Securities and Futures Commission:***

27

28 Clause 149 refers to the auditor appointed under the Companies Ordinance, actually,  
29 but there is a duplication of the auditor of an intermediary. There is a reference both in this  
30 ordinance and in the Companies Ordinance for them to appoint an auditor. Remember also



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1 that we have a separate power to appoint auditors to examine and audit in whole or in part the  
2 affairs of a licensed intermediary. So there are other auditors who are also appointed under  
3 that part.

4

5 Even if Clause 149 did not exist, in future, because everyone will be a company,  
6 they will have a company auditors, a Companies Ordinance auditor anyway; so it is really  
7 just mirroring that section.

8

9 ***Hon Audrey EU Yuet-mee, SC, JP:***

10

11 So Andrew, what you are saying is that if the auditor is the ordinary auditor who is  
12 appointed under the Companies Ordinance, he does not get the benefit of this immunity?

13

14 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
15 ***Securities and Futures Commission:***

16

17 That is right.

18

19 ***Hon Audrey EU Yuet-mee, SC, JP:***

20

21 But if he is an auditor appointed by the Commission for a specific purpose under  
22 Clause 149, then he would get the benefit of this immunity?

23

24 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
25 ***Securities and Futures Commission:***

26

27 Under clause 155, yes. We appoint them under a different clause, but the answer  
28 is "Yes".

29

30 **主席：**

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1  
2 其實需否在條文加入如 due diligence 等的字眼呢？

3  
4 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
5 **Securities and Futures Commission:**

6  
7 Just before we get to that point, Mr Chairman, just to go back on a couple of the  
8 observations made, I think if the allegation was that a Commission staff member, or “any  
9 person”, to use the language of the clause, had been reckless or grossly negligent, then there  
10 would be a question of whether or not they had performed their function in good faith as a  
11 matter of fact. Certainly if they were reckless, one would doubt that they could show good  
12 faith, but the concern here is, and the reason why there is not a due diligence provision, that in  
13 the past people have tried to intimidate the Commission in the performance of its functions by  
14 taking civil action against staff members, individual staff members, and in some cases suing  
15 them in defamation, for example, for many millions. From recollection, in one case at least  
16 it was more than a billion dollars. It was a very well-known person who in fact took that  
17 action. Later it was dropped. They were not able to particularize their claim. That was  
18 the thinking, I think, behind leaving it at a standard of good faith. It was to discourage that  
19 kind of intimidatory action.

20  
21 **Hon Audrey EU Yuet-mee, SC, JP:**

22  
23 Mr Chairman, I think I know the case that Andrew mentioned. I do not think that  
24 could be cited as an example to say this is a reason for dropping due diligence. I think you  
25 can never stop mad people from launching all sorts of senseless actions which eventually are  
26 abandoned anyway; and to rely on that as a reason for saying “We want to discourage this  
27 kind of action. Therefore we do not need to have due diligence” sounds to me rather a feeble  
28 reason.

29  
30 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**

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1 *Securities and Futures Commission:*

2  
3 Well, I did not say he was mad.

4  
5 *Hon Audrey EU Yuet-mee, SC, JP:*

6  
7 I was not referring to that particular person. I am just saying as a matter of theory,  
8 you can always have mad people who launch all sorts of mad actions. To say “We want to  
9 discourage these sorts of mad actions; therefore we drop the standard of requirement for staff”  
10 does not sound like a very logical response.

11  
12 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
13 *Securities and Futures Commission:*

14  
15 Good faith is a real and meaningful standard, though. I take your point that due  
16 diligence may add something to it, but it is not a trivial matter to make out good faith as a  
17 defence. It does not stop you being sued, of course. You have actually got to make that out  
18 in your defence.

19  
20 *Hon Audrey EU Yuet-mee, SC, JP:*

21  
22 I know, but you can have morons who act on good faith. The world is full of  
23 morons who appear to act on good faith.

24  
25 **主席：**

26  
27 就這方面，我想提出一點。如果我們要討論很多獨立機構，例如  
28 MPFA，或政府部門的法例，有沒有制訂這類豁免，可能需要很長的時間。  
29 但如果只要求有關人 act in good faith，是否足夠呢？其他條例有否制訂類似  
30 的條款呢？

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1

2 **Deputy Chairman:**

3

4 Mr Chairman, that is exactly my point. I rather suspect that this is your usual  
5 immunity clause.

6

7 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
8 **Securities and Futures Commission:**

9

10 It is.

11

12 **Deputy Chairman:**

13

14 For people performing public duties. That is why the former Financial Secretary  
15 can go around telling people to do all sorts of things, without fear of being sued for  
16 negligence, even when people suffer great losses. I have made this point several times. I  
17 think the trouble is that if you add anything here, you will have to add that to all your  
18 immunity clauses. This is not a reason for not doing so. Maybe you should start from here.

19

20 **主席：**

21

22 其他有關條款是否也沒有採用due diligence的字眼？

23

24 **財經事務局副局長區環智女士：**

25

26 就此，我們也曾跟律政司負責法律政策的同事商議。就執行公職的  
27 人員，他們也曾研究怎樣草擬有關的免責條款，才可符合普通法的精神。  
28 他們亦曾提供多宗個案給我們參考。在普通法及明文法律下，就有關執法  
29 機構的免責條款似乎也是採用這種草擬方式的。我相信我們應就這個問題  
30 取得平衡，令執行公職的人員不致過於畏懼，使他們可有效地執行規管工

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1 作，同時亦可確保他們在執行工作時不會濫權。我們認為，在其他條款制  
2 訂一些制衡措施，以確保這些執行公職的人員的工作的透明度高和問責性  
3 強，或許已能達致大家要求的水平。

4  
5 **主席：**

6  
7 胡經昌議員，請講。

8  
9 **胡經昌議員：**

10  
11 主席，我認為把這項條款併入條例草案之內，這個做法較為理想。  
12 我亦同意副主席剛才的論點，表示過往的條例並沒有制訂類似的條款。但  
13 當局剛才亦指出，隨着時勢的改變，當局亦需要修訂過往制訂的條款。因  
14 此會否考慮就這方面作整體的修訂呢？為公平起見，我認為當局應制訂制  
15 衡措施。因為整條條例草案也訂有很多安排，例如有關MMT的安排。在條  
16 例草案獲得通過後，其他人士也可循民事程序，向有關人士追討責任。所  
17 以，若證監會也認為本身處事公正，較公平的做法，是在條例草案中加入  
18 這項制衡措施。

19  
20 **Chairman:**

21  
22 Alexa.

23  
24 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

25  
26 多謝主席。我十分贊同胡議員剛才提出的論點。如果其他人亦須承  
27 擔有關責任，證監會也不應獲得豁免。然而，我希望大家考慮到，有關good  
28 faith的要求也是一項相當絕對的要求。另外，在很多情況下，證監會在執  
29 行工作時，也需要對市場發生的重大事件作出即時的反應，例如譴責中介  
30 人或處分中介人等。在這些情況下，證監會未必有足夠時間考慮所有有關

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1 due diligence的問題。有關good faith的準則是我們向來在執行工作上的  
2 requirement，我們亦會為我們的工作負責。

3  
4 **主席：**

5  
6 這個解釋令我更不明白。余若薇議員，在case law方面，過往是否  
7 有很多有關good faith的訴訟呢？

8  
9 **余若薇議員：**

10  
11 “Good faith”和“due diligence”是兩回不同的事情。我相信政府或證  
12 監會也很難向公眾解釋，因何其他人行事要十分小心，否則便會被當局起  
13 訴，而證監會則無須符合有關due diligence的規定。即使在Alexa剛才提到  
14 的一些很緊急的情況下，有關人也不應把別人向他提供的information胡亂發  
15 放，而應事先進行很簡單的調查。而這項簡單調查的深入程度，便要視乎  
16 有關事件的時間性和重要性而定。這仍是符合有關due diligence的要求的其  
17 中一種方式。所以，有關人無論如何也不應處於毫無選擇而胡亂發放有關  
18 資料的境況。

19  
20 換句話說，有關due diligence的要求也頗低，並未至於有關duty of  
21 care或negligence的要求。如果情況非常危急或時間短促，有關人亦無須完  
22 成很多必須完成的步驟。因此，有關due diligence的要求也是因時而定吧。

23  
24 所以，我認為證監會也無需過份擔憂當一些事情發生後，證監會無  
25 法解釋因何採取某些處理方法。無論如何，證監會也有責任向公眾解釋，  
26 證監會所採取的處理方法是正確的。即使在這款加入due diligence的字眼，  
27 我也不認為是要求證監會承擔特別的責任，證監會更可向公眾作出交代。

28  
29 如果不把due diligence的字眼加入這項條款，其他人便會認為，證  
30 監會對其他人的要求很高，但證監會本身卻不符合due diligence的要求。這

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1 點似乎有點不妥。

2

3 **副主席：**

4

5 主席，如果要證明有關人行事沒有good faith，通常只有兩種情況。  
6 第一種情況是證明有關人存有dishonesty，即純粹是不誠實或以bad faith行  
7 事。第二種情況是有關人在程序上出現了很大的問題，例如bias。換句話說，  
8 當局需要prove dishonesty or bias。除此以外，當局似乎也不能指有關人行  
9 事不是in good faith的了。所以，可證明出現這些情況的可能性非常低。

10

11 **主席：**

12

13 我相信目的是已經達到了。

14

15 **副主席：**

16

17 所以，有關good faith跟due diligence的要求，是有很大距離的。

18

19 **主席：**

20

21 好了，我相信同事們已很清楚地表達他們的意見，現在交由政府作  
22 出考慮了。

23

24 **Mr Andrew PROCTER, Executive Director, Intermediaries Investment Products, Securities  
25 and Futures Commission:**

26

27 I do not think this would be the right forum to reach absolute agreement on this, but  
28 for a start I think it would be the staff member or the person who would have to establish their  
29 good faith, so the burden would be on them. I do have a concern that drawing an analogy  
30 from the due diligence discussions, for example, in corporate law, may be problematic. I

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1 mean, as Ms EU has described it, her formulation of due diligence was a very sensible and  
2 practical one; but there is a difference between what the Commission may have to do where it  
3 is not the judge of the timing of the action. It may have to react very quickly, and what  
4 corporate advisers and directors do is act as they are the judges of their own destiny. They  
5 can choose when to act, and they can choose what they need to do in preparation for those  
6 actions. I would have a concern that inserting the notion of due diligence in a provision like  
7 this may cause the Commission to hesitate and delay before taking action in the public  
8 interest.

9  
10 I think it would be wise to take the opportunity to just look at the way in which due  
11 diligence is formulated. As the Deputy Chairman said, it is not what you find in the typical  
12 immunity provision. Typical immunity provisions here and elsewhere are just expressed in  
13 terms of good faith, and I think there is a reason for that. I think it reflects the fact that  
14 public authorities sometimes have to act very quickly in what they judge to be the public  
15 interest; and they do it in good faith and in a protective way. They do not get to choose  
16 when to act, and they do not necessarily have a choice as to sitting back and considering and  
17 weighing.

18  
19 So, I think there is some difference between that and what directors can do, where  
20 they are much more in charge of their own destiny. So I would like a chance just to look at  
21 that and just to think about that, to see whether some other phrase rather than “due diligence”  
22 is better able to express the notion of taking care, if you like, without imposing a burden or a  
23 concern for Commission staff.

24  
25 **Chairman:**

26  
27 Audrey.

28  
29 **Hon Audrey EU Yuet-mee, SC, JP:**

30



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1 I was just going to say that if adding in the words in whatever suitable form makes  
2 the Commission take care – that is Andrew's word – and maybe pause to reflect before  
3 launching any action, I would have thought that is the very purpose one wants to achieve. I  
4 think at the end of the day, this is really just a civil liability claim and it has to be adjudged by  
5 the court. If you are talking about any person who is really on Commission's duty, you are  
6 really talking about somebody who is in a position to defend himself in civil proceedings. If  
7 you think of the person who perhaps in this particular case is aggrieved because he really is  
8 on the receiving end of a wrong decision, maybe done in good faith but grossly negligently,  
9 you do not really want him to go away aggrieved, without having at least the right of an  
10 action, which is going to be decided at the end of the day. Anybody who is brave enough to  
11 take on such an action against a person who is on Commission's duty – either he is mad, in  
12 which case he would eventually fail, or he must be very, very aggrieved. It is, at the end of  
13 the day, a question of balance, so if you ask me where the balance should lie, I would think  
14 the choice for me is really quite clear.

15  
16 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
17 ***Securities and Futures Commission:***

18  
19 I understand all of that, and do not disagree with it, but when I think back to the  
20 situations we have had, where people have either taken or threatened action, there are a lot of  
21 other things that come into play there, as they affect the individual staff members of the  
22 Commission. You cannot, for example, assume that the Commission is going to fund their  
23 defence of the action. It could be a fantastically expensive exercise for them, and I can  
24 remember in one particular case it had a very serious impact on the way certain people  
25 thought about their duties and responsibilities, and their willingness to take action. Not only  
26 them, but those around them, of course. It can have a destructive effect or a potentially  
27 destructive effect on the work of the Commission.

28  
29 In a particular case that comes to mind, the Commission decided that it would fund  
30 a case. We had to think very carefully about why we were doing that, and in what

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1 circumstances we would withdraw funding. For example, would we continue to fund  
2 someone if we thought there was some evidence of bad faith? At what point? Would we  
3 just simply continue to fund them through the appeal process, and then try and get money  
4 back at the end of the day, if it turned out that they acted in bad faith? You can imagine that  
5 even a discussion about that had a very significant impact on the people who were the subject  
6 of the discussion. We were trying to make judgments about whether or not they had acted in  
7 good faith - we ourselves, in advance of the evidence coming out – and whether or not they  
8 deserved to be funded; and whether or not we should give an open assurance that we would  
9 continue to fund them right through the action. That of course also, in a case where the  
10 plaintiff was sane, had an effect on whether they would try and negotiate or compromise a  
11 settlement of the claim. There are lots of things that come into play there.

12  
13 **財經事務局副局長區璟智女士：**

14  
15 當我再次參考律師過往向我們提供的意見時，我發現我們曾就這個  
16 課題進行研究。律師的意見是：第一，沒有足夠理由僅為SFC制訂超越現時  
17 普通法下有關要求執行公職人士應盡責任的條款，並認為現時的寫法已能  
18 達致Common Law的標準。第二，正如議員們剛才提到，其他人士也須承擔  
19 這些責任，為何證監會不需要呢？但律師要求我們在考慮需否制訂額外制  
20 衡時，亦考慮到對其他人士的制衡。由於現時制訂的制衡措施已加強了證  
21 監會的問責性和透明度，因此希望各位亦能考慮有關的配套安排。

22  
23 **主席：**

24  
25 我相信雙方已充分地表達意見。那麼我們現在可討論載於Page 25  
26 的第369條。李家祥議員有沒有補充？

27  
28 **李家祥議員：**

29  
30 我亦希望作少許補充。就這項條文，會計界跟證監會在過往數年亦

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1 曾進行充分的討論及意見交流。可能主席亦知悉，我們最近在討論上取得  
2 些微突破，因為我們參考了很多議員及黨派，尤其是民主黨向香港會計師  
3 公會和會計業界提供的意見。雖然會計界內仍然存有很多抗拒的聲音，但  
4 我相信這些聲音是會漸趨統一的，所以不會造成問題。

5  
6 會計界認為，在這項條文提供豁免，並不表示會計界會因而需向證  
7 監會提供很多報告。如果各位瞭解有關核數和審計的工作，便會知道我們  
8 的工作只是系統性的工作。我們的工作範圍和文件，對於調查類似fraud的  
9 事情是沒有任何針對性的。所以，即使訂有這項豁免條文，也不表示證監  
10 會會經常接獲這類報告，亦不表示會計界需經常擬備這類報告。我們希望  
11 清楚表明這點，以免當局存有不切實際的期望。另外，我要澄清會計界只  
12 是接受這項公眾責任，以及盡可能協助公眾進行有關工作，而會計界人士  
13 本身並不是干犯有關罪行的人。所以就這方面制訂涉及罪行的條款，是不  
14 適當的做法。但為着公眾利益，會計界最終亦已在上星期發出一份專業指  
15 引。在某程度上，雖然我們知道政府沒有意圖就這方面使業界承擔刑事責  
16 任，才提供這項豁免，但我們亦會對香港會計師公會的會員，施加專業的  
17 要求。如果會員不能符合有關的要求，便須承擔後果。有關會員可能會受  
18 到公會紀律處分，特別是如果公會證明有關會員沒有依照公會的指引行  
19 事，該會員便可能須承擔民事起訴的後果。這個後果相信會對會計師造成  
20 很大的威脅。雖然我們也接納這是會計界專業水準的一部分，但我們亦希  
21 望政府在解釋這條條例草案時，明確地指出犯案者並不是會計師，更希望  
22 政府指出，這款沒有任何暗示或明示有關會計師存有觸犯刑事罪行的意  
23 圖。就這個問題，會計業界已用了很長時間反復討論，並會發出一份專業  
24 指引。

25

26 **主席：**

27

28 會計界已經發出指引？

29

30 **李家祥議員：**

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1  
2 有關文件尚未正式成為指引，因為我們仍需進行諮詢程序，然後才  
3 可正式公布這份指引，所以這份指引尚需要3個階段才能確認。事實上我們  
4 已向會員發出這份指引的擬稿，並已把其上載至公會的網頁。因此，正式  
5 的諮詢行動已經開始。諮詢的對象亦包括政府有關部門及海外的專業團體  
6 等。這是一項較新的進展。如果我們能與政府及各方面達成共識，我們便  
7 無需再就這條條例草案提出任何修訂建議或意見。

8  
9 **主席：**

10  
11 你剛才提到3個諮詢程序，根據你們的估計，這份擬稿甚麼時候才  
12 能正式成為指引？

13  
14 **李家祥議員：**

15  
16 這份指引在今年年底或明年年初便可落實。雖然我們進行公開諮  
17 詢，但由於這條條例草案基本上只是針對上市公司，而接觸上市公司審計  
18 工作的公司是非常少的。我相信在香港來說，這些工作只是很高度集中由5  
19 間公司進行。另外，為一至兩間上市公司進行審計工作的公司亦只有約10  
20 間。所以，牽涉的公司只是很少，而會計界的內部諮詢工作亦已進行了很  
21 長時間。因此，我很有把握這份專業指引最終也能落實。

22  
23 **Chairman:**

24  
25 Okay.

26  
27 **副主席：**

28  
29 主席，我希望就載於第24頁的第368條第(5)款提問。這款訂明，當  
30 局可以強制律師披露某人是否他的當事人及他當事人的地址，對嗎？為甚

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1 麼會制訂這些要求呢？一般來說，現時有否其他條例，訂明有關人可從律  
2 師取得有關某人是否他的當事人的資料，或要求律師披露他的當事人的名  
3 字和地址呢？

4  
5 **余若薇議員：**

6  
7 我也希望提出這個問題，但我們剛才一下子便討論第369條了。正  
8 如副主席現時就載於第24頁的第(5)款提出的問題，對於“Nothing in sub-section  
9 (4) affects any requirement under this ordinance.”中的“any requirement under this  
10 ordinance.”，政府可否告訴我們，條例草案中哪些條文訂有這些要求呢？

11  
12 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
13 **Securities and Futures Commission:**

14  
15 It is not a requirement expressed in terms of “The Commission has a right to  
16 require that a legal practitioner disclose the name and address of a client”. It would have to  
17 be one of the general provisions that relates to an investigation or inspection power. So the  
18 triggers in Part VIII would have to be satisfied first, and then you would have to issue a notice  
19 requiring production of documents or provision of assistance, or the answering of questions.  
20 It would be one of those kinds of provisions that may lead to a question being asked of a legal  
21 practitioner. Where the legal practitioner says “I’m not going to disclose the content of that  
22 communication because it’s privileged”, the next question may be: “Tell me the name and  
23 address of your client”. It would be in that kind of context.

24  
25 **Hon Audrey EU Yuet-mee, SC, JP:**

26  
27 Mr Chairman, does it mean the combination of sub-clause (4) and sub-clause (5)?  
28 Do I understand this as meaning that if you are a legal practitioner, whether in Hong Kong or  
29 outside Hong Kong, you have the privilege, or you are not required to disclose anything other  
30 than the name and address of your client? Is that right?

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1

2 **Ms Sherman CHAN, Senior Assistant Law Draftsman:**

3

4           May I add this on the name and address disclosure? Under the common law a  
5 solicitor is anywhere required to disclose the name of the client, although under the common  
6 law a solicitor may not be required to disclose the address of the client. In a lot of our  
7 legislation we do have provisions requiring disclosure of address specifically, so this is not  
8 unusual in our legislation. This only reflects the general standard reflected in other  
9 legislation.

10

11 **主席：**

12

13           妳需要舉例說明嗎？

14

15 **高級助理法律草擬專員陳子敏女士：**

16

17           根據我現時備有的資料，這些條例包括這條條例草案的藍本，即《證  
18 券及期貨事務監察委員會條例》，以及《槓桿式外匯買賣條例》等。

19

20 **副主席：**

21

22           主席，我實在不希望針對這個問題，但我相信我們過往亦曾討論有  
23 關 professional privilege 的問題。 It is not a right of a lawyer, it is not the privilege of the  
24 legal practitioner, it is the privilege of his client. It is the privilege of his client. The way  
25 you put it, you make it as if it is a right of the legal practitioner. I just do not know how  
26 often we have to repeat this point. Also, I think we have gone through this exercise of  
27 whether you should re-affirm a professional privilege which is the basis of the common law;  
28 whether by making it express you actually create the impression that unless it is expressly  
29 provided, the privilege is somehow not there. I think this is a general discussion that we  
30 have had, I think the legal adviser would remember, in many circumstances.

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1

2 *Ms Sherman CHAN, Senior Assistant Law Draftsman:*

3

4           On this particular point we have actually consulted the Law Draftsman, and  
5 actually his advice is that it is preferable to have the privilege expressly retained in order that  
6 there will not be a contrary intention being inferred. Actually I have consulted him on this  
7 particular point.

8

9 **主席：**

10

11           Any more questions? Let us come back to Clause 369. 政府需否  
12 作出回應？

13

14 **財經事務局副局長區璟智女士：**

15

16           我認為不需要了。我們很歡迎香港會計師公會採取主動行動，出版  
17 專業指引的擬稿，並諮詢業界。我們亦希望他們可盡快落實這份指引。相  
18 信這份指引對於第369條獲得通過後的執行工作亦會有所幫助。至於李議員  
19 要求政府重申有關條款所指的犯案人並非針對會計師，我們認為沒有問  
20 題。

21

22 **胡經昌議員：**

23

24           主席，我希望提出簡單的問題。第369條第(1)款第2行提到“a listed  
25 corporation, or of any associated corporation of a listed corporation”。對於“associate  
26 corporation”一詞，是否已足以理解，或另存有一個定義？

27

28 **主席：**

29

30           Schedule 1有沒有界定這個詞語？

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1

2 **胡經昌議員：**

3

4 沒有。

5

6 **財經事務局副局長區璟智女士：**

7

8 或許大家可以翻開Page 30。第30頁上半頁便載有這個詞語的解釋。

9

10 **主席：**

11

12 沒錯。對於第369條，各位有沒有問題？《藍紙條例草案》中已訂  
13 有這條。曾經有議員提出，認為為核數師提供免責是不足夠的。既然現時  
14 香港會計師公會提出在他們的專業守則內加入條款，規定會計師主動採取  
15 行動，我們會就這方面重新考慮需否對這條作出修訂。

16

17 接着是討論Page 31。

18

19 **副主席：**

20

21 我要提出的問題，亦是我過往曾經提出的問題。第370條第(1)款有  
22 關obstruction這個字的範圍是很廣泛的。我亦曾經提問，若有關人阻差辦  
23 公，是否也應被判監禁兩年及罰款一百萬元呢？這是有關parity of penalty  
24 的問題。希望當局盡快作出回應，因為我們已多次提出這個問題，多謝主  
25 席。

26

27 **主席：**

28

29 政府現在可否作出回應？

30



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1 **財經事務局副局長區璟智女士：**

2  
3 我們會把有關回應連同副主席剛才要求我們就3項罪行作出比較的  
4 資料，以一份簡單文件的形式，一併提供給你們吧。

5  
6 **主席：**

7  
8 Okay，我明白了。

9  
10 **副主席：**

11  
12 主席，在‘in this section, “specified person” means’中的“specified  
13 person”是否與其他條款的“specified person”不同？哪部分訂明有關定義？

14  
15 **高級助理法律草擬專員陳子敏女士：**

16  
17 第366條本身訂有“specified person”的定義。

18  
19 **副主席：**

20  
21 哪頁？

22  
23 **主席：**

24  
25 第19頁。

26  
27 **Deputy Chairman:**

28  
29 Okay.

30

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1 **主席：**

2

3 法律顧問，請講。

4

5 **助理法律顧問顧建華先生：**

6

7 多謝主席。我希望討論第368條第(3)款。這款提供了一項相當廣泛  
8 的豁免。但這項豁免卻沒有要求有關人在履行這條條例草案的要求時必須  
9 出於善意，不知道大家需否考慮這個問題呢？換句話說，這款並沒有要求  
10 有關人是in good faith的。

11

12 **主席：**

13

14 載於第24頁的第368條第(3)款。

15

16 **主席：**

17

18 這款的範圍更加廣泛，比第(1)款的要求還要寬鬆，對嗎？

19

20 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
21 **Securities and Futures Commission:**

22

23 These are people who are required to do things, Chairman. We could not impose  
24 any requirement of goodwill on them. They may have absolute ill-will and malice. In fact  
25 they may very much resent having to comply with a requirement of the Commission. What  
26 this clause says is that if they answer questions and produce documents under notice, or they  
27 comply with reporting requirements set out in rules, then they are not liable in contract, tort or  
28 defamation.

29

30 Again, I gave some examples earlier of bankers being compelled to produce

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1 documents and so on – that sort of thing. The state of mind of the person who complies  
2 with a requirement we do not think is relevant in this context. What is relevant is that they  
3 are required to do it, and that is, if you like, a defence to any action that might be brought  
4 against them. There are other provisions, of course, that would come into play if they did  
5 not comply properly with the requirement.

6  
7 **主席：**

8  
9 Okay，對於Page 31和32，各位有沒有問題？如果沒有，接着是討  
10 論 Clause 371——False or misleading representations in applications to Commission。

11  
12 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
13 **Securities and Futures Commission:**

14  
15 This is one of those clauses where, if they did not comply properly, they would find  
16 themselves liable.

17  
18 **主席：**

19  
20 Okay. 胡經昌議員。

21  
22 **胡經昌議員：**

23  
24 主席。我希望就第371條第(3)(b)款提問。或許我們過往也曾討論這  
25 個問題。有關就future event和state of mind作出陳述這兩項要求是否不合理  
26 呢？正如政府也曾表示，對於未來的事件提出的問題，是無需回答的。在  
27 這個情況下，無論有關要求的對象是誰，我們應否考慮不加入這些要求呢？  
28 我所指的是第(b)段和第(c)段的其中一部分。

29  
30 **財經事務局副局長區環智女士：**

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1  
2 就這方面，大家最重要是考慮第371條第(1)款所訂的制衡或測試點  
3 是否足夠。這款訂明，控方必須作出舉證，證明辯方明知故犯或罔顧後果  
4 地作出有關陳述。

5  
6 **主席：**

7  
8 還有沒有其他問題？

9  
10 **胡經昌議員：**

11  
12 主席，在一般情況下，若要指某人的陳述是虛假時，必需存有事實  
13 根據。即使指某人的陳述具誤導性，也需具有實際情況作為根據。所以，  
14 應否把未來的事件當作陳述處理呢？雖然我不知道，在法律上  
15 “representation”，即“陳述”是否必須關乎實際的事情，但在中文的運用上，  
16 “其他思想狀態”的意思實在很難理解。我相信要留待法律界人士考慮，採  
17 用這個字眼是否正確的做法。我認為“意圖”的意思是可以明白的，“意見”  
18 這個字眼尚可理解，但至於“信念”方面，我也不肯定應否納入這段之內。  
19 對於“其他思想狀態”這類字眼，法律界有甚麼意見呢？

20  
21 **主席：**

22  
23 簡單來說，你的問題是“其他思想狀態”是甚麼意思，對嗎？

24  
25 **胡經昌議員：**

26  
27 即使政府本身明白這個意思，也需要令大家明白和接受有關解釋。

28  
29 **Miss AU King-chi, Deputy Secretary for Financial Services:**

30

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1 I would like to invite SFC colleagues to look at examples of this sort of information.  
2 Say an applicant for a licence may have to include this in his application as part of the  
3 representation to the SFC.

4  
5 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
6 ***Securities and Futures Commission:***

7  
8 As to future events, I have been trying to think of the sorts of things that might  
9 come up. Let us take someone who is applying for permission to offer collective  
10 investments to the public, and they put forward a proposal in respect of a particular  
11 investment which has a structure, fund manager custodian, some delegations and sub-  
12 delegations, and there are related companies within those groups of service providers. We  
13 will quite often require from them representations as to the way in which they will operate  
14 their business, who will take what kind of investment decisions, how the delegations will  
15 work in practice, what the separation and segregation of responsibilities will be to avoid  
16 conflicts of interest, how that will be dealt with, what the role of the trustee will be in  
17 supervising those kinds of issues; requirements that they will, if they are in certain  
18 jurisdictions, obtain from an auditor in that jurisdiction; certificates in respect of their  
19 systems and controls. All of those things are sought by way of future assurance about the  
20 way in which they will conduct their business, in order to satisfy us that it is safe to allow  
21 them to offer that product to the public in Hong Kong. There are similar sorts of examples  
22 when someone comes along and says: "I would like a licence", for example, "to be a  
23 securities dealer". We would ask them: "Do you have an intention to hold client assets?"  
24 If they say "No" then there may be a condition placed on their licence which would prohibit  
25 them from holding client assets.

26  
27 However, it may subsequently turn out that they do hold client assets or they may  
28 give advice of certain sorts in respect of the Takeovers Code, even though they have given an  
29 assurance that that would not take place. Or they may say – and be subject to a  
30 condition – that they would not be the sole adviser on takeovers cases. All those sorts of

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1 assurances about the way in which the business is to be operated are important in our  
2 judgments about whether it is appropriate to allow the business to commence.

3  
4           There are other assurances about adequacy of capital, the requirement to maintain  
5 certain levels of capital. We seek assurance about what would happen in certain events.  
6 For example, we sometimes impose trading restrictions on someone, even at the outset, given  
7 the nature and structure of their business; and we seek assurance from them that they will be  
8 adhered to. Quite often those sorts of things are expressed in terms of conditions, but  
9 sometimes expressed in terms of undertakings.

10  
11           In that context when applications are made we do quite often get assurance about  
12 the future of the business and the way in which it will be conducted, and they are expressed as  
13 statements of intention about future circumstances. They are important points, too. They  
14 go very much to the question of whether or not it is appropriate to allow someone to carry on  
15 a certain kind of business.

16  
17 **胡經昌議員：**

18  
19           主席，Mr Andrew PROCTER剛才列舉的例子，特別是對於經紀的問  
20 題，我相信整條條例草案已訂有很多條款，使證監會可執行有關工作。雖  
21 然證監會已舉出兩個例子，但我的憂慮是，由於這款的草擬方式過於廣泛，  
22 把future event也包括在內，會否造成問題呢？這款現時的草擬方式這麼廣  
23 泛，當局需否在字眼上作出修訂呢？

24  
25           另外，證監會似乎也尚未回應我剛才提到有關何謂state of mind的  
26 問題。我同意當局應就某些情況進行規管，但這款的草擬方式實在過於廣  
27 泛。若將來發生這類情況，根據這款所訂，有關人“即屬犯罪”。在這些情  
28 況下，我們應如何處理呢？我實在希望瞭解當局對於這些字眼的意見。

29  
30 **財經事務局副局長區環智女士：**

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1  
2 主席，我認為這項條款的草擬方式並不廣泛。採取這個草擬方式的  
3 目的，是希望業界清楚知道，當他們向證監會申請牌照或批准為市民大眾  
4 提供服務時，可協助證監會考慮是否發牌而提供的資料的真確性。

5  
6 這款可以讓申請人知道，他們所提供的資料，包括他們現時的計劃  
7 和將來的計劃，也是十分重要的。正如Mr. PROCTER剛才提到，申請人就  
8 怎樣處理客戶的資產而釐訂的計劃，其實是十分重要的。雖然申請人的業  
9 務現時尚未開始運作，但SFC亦會把這些計劃書一併考慮，才決定會否發  
10 牌。因為證監會是基於這些資料決定會否發出牌照，所以申請人必須確保  
11 有關資料的內容屬實。

12  
13 **副主席：**

14  
15 主席，我沒有提出意見，因為我認為這款的英文本的意思較為清  
16 晰。在研究這款時，最重要的並不是考慮有關陳述是否包括意圖及心理狀  
17 況等。第(1)款第(a)段訂有兩個十分重要的部分。第一，不論有關陳述關乎  
18 甚麼內容，該陳述是用以支持有關人向證監會提出的申請的，“...that  
19 representation has to be “in support of any application”。第二，這段亦訂有“that is false or  
20 misleading in a material particular”的字眼。意思是這款並非指證監會可要求申請  
21 人陳述任何有關心理狀態的事情或未來事件，並指明有關陳述必須在  
22 material particular上屬虛假或具誤導性，申請人才屬犯罪。

23  
24 我不知道在提出申請時，有甚麼有關心理狀態的資料屬於material  
25 particular。但如果有關資料確實是屬於material particular，而申請人亦就這  
26 些資料作出虛假陳述，並正如第(1)(b)款所訂，若申請人明知有關陳述是虛  
27 假或具誤導性的，則該申請人便屬犯罪。

28  
29 我認為這部分所訂的範圍是狹窄的。因此我認為第(3)款的草擬方式  
30 並非過於廣泛。否則，我便會就第(3)(c)款提出爭議。但我們稍後討論中文

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1 本時，便需要斟酌可否使有關中文本的草擬方式較為清晰。或許我們在稍  
2 後審議中文本的有關條文時再行討論吧。

3  
4 **主席：**

5  
6 這問題只關乎中文本的意思能否反映英文本的意思而已。我相信副  
7 主席和副局長已就這個問題作出清楚的解釋。我亦不認為這是個大問題，  
8 因為根據第(1)款，當局要向申請人提出起訴也是十分困難的。

9  
10 好了，現在討論第372條——Provision of false or misleading information。  
11 Audrey，請講。

12  
13 **余若薇議員：**

14  
15 主席，就第372條，subclause (1) deals with provision of information, which  
16 probably includes verbal information, because this can be contrasted with subclause (3),  
17 which deals with the provisions of record and document. Now, when I look at subclause (3)  
18 there are additional requirements. For example, subclause (4) says: “No person shall be  
19 convicted of an offence under subclause (3) unless the prosecution proves that (a), the record  
20 of the document has been relied on...”. I just wonder whether the same condition applies to  
21 subclause (1), which is the provision of information. There does not seem to be a  
22 requirement that the information has to be relied on. Why is there a difference or a  
23 distinction between the provision of information and the provision of document?

24  
25 **財經事務局副局長區璟智女士：**

26  
27 或許請證監會的同事稍後加以解釋吧。第372條是在上一屆立法年  
28 度通過的。當時的立法會亦曾就如何修訂這項條款向政府提供很多意見。  
29 據我的理解，第(1)款主要是針對業界人士向證監會或交易所提供資料的情  
30 況，因為某些規章或法例要求業界向有關機構提供這些資料。第(3)款是有



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1 關市場人士主動向證監會提供資料的情況。

2  
3 就有關主動提供資料的第(3)款，當時大家也希望向有關人士提供較  
4 多保障，因而訂有第(4)款的安排。我亦希望請證監會的同事加以解釋。

5  
6 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
7 **Securities and Futures Commission:**

8  
9 I think it is very much the product of the discussion that took place when this  
10 provision was drafted last time. My understanding of the way in which clauses 371 and 372  
11 fit together is that clause 371, as we have just discussed, applies to people who provide  
12 information in support of an application. 372(1) applies where someone is required to  
13 produce information – that is, required by the Commission to do so. 372(3) in effect is left  
14 over for situations where there is no requirement to produce, and it is not produced in support  
15 of an application, but information is provided nonetheless. It is a bit like the officious  
16 bystander, I suppose, being one situation that would apply.

17  
18 Now, in fact if you look at other legislation, comparable legislation, these  
19 provisions are expressed much more simply. They just say that if you provide false and  
20 misleading information to the regulator, you commit an offence. They do not deal with any  
21 of these warning provisions. They do not deal with reliance or any of that. If you contrast  
22 the UK legislation, what is the equivalent of clauses 371(3) and 372 takes seven lines. The  
23 judgment that was made in the discussion before the Legislative Council Bills Committee last  
24 year was these extra safeguards should be built in where someone is providing information in  
25 the circumstances described in subclause (3), and that there should be this notion of reliance  
26 as well.

27  
28 It just reflects a judgment that was made at the time as a result of debate there, and  
29 it was very much the product of a 3-way debate. That Bills Committee was unusual in that  
30 the industry participated throughout the discussion of the clause, and it was drafted in

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1 committee, so to speak. It reflects that, I think, in sub-clause (3).

2  
3 ***Deputy Chairman:***

4  
5 Mr Chairman, I do not want to disturb it, but certainly I think this is intellectually  
6 very questionable. In a criminal provision, that the criminal offence should depend on  
7 whether someone relied on it. This certainly is conceptually wrong, but as I say, I do not want  
8 to discuss it. You had a hard time coming to an agreement, but I personally think it is very  
9 bad.

10  
11 ***Hon Audrey EU Yuet-mee, SC, JP :***

12  
13 Mr Chairman, may I ask for some further clarification? According to the  
14 explanation just given, the difference between subclause (1) and subclause (3) lies in the  
15 words. In subclause (1) it is "...in purported compliance with the requirement to provide  
16 information imposed by, or under any of the relevant provisions", and then it says "provides  
17 to a specified recipient". Then in subclause (3) it says: "...in circumstances other than  
18 those which would constitute an offence under subsection.... provides to a specified recipient  
19 in connection with a performance by the specified recipient of the function under any of the  
20 relevant provisions". Andrew has just explained that subclause (3) is when an officious  
21 bystander volunteers information.

22  
23 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
24 ***Securities and Futures Commission:***

25  
26 That is right, but there are other circumstances in which subclause (3) could arise.

27  
28 ***Hon Audrey EU Yuet-mee, SC, JP:***

29  
30 Yes – because I do not read subclause (3) to say "officious bystander who

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1 volunteers information”.

2  
3 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
4 ***Securities and Futures Commission:***

5  
6 No; but I find it difficult to keep all these in my head as well, I must say. My  
7 understanding of it is that the provision in subclause (3)(a) and the reference to it not  
8 constituting an offence under subclause (1) means that it is not in purported compliance with a  
9 requirement to provide information. You could not only have someone who reports a  
10 matter to the Commission, and makes a complaint, reports misconduct in the sense of the  
11 officious bystander. You could have a member of the staff of a firm who says “There is a  
12 problem within the firm”, and they report it. The compliance officer officially reports it.  
13 There is no requirement for them to do it. They are not compelled to do it.

14  
15 There could equally be situations where they are asked for information in the  
16 course of, say, consideration of a whitewash application under the Takeovers Code. There is  
17 not necessarily an application that they have made. We may be seeking information from  
18 third parties, so they would not fall within “an applicant” for the purposes of clause 371.

19  
20 We may, in the course of an investigation, ask someone questions on a voluntary  
21 basis – so again, no compliance element under clause 372(1). All those circumstances  
22 would be examples of where people are providing information to us, but they are not  
23 compelled to do it, and they are not doing it in support of an application. I think that is how  
24 it fits together.

25  
26 ***Hon Audrey EU Yuet-mee, SC, JP:***

27  
28 Yes. Mr Chairman, at the moment I am not trying to understand the policy. I am  
29 trying to understand the drafting. The difference between subclause (1) and subclause (3).  
30 What are the situations which fall within subclause (1) and what are the situations that fall

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1 within subclause (3)? Now, Andrew originally explained, and says subclause (1) applies  
2 when information is required. The person is under a duty to provide information. That I  
3 understand. Then he says subclause (3) applies to people who volunteer information. I  
4 certainly do not read subclause (3) as just covering people who volunteer information. It can  
5 apply to people who are required to provide information. Is that not right?

6  
7 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
8 ***Securities and Futures Commission:***

9  
10 Well, certainly subclause (3) applies in the circumstances I was describing, I think,  
11 because subclause (1) does not apply.

12  
13 ***Hon Audrey EU Yuet-mee, SC, JP:***

14  
15 Do not go into the examples of the situation. I am just trying to understand the  
16 distinction. If you put a label to subclause (1) and to subclause (3), what is the label that you  
17 would use, so that one can say: “Ah, this is situation (1) and this is situation (3)”? That is  
18 the exercise I am trying to do.

19  
20 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
21 ***Securities and Futures Commission:***

22  
23 The only way I can explain it is to say that situation (3) is where information is  
24 provided to the Commission but it is not under compulsion, not provided under compulsion.

25  
26 ***Hon Audrey EU Yuet-mee, SC, JP:***

27  
28 I see; but it is still provided to a person who is exercising a function. In other  
29 words, there is no sanction if you do not provide the information under subclause (3)?

30

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1 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
2 *Securities and Futures Commission:*

3

4           That is right.

5

6 *Hon Audrey EU Yuet-mee, SC, JP:*

7

8           Is that what you say to be the distinction?

9

10 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
11 *Securities and Futures Commission:*

12

13           That is right. It is another way of looking at it; yes.

14

15 *Hon Audrey EU Yuet-mee, SC, JP:*

16

17           So under subclause (1), it is a situation where, if you do not provide the information,  
18 you are committing an offence? Is that what you are saying?

19

20 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
21 *Securities and Futures Commission:*

22

23           That is practically right, because you would have always had to provide it.

24

25 *Hon Audrey EU Yuet-mee, SC, JP:*

26

27           It cannot be “practically right”. It is either right or is it not.

28

29 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
30 *Securities and Futures Commission:*

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30

It is right.

*Hon Audrey EU Yuet-mee, SC, JP:*

Okay.

*Deputy Chairman:*

Well, is it really right?

*Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,  
Securities and Futures Commission:*

Wait a minute. The reason that it may not be right is this: I can think of situations where there may be a requirement to provide information under rules to which the non-provision has no sanction attaching.

*Hon Audrey EU Yuet-mee, SC, JP:*

You see, my difficulty is that looking at the words in subclause (3) where you say “...in circumstances other than those that would constitute an offence under subclause (1)”. I am not quite sure that is right, because when you say “circumstances that would constitute an offence” you are not describing the situation. You are describing the person giving false information, and therefore committing an offence.

*Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,  
Securities and Futures Commission:*

I agree with that. I was trying to distinguish the commencement point, if you like,

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1 the reason for the provision of the information. You are quite right to go on and say that  
2 having provided information in purported compliance with the requirement is not enough.  
3 They also have to commit the other elements of the offence.

4  
5 ***Hon Audrey EU Yuet-mee, SC, JP:***

6  
7 That is right. So I am very sceptical about the words “in circumstances other than  
8 those that would constitute an offence under subclause (1)”. That sounds very, very odd to  
9 me, and that cannot be the right phrase to describe situation under subclause (3).

10  
11 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
12 ***Securities and Futures Commission:***

13  
14 I think you may well be right about that. I think I am right about what the  
15 distinction is.

16  
17 ***Hon Audrey EU Yuet-mee, SC, JP:***

18  
19 Because you are describing the policy intent behind subclauses (1) and (3). I  
20 follow that, but looking at the drafting, I think it is very, very unclear – and in particular the  
21 words I read out in subclause (3): “... in circumstances other than those that would  
22 constitute an offence under subclause (1)”.

23  
24 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
25 ***Securities and Futures Commission:***

26  
27 I think there would be other ways of expressing the policy intent, but these are the  
28 words that were settled on by Legislative Council last time.

29  
30 ***Hon Audrey EU Yuet-mee, SC, JP:***

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1

2 I think you might have to look at that again.

3

4 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
5 ***Securities and Futures Commission:***

6

7 Yes. Chairman can correct me if I am wrong, but this is word for word what was  
8 agreed last time.

9

10 ***Deputy Chairman:***

11

12 Mr Chairman, I think the problem is here. Subclause (1) consists of not only the  
13 preamble but also (a) and (d). But (b) has to do with “knowing or reckless” and so on. So  
14 your “other circumstances” should not refer to the whole of subclause (1), but perhaps only  
15 (a). In other words, the situation in (a) is that he “...in purported compliance with a  
16 requirement to provide information...”

17

18 So then in this circumstance any information which is false and produced  
19 knowingly being false, then he would be caught. Perhaps then here, instead of relying on the  
20 shorthand of “those that would constitute an offence under subclause (1)” you should  
21 substitute it with some more definite words, reflecting subclause (1)(a).

22

23 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
24 ***Securities and Futures Commission:***

25

26 You could say, in effect, “other than in purported compliance with the requirement  
27 to provide information”.

28

29 ***Deputy Chairman:***

30



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1 Yes, something like that.

2  
3 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
4 *Securities and Futures Commission:*

5  
6 That is right.

7  
8 *Deputy Chairman:*

9  
10 It is just that we are so much into the mire of collective drafting that sometimes we  
11 do not know where to stop.

12  
13 *主席：*

14  
15 胡經昌議員還有沒有問題？

16  
17 *胡經昌議員：*

18  
19 我希望就第372條第(3)(b)款第(i)和(ii)節提出簡單的問題。這部分訂  
20 明，如果證監會事前沒有作出警告，表明提供虛假或具誤導性的紀錄或文  
21 件會構成罪行，即使有關人提供虛假或具誤導性資料，也不會視為觸犯有  
22 關罪行。請問證監會有否制訂程序，在要求有關人提供資料時表明這點呢？  
23 我的憂慮是如果證監會因不經意地漏寫這點而導致有關人觸犯罪行，情況  
24 便頗為嚴重。證監會是否必定會執行這個提供書面警告的程序呢？

25  
26 *Chairman:*

27  
28 Andrew or Alexa?

29  
30 *證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：*

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1  
2 多謝主席。這項條文是由當時的立法會有關的Bills Committee通過  
3 的條文。由於根據這款而提供資料的行為，不是 pursuant to 一項  
4 requirement，而是某人 volunteer information，業界憂慮到，如果有關人  
5 volunteer information時，不慎提供了超越事實的資料，因而導致入獄，便  
6 有點不妥當。所以有關的Bills Committee最後決定，即使有關人向證監會  
7 volunteer information，如果證監會認為有關資料是虛假的，在證監會進行  
8 追究行動前，便會向有關人發出warning，詢問他所提供的資料是否屬實。  
9 如果他take了這個warning後仍然提供同樣的information，那麼證監會便可運  
10 用這項條款。

11  
12 **胡經昌議員：**

13  
14 主席，這節訂明的情況，是有關人主動向證監會提供資料，然後證  
15 監會才詢問有關人他所提供的資料是否屬實。在程序上有沒有問題呢？因  
16 為這節所採取的寫法是“prior written warning”，採用“prior”這個字眼有沒有  
17 問題呢？這是一個有關先後次序的問題。

18  
19 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

20  
21 這並不是先後次序的問題，而是當證監會運用這項條文提出起訴  
22 時，必須證明該會曾向有關人作出prior written warning。

23  
24 **主席：**

25  
26 換句話說，對於你第一次提出的問題，答案是“有”。

27  
28 **胡經昌議員：**

29  
30 有。

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1

2 **主席：**

3

4 對嗎，Alexa？

5

6 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

7

8 對。

9

10 **主席：**

11

12 Okay，你的問題已經得到解答。現在休息10分鐘，直至這個時鐘顯  
13 示10時45分再繼續討論。

14

15 (上午10時35分會議暫停)

16 (上午10時45分會議恢復)

17

18 **主席：**

19

20 各位同事，會議恢復。我們繼續就第XVI部進行討論。有關文件的  
21 編號是CB(1)2140/00-01。在會議暫停前，我們剛完成討論載於Page 36的第  
22 372條。我們接着是討論載於Page 36的第373條——Power of Commission to  
23 intervene in proceedings。

24

25 對於第36、37及38頁，各位有沒有問題？如果沒有，接着是討論  
26 Clause 374。法律顧問，請講。

27

28 **助理法律顧問顧建華先生：**

29

30 多謝主席。根據第373條第(6)(b)款，證監會將會與訴訟的其他各方

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1 具有同等的權利和責任。但這款所造成的效果並不是十分清晰。一般的訴  
2 訟程序也有原告和被告，但證監會既非原告亦非被告，亦似乎不是以一般  
3 的第三者的身份參與有關程序。如果證監會具有責任，有關文件的交換，  
4 或日後訴訟費用的分擔等，將會根據甚麼原則決定呢？還是就交換文件方  
5 面，參與訴訟的有關方面也須把所有文件同時向證監會提交呢？這些可能  
6 是較為細節的問題，但我並不認為現時第373條的草擬方式能對法庭提供任  
7 何指引。是否把所有問題也留待法庭決定呢？這會否對法庭造成較大的負  
8 擔呢？我們需否制訂一些授權條文，例如授權首席法官作出相應的規則  
9 呢？

10

11 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
12 ***Securities and Futures Commission:***

13

14 Mr Chairman, I understand the legal adviser's concerns, but we do think it is better  
15 to leave it to the trial judge or the interlocutory judge, as the case may be, prior to trial. We  
16 think that the court will be well able to fashion orders and to grant leave on terms that are  
17 appropriate, and that will include rights of discovery and production, rights as to examination  
18 and cross-examination at trial, rights to lead evidence, and otherwise make submissions, the  
19 order in which that happens, and the participation of the Commission as a party.

20

21 We also think that the discretion available to the court in respect of costs will be  
22 wide enough to allow for appropriate orders. Of course we think the Commission should be  
23 liable to orders for costs against it if it is appropriate. I can imagine extreme circumstances  
24 in which it might also get the benefit of a costs order in its favour, but I think that is pretty  
25 unlikely. We think that is sufficient, that the court can deal with it. The process is one in  
26 which the parties have to put on notice, leave has to be sought, orders have to be fashioned –  
27 and we do not have any doubt that the court can deal with that in the circumstances of the  
28 case.

29

30 ***Deputy Chairman:***

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1  
2 Mr Chairman. I would rather not have special rules for clause 373 of this  
3 Ordinance, because I have a feeling that we are getting too many of these special procedures.  
4 I would much rather ask the Administration to bring clause 373 to the notice of the judiciary  
5 to see if they have any further comments. I say this particularly in view of the fact that the  
6 court is at this moment thinking about reforming several procedures itself, and judges will,  
7 with or without any increase in salary, take on additional roles in case management. That  
8 may well have to be taken care of in that situation. Thank you.

9  
10 **主席：**

11  
12 接着是討論第374條——Proceedings not to be stayed。如果各位沒有  
13 問題，接着是討論第375條——Standard of proof。

14  
15 **Deputy Chairman:**

16  
17 Mr Chairman, I have no quarrel with the basic legal effect of this provision, but I do  
18 have some concerns about whether certain terms are too uncertain. For example, subclause  
19 (b): “a person has been responsible for an unlawful act or omission”. Does this refer to  
20 having committed that unlawful act or omission? If it is, I would rather use some more  
21 definite words.

22  
23 Then over the page at paragraph subclause (d), you have “a person has been  
24 concerned in...” - and I am worried about the words “concerned in” - and “anything which  
25 results in...”. Again, the “anything” - I wonder if that could be more precise.

26  
27 Then subclause (e), “... a person who attempted or conspired with any other person,  
28 to commit anything...”. What is the “anything” which results? If the performance of an  
29 innocent act which results in the occurrence of certain matters, does it come under it? I  
30 wonder if those things could be more precisely and tightly drafted.

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1

2 **Chairman:**

3

4 Sherman?

5

6 **高級助理法律草擬專員陳子敏女士：**

7

8 我們再作研究吧。

9

10 **主席：**

11

12 好的。接着是討論第376條。法律顧問，你希望就第375條提問，對  
13 嗎？

14

15 **助理法律顧問顧建華先生：**

16

17 主席，我不太明白第375條所訂的要求。既然這條所訂的有關程序  
18 不是刑事程序，亦僅適用於法庭，第375條便只適用於證監會。因為在一般  
19 情況下，如果在法庭進行的程序不是刑事程序，民事程序的舉證準則便適  
20 用。似乎Securities and Futures Appeals Tribunal和市場失當行為審裁處亦不  
21 一定受到第375條的規範。

22

23 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
24 **Securities and Futures Commission:**

25

26 I do not understand the question.

27

28 **Miss AU King-chi, Deputy Secretary for Financial Services:**

29

30 Mr KAU, can you repeat your question in English?

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1

2 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
3 *Securities and Futures Commission:*

4

5 He can repeat it in Chinese.

6

7 *Mr KAU Kin-wah, Assistant Legal Adviser:*

8

9 Well, it is very simple. I just want to clarify whether this provision applies to the  
10 Securities and Futures Appeal Tribunal (SFAT) or the Market Misconduct Tribunal (MMT).

11

12 *Miss AU King-chi, Deputy Secretary for Financial Services:*

13

14 To answer that, SFAT has its own provision governing standard of proof. That is  
15 clause 212(4). Then MMT also has its own provision governing standard of proof. Is that  
16 your question?

17

18 *Mr KAU Kin-wah, Assistant Legal Adviser:*

19

20 So, in that case I think the only relevance of clause 375 is for the standard of proof  
21 to be applied by the Commission, because for a court the normal standard of proof will  
22 anyway apply. It seems redundant to say that the court applies the standard of proof which  
23 applies to civil proceedings.

24

25 *財經事務局副局長區璟智女士：*

26

27 我明白你的問題。我稍後再研究，為何這條款要保留有關法院應採  
28 用的舉證準則的部分。

29

30 *主席：*

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會否存有一些不在這兩種情況內的cases呢？

**財經事務局副局長區璟智女士：**

這是我的憂慮，假如刪除有關法院的部分，一些必要程序也可能會無意中被刪除。

**Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products, Securities and Futures Commission:**

There are proceedings outside of the tribunals and the Commission that go to the court, which would be picked up by this clause. For example, we have powers to apply for injunctive relief and other sorts of relief. But I understand the legal adviser's question really turns on this fact: even if you did not refer to the court, the court would apply the civil standard anyway. It sounds right.

**財經事務局副局長區璟智女士：**

我稍後會諮詢我們的法律顧問。

**主席：**

Please check. 胡經昌議員，請講。

**胡經昌議員：**

我的問題已經有人提出了。

**主席：**



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1  
2           好的。I think the government will give us the answer.   接着是討論  
3 第376條。

4  
5 **Deputy Chairman:**

6  
7           Mr Chairman, I am very sorry, but I have forgotten the answer given to my question,  
8 which I have raised at an earlier stage. It was about the role of an unqualified person – that  
9 is someone without qualifications in the practice of law. What is “appear and plead before a  
10 magistrate”, in any case? Does it extend to the prosecution of the case? Secondly, when  
11 you go to subclause (3), you refer to the power of the Secretary for Justice about prosecution  
12 of criminal offences. She now uses lay prosecutors who have no legal qualifications. Does  
13 it mean that under subclause (3), the Secretary for Justice can assign the case to a lay  
14 prosecutor without legal qualification?

15  
16 **財經事務局副局長區璟智女士：**

17  
18           現在負責執行第376(2)條所訂工作的證監會僱員，不一定是符合法  
19 律界資格的人士，即under LPO的法律界人士。但這些僱員肯定是對案情有  
20 所瞭解，並明白檢控程序的專業人士。

21  
22 **主席：**

23  
24           我希望提醒副局長一點，在有關areas of concern raised by members  
25 的checklist中，載有吳靄儀議員過住曾經提問而政府亦已承諾的事項，即  
26 “Administration to provide a list of the types of offences that may be prosecuted by SFC.”。  
27 有關內容載於秘書處在5月29日發出的立法會CB(1)1379/00-01(01)號文件。

28  
29 **財經事務局副局長區璟智女士：**

30

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1           基本上，就本條例下以簡易程序定罪的罪行，證監會是可以進行檢  
2 控工作的，即以裁判司署的層次進行檢控。

3  
4 **Deputy Chairman:**

5  
6           So “may appear and plead” would cover prosecution, a complete prosecution? I  
7 ask for this point to be clarified, because it is very unfair to the litigant as well as to the public,  
8 to have unqualified people prosecuting these sort of offences. I certainly object most  
9 strongly to subclause (3), because this means – and the Administration seems to confirm it –  
10 that it is open to the Secretary for Justice to prosecute by means of lay prosecutors.

11  
12 **財經事務局副局長區璟智女士：**

13  
14           副主席的意思是否反對由 lay prosecutors 作出檢控？

15  
16 **副主席：**

17  
18           我反對。

19  
20 **財經事務局副局長區璟智女士：**

21  
22           主席，對於這個政策層次，我相信我們無法在這個法案委員會會議  
23 上進行討論。

24  
25 **副主席：**

26  
27           為甚麼？

28  
29 **財經事務局副局長區璟智女士：**

30

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1 因為這是一項非常廣泛的政策。

2  
3 **副主席：**

4  
5 不是的。我們當然不可討論世界上應否存有lay prosecutor，但我只  
6 是討論有關prosecution of certain offences by the Commission的第376條而  
7 已。第(3)款的含意是律政司司長可以用lay prosecutors。

8  
9 **財經事務局副局長區璟智女士：**

10  
11 第376條第(3)款是針對《基本法》有關的條文所草擬的，內容是指  
12 SJ才擁有最後的權力，決定是否進行刑事檢控。制訂第(3)款的目的，是確  
13 保第376條不會違反《基本法》第六十三條。《基本法》第六十三條訂明，  
14 特別行政區律政司主管刑事檢控工作，不受任何干涉。

15  
16 **副主席：**

17  
18 我明白。如果這條的意思是這樣，當局便要清楚訂明。如果採用  
19 “...powers of the Secretary for Justice...”的草擬方式，律政司便不單有權決  
20 定是否作出檢控，亦有權決定如何進行檢控。當局可否就第(2)和(3)款一併  
21 作出回應呢？例如，當局可以清楚說明，對於一些不牽涉任何法律論據等  
22 的例行檢控，會由證監會中富經驗的人士負責等。就這方面，司法及法律  
23 事務委員會亦曾討論，在甚麼情況下應由甚麼人士進行檢控。當局可否表  
24 明，實際上甚麼人士會負責作出檢控，並使條例草案反映有關情況呢？

25  
26 **財經事務局副局長區璟智女士：**

27  
28 對於第(3)款，我剛才已經作出解釋，這款的目的是確保第376條不  
29 違反《基本法》的規定。如果各位認為有關字眼不清晰，我們可以再作研  
30 究，較清楚地表達有關意思。制訂第(1)和(2)款的目的，是容許證監會的僱

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1 員處理在裁判司署提出檢控的程序。我剛才已經解釋，所涉及的只是一些  
2 循簡易訴訟程序提出檢控的個案。據我理解，這些個案的檢控一直以來也  
3 是由證監會的同事作出，而不是由律政司的同事作出。

4  
5 **副主席：**

6  
7 妳剛才提到簡易程序。在法律上，所有在裁判司署席前提出的檢控  
8 也是屬於簡易程序的範圍。

9  
10 **財經事務局副局長區璟智女士：**

11  
12 我的理解也是這樣。

13  
14 **副主席：**

15  
16 因此，所謂的簡易程序其實殊不簡易。涉及把被告判處入獄3年的  
17 程序，也是簡易程序。條例草案所訂的很多程序也是簡易程序。所謂簡易  
18 程序，其實是指可在某級法院進行的程序而已，所以現在牽涉到很多法律  
19 上的爭議。既然當局在上次會議上答允就這方面提供資料，請當局現在向  
20 我們提供有關資料吧。

21  
22 **財經事務局副局長區璟智女士：**

23  
24 我剛才亦有提到，在上次會議上，有議員要求我們提供一份資料，  
25 列出一些可予檢控的罪行。但我們再作考慮時，對有關資料的參考價值表  
26 示有保留。在本條例草案下，舉凡可循簡易程序進行檢控的罪行，便會包  
27 括在內。

28  
29 **副主席：**

30

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1 情況不是這樣。就我記憶所及，根據當局在上次會議上提供的答  
2 案，情況原則上不是很差的。當局提供的答覆是，事實上不是所有牽涉到  
3 這些罪行的情況，也是由證監會轄下沒有法律資格的人士進行檢控的。事  
4 實上，當局曾表示證監會會負責一些較為簡單的個案，但對於一些具爭議  
5 性的個案，證監會是不會負責檢控的。但因為當局沒有作出書面答覆，我  
6 很難清楚地說明當時的情況。

7  
8 **財經事務局副局長區璟智女士：**

9  
10 林太有否補充？據我記憶所及，我們在上次會議上似乎沒有提及作  
11 出書面回覆。無論如何，請妳解釋實際的運作情況吧。

12  
13 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

14  
15 相信各位亦知道，即使 Magistrate courts 的裁判官中，亦有 lay  
16 magistrates。有關的實際運作情況是，如果牽涉簡易程序的刑事起訴，證監  
17 會會自行處理。在一般情況下，也是由法律服務部具有律師資格的同事提  
18 出起訴的，但在某些情形下，檢控的工作也不一定由我們負責，例如在一  
19 些案情簡單，或被告已表示將會認罪的情況下，很多時也可能由法規執行  
20 部負責處理有關個案的同事提出起訴。

21  
22 **副主席：**

23  
24 如果情況是只有由 lay magistrate 聆訊的個案才運用簡易程序，我便  
25 會十分安心，因為 lay magistrate 是不處理這些案件的。Lay magistrates 是負  
26 責處理有關非法擺賣、亂拋垃圾和不牽涉法律問題的違規情況的。主席，  
27 我仍然希望署方提供書面答覆，以及確保有關做法是署方的政策，因為我  
28 很關心有關甚麼人士可以進行檢控的問題。這個問題對我來說是很重要的。  
29 的。

30

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1 **財經事務局副局長區璟智女士：**

2  
3 這確實是我們的政策。我們希望向證監會提供彈性，使證監會的同事可以進行這項工作，而有關的同事亦不一定是法律界的執業人士。

4  
5  
6 **副主席：**

7  
8 我明白這點。

9  
10 **財經事務局副局長區璟智女士：**

11  
12 最重要的是那位人士瞭解案情和明白檢控程序，以及他所進行的工作能達致專業水平。證監會自1989年成立至今的十多年內，一直以來也按照這個程序處理有關個案。我們亦曾與刑事檢控專員的同事商討，他們提到法庭用家也沒有就這個制度作出投訴，所以這個制度的運作似乎也行之有效，他們亦希望保留這個制度。但我們亦不介意向各位提供資料，以解釋SFC過往在執行這個制度方面的情況。

13  
14  
15  
16  
17  
18  
19 **主席：**

20  
21 請妳們參考由秘書擬備有關areas of concern raised by members的文件。這份文件列出妳們曾答允向委員會提供的資料。就第376條，各位還有沒有問題？

22  
23  
24  
25 **Deputy Chairman:**

26  
27 Mr Chairman, I just want to say once again: who prosecutes in a particular case,  
28 the extent of the law providing for prosecution of serious offences by non-legally qualified  
29 persons? These are very serious questions. If all summary offences can be prosecuted by  
30 unlegally unqualified persons, then the law may be remiss. I make this a very strong point.

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1 I would like to have the policy stated in writing, so that the policy can be followed through, so  
2 that the SFC can be held to its policy; and we cannot do that unless we have a reply in writing.  
3 Can I have that?

4

5 **財經事務局副局長區璟智女士：**

6

7 我們會把我們剛才所提出的情況以書面形式表達。

8

9 **Deputy Chairman:**

10

11 I am sure you are very sensible, because if you have done a lot of investigation you  
12 do not want your cases to fall apart from inexpert prosecution. I am sure this is in your  
13 interests and this is in the interests of the public. In view of the present, unsatisfactory  
14 situation about lay prosecution, I would really urge you to provide me with a written reply.

15

16 **財經事務局副局長區璟智女士：**

17

18 Department of Justice的同事有沒有回應？

19

20 **高級政府律師甄文蕙女士：**

21

22 副主席剛才對於為何有需要制訂subclause (3)存有疑問。就這方  
23 面，負責《基本法》的同事曾經作出研究。制訂第(3)款的目的，並不是賦  
24 予律政司司長權力，以委派lay prosecutor；而是因為《基本法》第六十三條  
25 提到，律政司司長有ultimate control of所有的prosecutions，所以制訂第(3)  
26 款的目的，是使律政司司長可以介入有關程序。例如，如果他認為SFC在處  
27 理有關prosecution上的方式不適當，他可以有權介入並take over有關  
28 proceedings。例如，若有關個案在法律上存有很大的爭論點，而我們亦認  
29 為應由律政司具有法律資格和豐富經驗的人士處理，第(3)款便賦予我們取  
30 回有關程序的權力，而不是在我們授權SFC處理後，證監會便可任意進行

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1 prosecution。

2

3 **副主席：**

4

5 主席，這正是問題所在。當局提出兩個不同的答案。第一個答案是  
6 第(3)款與是否以無法律資格的檢控人員提出檢控無關，而純粹是關乎決定  
7 是否提出起訴的問題，而在《基本法》下，律政司司長被賦予作出這項決  
8 定的權力。

9

10 第二個答案是律政司司長可以決定取回檢控程序，並委派一些他認  
11 為有能力的人提出檢控。這涉及另一項權力，即決定由甚麼人士提出檢控  
12 的權力。如果律政司司長可以決定由一些有能力的人提出檢控，他亦有權  
13 決定用lay prosecutor提出檢控。當局本身亦不肯定第(3)款所訂的內容，試  
14 問其他人怎能明白呢？如果第(3)款純粹是有關律政司司長在《基本法》下  
15 有權決定提出檢控與否的問題，希望當局在此條下清楚訂明。

16

17 **財經事務局副局長區璟智女士：**

18

19 我相信甄律師剛才是解釋另一個問題，即嘗試解釋制訂第(3)款的因  
20 由，以及這款與《基本法》的關係。我們剛才討論的另一個問題是，是否  
21 必須由具有專業律師資格的人士提出以循簡易程序進行的檢控工作。我們  
22 的答案是不一定。在這個情況下，證監會和其他部門的安排是相類似的。

23

24 **副主席：**

25

26 我已多次提到，我對於這點並沒有意見。

27

28 **財經事務局副局長區璟智女士：**

29

30 其他部門負責提出檢控的人士稱為departmental prosecutor。雖然他



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1 們沒有法律資格，但並不代表他們的能力必定比有資格人士遜色，而最重  
2 要的是他們是否瞭解案情。在這個情況下，我們所需考慮的是公眾利益，  
3 而未必是界別的利益。其他部門亦有這樣的安排，例如環保署、海關、稅  
4 務局也設有部門的檢控人員。相信律政司的同事在研究這項政策時，亦要  
5 考慮這項現有安排是否運作暢順和有效，以及最終考慮公眾利益會否受  
6 損。

7

8 *Deputy Chairman:*

9

10 Mr Chairman, I know this very well. I know that there exists departmental  
11 prosecutors. This policy had been discussed more than once in the Panel on Administration  
12 of Justice and Legal Services. However we are now precisely dealing with a very complex  
13 piece of legislation. I have no problem agreeing that in certain circumstances – for example,  
14 when the defendant is prepared to plead guilty – you do not need someone with a legal  
15 qualification, just for that proceeding. But I would be extremely concerned if it extends to  
16 any other circumstances. The SFC had agreed to give me a written reply stating their policy,  
17 which I believe would show that they will not undertake any of their own prosecutions unless  
18 they are of a simple nature. I am not prepared to open the discussion to such a wide range.  
19 But you have to clarify whether sub-clause (3) refers just to the power to decide to prosecute  
20 or not to prosecute, or whether the Secretary for Justice has the power to decide that the case  
21 should be prosecuted by lay prosecutors who have no legal qualification.

22

23 *財經事務局副局長區璟智女士：*

24

25 我相信我們已經清楚說明我們的政策了。

26

27 *Deputy Chairman:*

28

29 Are you going to provide the answer to (3)?

30

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1 **財經事務局副局長區璟智女士：**

2  
3 證監會會就如何執行第(2)和(3)款提供資料。

4  
5 **Deputy Chairman:**

6  
7 No. It is about (3), whether you just refer to the basic law, the Secretary's power  
8 of deciding whether or not to prosecute, or whether you refer to more than that.

9  
10 **財經事務局副局長區璟智女士：**

11  
12 就第(3)款，我們會從Basic law的角度，研究如何才可使這款不違反  
13 《基本法》的規定。如果我們發現可更清晰地訂明這點，我們會與大家再行  
14 討論。讓我們跟《基本法》的專家商討如何回應副主席剛才提出的問題。  
15 但對於第(2)款，我們已說得很清楚，證監會會把有關經驗告訴各位。

16  
17 **主席：**

18  
19 各位對於第376條有沒有問題？如果沒有，接着是討論第377條。胡  
20 經昌議員。

21  
22 **胡經昌議員：**

23  
24 為何這條所訂的時限是3年呢？在一般情況下，Magistrate courts所  
25 訂的時限也不是那麼長的。我好像曾提出這個問題，而似乎政府也曾解釋  
26 有這樣的需要。但為何要把時限訂為3年，而不是兩年或一年呢？有沒有任  
27 何數據支持這個時限呢？

28  
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
30 **Securities and Futures Commission:**

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1  
2           It really is a question of looking at our experience in investigating these matters  
3 over a number of years, and our difficulty in preparing a case to the stage where charges can  
4 be laid within 12 months, as we have experienced it in recent years. The judgment we  
5 made, and our advice from the Administration, was that 3 years was an appropriate time-  
6 frame to allow for investigation of the most difficult cases and to get them ready for trial.  
7 There is nothing magical about it. It is just a question of looking at our experience,  
8 recognizing that in some cases in recent years we have not been able to complete an  
9 investigation within the 12 months' time-frame, and that has not been good for the protection  
10 of the investors; and our view is that 3 years is an appropriate length of time.

11  
12 **胡經昌議員：**

13  
14           主席，我希望知道為何要把時限訂為3年這麼長。如果是為了方便  
15 證監會作好預備，甚至把時限訂為5年也可。但當局應根據實際情況決定這  
16 個時限，我不希望證監會因為工作進度不夠迅速，而不必要地把時間拖長。  
17 證監會剛才提到有關經驗的問題，可否向我們提供數據呢？我認為證監會  
18 應選擇採用平均的年數，而不是選擇最長的年數。

19  
20 **主席：**

21  
22           你認為3年的時限是長還是短？

23  
24 **胡經昌議員：**

25  
26           我認為3年是較長的時間。所以我才詢問當局可否向我們提供具體  
27 數字，而當局剛才只表示據他們估計，3年是正確的時限。

28  
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
30 **Securities and Futures Commission:**

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1  
2           The figures would show, if we were to produce them in respect of investigations,  
3 that most investigations – in fact, the great majority – are completed within 12 months. Our  
4 experience has been that may not be very often possible in some cases. It is to avoid that the  
5 period be extended out from 12 months to 3 years for these non-indictable offences.

6  
7 **主席：**

8  
9           我認為3年不是很長的時間，並已經是頗短的時間。你是否仍希望  
10 把時限縮短？

11  
12 **胡經昌議員：**

13  
14           主席，我的意思是必須選取一個有意思的時限。如果當局表示5年  
15 的時間才足夠，大可把時限訂為5年，但我不希望當局只是任意地選取一個  
16 時限。

17  
18 **主席：**

19  
20           但如果當局把時限訂為5年，你會滿意嗎？

21  
22 **胡經昌議員：**

23  
24           主席， Mr PROCTER剛才提到，在大部分的情況下，證監會也需  
25 要12個月的時間才可展開有關程序，而我的問題是為何必須把時限訂為3  
26 年，並詢問可否把時限訂為2年。據我的理解，現時Magistrate courts所訂的  
27 有關時限不是那麼長的。

28  
29 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
30 **Securities and Futures Commission:**

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1  
2 I do not want to have a discussion which goes off on a wrong basis. The period  
3 under the existing legislation is 3 years, but there is a provision in the existing legislation that  
4 requires the prosecution to be commenced within 12 months of discovery of the relevant  
5 matters; and it is that difficulty that sometimes has led to situations where we have not been  
6 able to complete an investigation and get it to the stage of laying charges within that 12-  
7 month period. So the 3 years from Commission is the existing law, but the 12 months from  
8 discovery – is section 148A of the Securities Ordinance.

9  
10 ***Deputy Chairman:***

11  
12 Mr Chairman, I do not have a great deal of problem about this. The Magistrates  
13 Ordinance is a very old piece of legislation. When it was enacted it did not envisage  
14 offences such as the offences within this ordinance, which requires really much more akin to  
15 things like commercial fraud, and a lot of it can be very complex commercial fraud. So I  
16 understand the need for a little leeway. I also understand that there is always this question:  
17 if you unduly delay so as to cause prejudice to the defendant, then the defendant can always  
18 make an application that his right to a fair trial is no longer protected. So there are all these  
19 safeguards. I was going to say that many of these offences can be prosecuted in the District  
20 Court level, or a higher level; and if you prosecute in the District Court, what is your time  
21 limit?

22  
23 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
24 ***Securities and Futures Commission:***

25  
26 There is not one, by my understanding.

27  
28 ***Deputy Chairman:***

29  
30 So that is why this is only to preserve your right to use summary proceedings, to

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1 give you a little extension of time. For these reasons, Mr Chairman, I have looked at it; I  
2 have addressed my mind to it; I think that I can accept. I understand why you need 3 years.

3  
4 **高級助理法律顧問李裕生先生：**

5  
6 我希望向各位提供一些資料。《裁判官條例》第26條下訂有6個月的  
7 時限，即檢控當局須在有關情況發生後的6個月內，把申訴或告發呈交裁判  
8 官。但第26條亦訂明，若成文法條例另有規定則除外。現時這條條例草案  
9 訂有3年的時限。至於3年是否合理的時限，便是政策上的決定。

10  
11 **助理法律顧問顧建華先生：**

12  
13 就我的記憶所及，條例草案訂有一項條文，要求業界人士保存有關  
14 紀錄一年的時間。如果把展開法律程序的時限訂為3年，若被告人沒有保存  
15 有關罪行的記錄，他便完全沒有記錄作出答辯。因為在事件發生的一年後，  
16 有關人已經可以取消所有記錄，所以他便無法取得記錄，證明他曾遵守有  
17 關規定。況且在事件發生3年後，亦沒有人會記得曾經發生的情況。

18  
19 **Deputy Chairman:**

20  
21 That is a very good defence. Do not spoil it.

22  
23 **Chairman:**

24  
25 It is a defence rather than an evidence.

26  
27 **主席：**

28  
29 既然甚麼紀錄也沒有，檢控當局又怎能提出起訴呢？

30

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1 ***Deputy Chairman:***

2

3           Speaking for myself, I think the requirement of keeping records is a duty. If we  
4 were to synchronize it, then we would be placing an extra duty on people who have to keep  
5 their records.

6

7 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

8

9           I am simply asking for that offence of not keeping records, because that was a very  
10 specific provision.

11

12 ***Chairman:***

13

14           Your question is: if there is a duty to keep records for 12 months, if anybody  
15 destroys the records after 12 months he has already completed his duty, and he will not be  
16 liable to any charges for destroying them.

17

18 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,  
19 Securities and Futures Commission:***

20

21           Not for destroying records.

22

23 ***Mr KAU Kin-wah, Assistant Legal Adviser:***

24

25           I think he may be charged with not having kept any records during that 12-month  
26 period.

27

28 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,  
29 Securities and Futures Commission:***

30

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1           No.

2

3 **Chairman:**

4

5           Within the 12 months he would definitely be charged.

6

7 **主席：**

8

9           Okay，就第377條的討論已經完畢。接着是討論第378條。

10

11 **Deputy Chairman:**

12

13           Mr Chairman, can I ask for some rethinking on the drafting here, particularly with  
14 reference to the words “or attributable to any recklessness on the part of...”? What is the  
15 recklessness about?

16

17 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
18 **Securities and Futures Commission:**

19

20           Whereabouts? Sorry.

21

22 **Deputy Chairman:**

23

24           It appears in clause 378, where you say “Where the commission of an offence  
25 under this Ordinance by a corporation is proved to have been aided, abetted, counselled,  
26 procured or induced by, or committed with the consent or connivance of...”. With all this I  
27 have no problem, but when you say “or attributable to any recklessness on the part of...”; then  
28 I do not know what this recklessness is supposed to be in connection with.

29

30           Usually when you say someone has been reckless, you say “reckless as to”



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1 something or other. When you say “any recklessness”, is it that I am reckless about how I  
2 keep records, or how I explain things to people? Does that count as part of it? I would  
3 ask that the words “attributable” – because “attributable” again is a very loose word – and  
4 “any recklessness” have to be tied down to some act or another. I would ask that perhaps  
5 the drafting team rethink the use of this expression.

6

7 I know this is probably not new, but still I think there is a point in thinking about it.  
8 The same words appear in subclause (2). In subclause (2), when you say “any other partner  
9 of the partnership, that other partner as well as the first-mentioned partner is guilty...” and you  
10 say “as well as”, usually I understand it as the same as “and”. I would think you should say:  
11 “are guilty”. However, I guess this is not what you have in mind. You say: “he is as guilty  
12 as the first-mentioned partner”, but if you say “as well as” I would expect a plural to follow  
13 that. Again, may I invite you to just reconsider the drafting and see if you can make it  
14 clearer?

15

16 **主席：**

17

18 接着是討論第3分部。Division 3—Power to make rules, and codes or  
19 guidelines, etc.。對於第379條——Financial Secretary to prescribe interests, etc, as  
20 securities and futures contracts, 各位有沒有問題？如果沒有，接着是討論第380  
21 條。

22

23 法律顧問，你希望就第379條提問，是嗎？

24

25 **助理法律顧問顧建華先生：**

26

27 我希望提出，第379條的後果，會令整條條例草案也不適用於財政  
28 司司長認為不屬於證券或期貨合約的活動。

29

30 **主席：**

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這條是否僅指一些新的產品？

**財經事務局副局長區璟智女士：**

在這次改革中，市場人士向我們提供的意見，是現有的規管架構較為僵化。如果市場出現新的產品，我們亦無法把它納入規管範疇。我們如果不能把新的產品納入規管範疇，便不敢把它引進我們的市場，因為這會成為非法經營。因此，我們要研究一個具彈性的方法，讓證監會可同時處理新的市場發展。我們亦曾參考外國的做法，發現他們的做法是透過附屬法例進行這項工作，以方便規管當局把新的產品納入規管範疇。

**Deputy Chairman:**

Mr Chairman, this is by notice published in the gazette, so this is not subsidiary legislation.

**財經事務局副局長區璟智女士：**

這是附屬法例。

**主席：**

這條所採取的寫法，表示這條所訂的是附屬法例，對嗎？

**財經事務局副局長區璟智女士：**

是的。我們也曾徵詢律師的意見。

**主席：**

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1  
2           這個做法是否等同於在30天內不廢除或不提出修訂即屬通過的程  
3 序，即negative vetting的程序？

4  
5 **高級助理法律草擬專員陳子敏女士：**

6  
7           是的，正確來說應該是28天再加上7天。

8  
9 **Chairman:**

10  
11           Okay.

12  
13 **Deputy Chairman:**

14  
15           Can legal adviser confirm that?

16  
17 **高級助理法律顧問李裕生先生：**

18  
19           主席，基本上，本條所訂的情況是以公告的形式作出公布。根據香  
20 港法例第1章，無論是以公告或其他形式作出公布，決定有關規則是否附屬  
21 法律的主要因素，在於有關規則有否立法效力。對於第379條，顧先生剛才  
22 也曾提到，這條的效力或後果是導致整條《證券及期貨條例草案》也不適  
23 用於某些產品，所以這條是具有立法效力的。根據以上的分析，這項公告  
24 應該是附屬法例。正如陳小姐剛才提到，有關期限是28天再加上7天。

25  
26 **主席：**

27  
28           Okay，換句話說，當政府訂立有關規則時，亦要經立法會審議，大  
29 家便可互相制衡。接着是討論第380條。

30

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1 *Deputy Chairman:*

2

3 Mr Chairman, since this is of such great importance, is it possible to make it clearer,  
4 give a clearer indication?

5

6 *Chairman:*

7

8 It is not a legislation.

9

10 **財經事務局副局長區璟智女士：**

11

12 我們是採用另一種草擬方式的。如果有關規則不是附屬法例，我們  
13 便會寫明，否則，整條條例草案內的規則也是附屬法例。

14

15 *Deputy Chairman:*

16

17 I understand that, but if you are hit with an inspiration which would make this  
18 clearer, I think we would appreciate it.

19

20 **財經事務局副局長區璟智女士：**

21

22 我的憂慮是如果在這條訂明有關規則是附屬法例，其餘部分亦要相  
23 應地作出修訂，否則便會存有疑問。

24

25 **高級助理法律顧問李裕生先生：**

26

27 主席，副局長剛才提到的做法，亦是香港現時其他條例草案採用的  
28 做法。即如果當局並非意圖令某些規則成為附屬法例，才在條例草案內訂  
29 明，有關規則或通告並非附屬法例。相反地，現時卻沒有一個做法，特別  
30 訂明有關公告是附屬法例。

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1

2 **副主席：**

3

4 主席，法律顧問的意思是，在很多情況下，我們也是以這些字眼顯  
5 示有關規則是附屬法例。

6

7 **高級助理法律顧問李裕生先生：**

8

9 對。

10

11 **主席：**

12

13 接着是討論第380條——Financial secretary to prescribe arrangements as  
14 collective investment schemes。對於Page 44、45和46，各位有沒有問題？如果沒  
15 有，接着是討論clause 381——Orders by Chief Executive in Council for levies。這條有  
16 關收取費用的條文也是附屬法例，因為當局須要把有關情況publish in the  
17 Gazette，並要經立法會批准，對嗎？

18

19 對於第47及48頁，各位有沒有問題？如果沒有，接着便是討論第382  
20 條——Rules by Chief Executive in Council for payment of fees。各位對於第  
21 49、50及51頁有沒有問題？如果沒有，接着便是討論第383條——Reduction  
22 of levy。減低徵費須否經立法會批准？根據這個寫法，似乎是不需要的，  
23 對嗎？

24

25 **財經事務局副局長區璟智女士：**

26

27 是必須經立法會批准的。這個情況亦屬於在第381條下制訂的附屬  
28 法例。

29

30 **主席：**

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胡經昌議員。

**胡經昌議員：**

主席，第382條下的所有條文是否也需依照程序，經立法會審議？

**主席：**

對。接着是討論載於Page 52的第384條——Rules by Commission。

**副主席：**

主席，對於第384條，我認為最主要的，是載於Page 56有關第384A條的註釋。這項註釋提到，我們過往曾詳細討論，有關證監會制訂附屬法例或規則的程序的問題。所以，這是很重要的問題，或許我們需要把第384條與第384A條一併審議。

**主席：**

好的。那麼我們現在討論載於Page 61的第384A條吧。

**Deputy Chairman:**

Mr Chairman, I do not find the new process suggested very satisfactory, because basically it is a very cumbersome one, and then you see that on page 62, under subclause (3) you have the let-out clause, which is that all this procedure does not apply if the Commission considers in the circumstances of a case that it is inappropriate or unnecessary. So you can easily get out of it. Then (b) provides you with a reason: “Any delay involved in complying with such subsections would not be in the interest of the investing public or in the

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1 public interest”.

2  
3 Basically, if you look at subclauses (1) and (2), they provide for a kind of situation  
4 where you just publish a draft of the proposed rules, and then you just generally invite  
5 representation. There is a very huge leeway as to how the Commission would do its  
6 consultation. Then subclause (2) indirectly provides for any contrary views not being taken  
7 into consideration. If the rules are changed as a result of consultation, then it gets re-  
8 published. I understand that the whole point of giving the power to the Commission to make  
9 rules is to expedite matters because of the changing market. If you provide for this kind of  
10 very open procedure, then I have no doubt that the let-out clause in subclause (3) will be used  
11 very frequently, whereas the consultation procedure that this Bills Committee has suggested is  
12 that you have a standing panel from the industry, and then a standing panel of consumers. It  
13 would be much easier for you to do your consultation on a regular basis, where you have  
14 legislative protection requiring you to do the consultation. It does not matter how you do it,  
15 but if you go contrary to advice, you have to put it on record.

16  
17 Mr Chairman, as expressed in an earlier stage, this may not be the only way of  
18 doing it. That is why we awaited the Administration's proposal. Certainly the proposal in  
19 subclause (3)(a) I find very defective and unsatisfactory.

20  
21 **主席：**

22  
23 副局長。

24  
25 **財經事務局副局長區環智女士：**

26  
27 我認為大家無須過慮，認為若訂有這項條款，證監會便會在大部分  
28 情況下，藉第(3)款逃避所需作出的諮詢。根據過往的經驗，證監會在絕大  
29 部分情況下，亦會在制訂規則前先諮詢市場。因為很多這些附屬法例亦會  
30 影響市場人士日常的運作情況，所以如果證監會不事先諮詢市場人士，便

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1 很難確保有關條款的實際運作暢順。即使沒有法例上的規定，證監會實際  
2 上亦會按照個別規則的內容，特別設立工作小組，並由一些對有關規則具  
3 有認識的人士擔任成員，請他們提供意見。同時，法例也規定證監會必須  
4 設有 *advisory committee*，而證監會亦會向諮詢委員會徵詢意見。另外，證  
5 監會最後也需要把擬議規則提交董事局，而董事局內的一半成員也是非執  
6 行董事。其實，這些是現有的安排。我們只是把這些安排明文訂明，希望  
7 令各位安心而已。所以，我不認為在制定這項條款後，證監會便會運用副  
8 主席剛才提到的 *let-out clause* 而逃避責任。

9  
10 據我們過往的經驗，證監會只會在特殊情況下，認為無需徵詢市場  
11 意見。例如證監會最近曾把一項規則提交立法會審議，有關規則是就每手  
12 期貨和期權合約的數目作出調整，以迎合市場的最新發展。證監會認為沒  
13 有需要就這方面徵詢市場的意見，因為市場人士的意見已經非常明顯，即  
14 把每手交易的數目縮小。對於這類較為技術性的情況，若大家亦清楚知道  
15 市場用家所需的改變，證監會便無需徵詢市場的意見。

16  
17 ***Deputy Chairman:***

18  
19 Mr Chairman, I remember that when we suggested the method of consultation we  
20 were very conscious of the fact that it is easier to consult the industry than to consult the  
21 wider public; and also when you listen to views from the view of consumer protection, then  
22 there is an advantage in a pre-established procedure or body. Here the law is not a private  
23 contract between the Commission and the industry, and if that is the explanation of the  
24 Administration, then I see the lack of balance that this Bills Committee has been concerned  
25 about all along. Also, as far as the example is concerned, it seems that it is for the  
26 Commission to decide whether this is a matter which should go out to consultation or whether  
27 it is not. I agree that sometimes in situations of this kind, it is silly to go through the  
28 cumbersome procedure laid down by subclauses (1) and (2). There has to be some kind of  
29 check and balance and transparency, for that matter, from the investors' point of view.  
30



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1           Of course the industry has been in the field all the time. They would know that it  
2 is coming, and they have representatives in the Legislative Council who would raise their  
3 voices if there is a rule which ought to be somehow suspended or repealed. I do not see that  
4 you have built into it protection for consumer interests.

5  
6 **財經事務局副局長區璟智女士：**

7  
8           就這方面，我希望請證監會的同事向委員介紹證監會最近成立的  
9 shareholders' group，即股東小組，以及證監會計劃如何讓股東小組就投資  
10 者等各方面的考慮向證監會提供更多意見。請林太作出解釋。

11  
12 **證券及期貨事務監察委員會執行董事兼首席律師林張灼華女士：**

13  
14           多謝主席。我們的shareholders' group剛舉行了第二次的會議。從下  
15 星期開始，shareholders' group每月也會出版newsletters，供公眾及中介人士  
16 參閱。該小組在每次會議完結後，亦會把一些新的報告刊登於這份  
17 newsletters。相信大家亦知道，現時這個股東小組並非證監會根據《證券及  
18 期貨事務監察委員會條例》第6條正式設立的小組，但我們正考慮把這個小  
19 組正式化。因為當這個小組正式化後，會有多項好處。第一，我們跟小組  
20 交換資料方面會較為方便，因為有關資料亦會受到confidentiality的保護和  
21 制衡。第二，我們希望就一些rules、新制訂的政策或對小投資者的保護方  
22 面的多項問題，向該小組諮詢。目前，該小組舉行會議的頻率較有彈性，  
23 但小組的很多組員亦希望每月舉行會議。所以，我們一直亦與該小組保持  
24 聯絡，並進行有關的諮詢工作。

25  
26 **主席：**

27  
28           我相信證監會可採取兩個做法。首先，證監會可在諮詢後，才把規  
29 則納入法例；或既然證監會現時亦計劃作出諮詢，證監會可先把有關程序  
30 納入法例，然後根據法例所訂的程序行事。對於這方面，似乎現時存有很

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1 多爭議。既然政府或證監會亦希望朝着這個方向行事，為何不藉這個機會，  
2 在條例草案的草擬工作完成前，把這些計劃進行的工作納入條例草案呢？  
3 例如把副局長剛才提到的shareholders' group納入法例。我們期望這個小組  
4 所採取的形式，是類似小投資者小組或consumers' panel的形式。我相信這  
5 個做法亦不會為當局造成很大的困難。

6  
7 **副主席：**

8  
9 我知道政府的答案必定是希望保留更大的彈性。他們亦會提問，既  
10 然這些程序正在進行，為何必須立法？其實每個地方的情況也是一樣，若  
11 某項措施不受法律保護，便會缺乏透明度及問責性。既然證監會已決定進  
12 行諮詢，大可把這項措施納入法例，藉此增強透明度及問責性，相信也不  
13 會造成不必要的爭拗。既然證監會現時已有進行諮詢，亦有意圖繼續執行  
14 這項措施，還需要多少時間才可把它程序化和正式化呢？證監會還需要考  
15 慮甚麼事情呢？

16  
17 **財經事務局副局長區璟智女士：**

18  
19 我相信副主席這個問題是很正確的。我希望在我們把主要的修訂呈  
20 交給各位時作出回應。

21  
22 **主席：**

23  
24 好的。

25  
26 **財經事務局副局長區璟智女士：**

27  
28 我們正考慮在第(8)款下把諮詢委員會正規化。我們剛才亦曾提到，  
29 在條例草案內亦訂有一個諮詢委員會，但我亦考慮到各位對某個界別特別  
30 關心的問題。

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1

2 **主席：**

3

4 我相信這個問題是雙方面的。胡經昌議員有否有補充？你是歡迎這  
5 個意見的，對嗎？

6

7 **胡經昌議員：**

8

9 我希望作出補充。第(3)和(4)款有否存在conflict？第(3)款較有彈  
10 性，但第(4)款規定，證監會必須諮詢金管局。但證監會在訂立規則前，不  
11 是也需要跟金管局討論嗎？有否需要把這個程序納入法例呢？為何第(3)款  
12 具有彈性，但純粹關於諮詢金管局的第(4)款所訂的，卻是必須進行的程序  
13 呢？既然證監會會向金管局進行consultation，如果金管局對擬議規則有意  
14 見，亦需跟證監會商討解決辦法，有否需要特別在這部分訂明諮詢程序呢？

15

16 **財經事務局副局長區璟智女士：**

17

18 第(4)款的內容，是如果證監會訂立的規則會影響銀行，證監會便有  
19 責任先諮詢金管局。這款跟其他條文是沒有抵觸的。

20

21 **主席：**

22

23 政府可否就第(6)款作出解釋？

24

25 **副主席：**

26

27 就這個問題，我們已討論了很長時間。這款訂明，在證監會訂立一  
28 些規則後，行政長官會同行政會議可以把部分的規則變成刑事罪行。雖然  
29 這項規則是附屬法例，但這款的效果，是以附屬法例的形式訂立一些刑事  
30 責任，即把原來沒有刑責的規則變成涉及刑事責任的規則。對於這方面，

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1 我希望政府作出解釋。

2  
3 **主席：**

4  
5 在現時的法例中，以附屬法例的形式訂立刑事罪行的情況是否很普  
6 遍？

7  
8 **財經事務局副局長區璟智女士：**

9  
10 對於這個問題，證監會的同事現正翻查資料。與此同時，我亦可以  
11 簡單地解釋制定第(6)款的理念。

12  
13 我們考慮到，現時證監會訂立的一些規則，可能並無訂明，如果有  
14 關人違反規則的某部分規定，便須要承擔刑事責任。但在日後的市場發展，  
15 某些違規情況可能會變得很嚴重，而大家亦可能認為有需要制訂一些刑事  
16 責任。但市場人士可能會憂慮到，當局最初訂立這些規則時，並沒有訂明  
17 違規者須負上刑事責任，為何把刑事責任加入規則之內。所以，我們便把  
18 這項職權交由另一個層次執行，從而增加這項職權的獨立性。市場人士亦  
19 認為這是一項制衡。

20  
21 **主席：**

22  
23 我亦明白這個概念，因為政府過往亦曾就此作出解釋。我希望詢  
24 問，就法例而言，以附屬法例的形式訂立刑事責任的情況是否很普遍？

25  
26 **財經事務局副局長區璟智女士：**

27  
28 違反附屬法例的行為可導致刑事責任的情況，是有先例的。這是否  
29 你提出的問題呢？

30

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1 **主席：**

2

3 對。

4

5 **Miss AU King-chi, Deputy Secretary for Financial Services:**

6

7 The breach of rules may result in criminal liability.

8

9 **Deputy Chairman:**

10

11 Yes, but that usually is provided in the primary legislation. The primary  
12 legislation would provide that the breach of rules to be made by the Chief Executive in  
13 Council, or whatever, under this particular provision, shall be a criminal offence. I will give  
14 you a very easy example. The Legislative Council Powers and Privileges Ordinance  
15 specifies that you would commit an offence if you contravene rules about conduct. Then  
16 you have subsidiary legislation which specifies the conduct which you are not supposed to  
17 breach – how you behave. There are rules such as not being allowed to shout in the  
18 galleries, or throw things down on members, which are very reasonable requirements, and  
19 things like that. But usually the form is that the primary legislation provides that you will  
20 commit an offence if you breach any of the rules to be made by so-and-so.

21

22 However, here the situation is rather different. The rules under the primary  
23 legislation are not criminal offences. You create, you turn something into a criminal  
24 offence by means of an order in council. That I think is something we need examples of.  
25 Do we have anything of that kind?

26

27 **財經事務局副局長區環智女士：**

28

29 先請陳律師解釋，接着再請 Mr PROCTER 解釋。

30

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1 **高級助理法律草擬專員陳子敏女士：**

2  
3 關於剛才所提到的問題，即在附屬法例下會否訂立一些刑罰，副主席  
4 席剛才亦曾解釋，在很多情況下，刑罰是在主體法例下訂立的。但我們亦  
5 曾參考很多法例，這些法例可制定賦權條文，訂明有關機構在訂立附屬法  
6 例時，亦可在附屬法例下，訂立一些罪行和罰則。

7  
8 這種做法是基於在制定主體法例時，當局尚未知道附屬法例的內容，  
9 以及有關係文的重要性或嚴重性。所以當局便制定賦權條文，讓有關  
10 機構可視乎附屬法例下有關係文的嚴重性，決定罰則和訂立罪行。有關的  
11 賦權條文可能訂明，有關附屬法例可以訂明，違反附屬法例下的任何條文，  
12 亦屬罪行，並訂明罰則及罰則的上限等。很多條例亦訂有賦權條文。我相  
13 信最重要的，是附屬法例訂有罰則的上限，使立法會在審議附屬法例時，  
14 可根據有關罪行當時的嚴重性而決定罰則。

15  
16 **副主席：**

17  
18 請列舉一些例子給我們參考。

19  
20 **高級助理法律草擬專員陳子敏女士：**

21  
22 我們在會後翻查資料，便可找到例子。

23  
24 **副主席：**

25  
26 為甚麼現在不可以提供這些資料呢？我們在上次會議上已經提出  
27 這個問題。

28  
29 **高級助理法律草擬專員陳子敏女士：**

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1           因為我也曾翻查資料，發現很多條例也有這個情況。但我今天沒有  
2 帶備這些資料，因為我不知道我們會在審議這部時討論這個問題，請見諒。

3  
4 **副主席：**

5  
6           不要緊，那麼請妳在下次會議上向我們提供這些資料吧。

7  
8 **高級助理法律草擬專員陳子敏女士：**

9  
10          我們可以稍後向妳們提供這些資料。

11  
12 **主席：**

13  
14          李先生，請講。

15  
16 **高級助理法律顧問李裕生先生：**

17  
18          就我的記憶所及，有關公眾衛生等的附屬法例也是採用陳小姐剛才  
19 所提到的方式訂立的，即在主體法例下訂明可訂立附屬法例，而在附屬法  
20 例下亦可訂定某些罪行、罪行的罰款或監禁年期等的上限。至於訂立甚麼  
21 罪行，或怎樣釐定罰則，則由訂立附屬法例的當局決定。就我記憶所及，  
22 有關衛生等的附屬法例亦有訂明這類罰則。

23  
24 **主席：**

25  
26          那些情況是我明白的，但似乎與這個情況有些不同。

27  
28 **Deputy Chairman:**

29  
30          Mr Chairman, let us have a look at the section before we go into any discussions.

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1

2 **Chairman:**

3

4 Andrew, do you want to supplement that?

5

6 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
7 **Securities and Futures Commission:**

8

9 Only very briefly, to say that this one, as you put it, where the Chief Executive can,  
10 by order in Council, turn a rule into a criminal rule, is similar to section 146A of the  
11 Securities Ordinance as it exists now, which reads: "The Chief Executive in Council may  
12 make regulations providing that a contravention of any specified provision of the Commission  
13 rules is an offence, and may prescribe penalties for the offence not exceeding a fine at level 1,  
14 and imprisonment for 3 months". So there is a provision in the existing law. It is not a  
15 provision that our collective memory, at least, can recall ever being used, but it does exist in  
16 the existing law.

17

18 **Deputy Chairman:**

19

20 Mr Chairman, I think this may be an unnecessary innovation, because if you see the  
21 need for such a thing, then I would ask you to seriously consider making this positive vetting  
22 rather than negative. Now, when you say "in the interests of", the only reason why you do  
23 this is that it may save time. When you are dealing with making something a criminal  
24 offence, that surely means it is not that you are without sanction, but you think your sanction  
25 is not sufficient, that your sanction is not effective enough, so the consideration of urgency  
26 and timeliness is not enough, I think, to displace the normal process of enacting criminal  
27 provisions. Namely, whether something should be criminalized should be a matter to be  
28 considered by the Council in the normal way.

29

30 **主席 :**



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1  
2 我希望待政府提交一些例子後再作討論。提到衛生方面的問題，我  
3 便聯想到一些規則，例如規定有關人士應怎樣處理魚生、燒味等的食物等。  
4 有關人違反了這些處理程序的情況，可能跟我們現時提到的情況不同，因  
5 為大家可清楚地知道，違反那些規則的後果，是影響飲食衛生，但我們所  
6 討論的規則，牽涉到的範圍可能較為廣泛。我們還是待政府就此作出解釋  
7 後才考慮這個問題吧。

8  
9 **副主席：**

10  
11 另外，這些rules的性質跟有關衛生的rules亦不相同。

12  
13 **主席：**

14  
15 是的。接着是討論載於Page 64的subclause (7)。

16  
17 **副主席：**

18  
19 我們要先確保大家對較前部分的條文沒有問題。對於這些條文，我  
20 沒有問題。

21  
22 **主席：**

23  
24 對於Page 65和Page 66，各位有沒有問題？

25  
26 **Deputy Chairman:**

27  
28 Mr Chairman, I have a question, starting from page 65, about the scope of  
29 subclause (8)(e), "savings on any principal legislation". What precisely is the scope of the  
30 words in the brackets? Maybe you can explain to me first what is the effect of paragraph (e),

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1 so that I have a better understanding of what exactly this power is.

2  
3 **財經事務局副局長區璟智女士：**

4  
5 我請陳律師解釋。

6  
7 **高級助理法律草擬專員陳子敏女士：**

8  
9 其實第(e)段是很多法例亦訂有的補充條文。制訂補充條文的目的，  
10 是增加附屬法例的靈活性，以涵蓋保留條文或過渡性條文。但就一些過渡  
11 性條文和保留條文訂立附屬法例時，亦可能會牽涉到主體法例。如果訂立  
12 這些附屬法例時，牽涉到主體法例的修訂，而有關法例亦沒有制訂特別的  
13 賦權條文時，當局便要排期，然後透過修訂主體法例下有關條文的方式，  
14 才可作出這些修訂。

15  
16 但有關修訂牽涉到的事情，可能只是關於一些保留條文、過渡性條  
17 文和補充性質的事項。所以，如果需要排期，然後經立法會三讀後才可作  
18 出修訂，便會浪費很多時間。所涉及的亦可能只是一件很小的事情，例如  
19 一些相應修訂，或可能因制訂有關附屬法例而需要對主體法例下的多項條  
20 文作出修訂，例如某個定義的cross reference等。所以，我們便希望藉着補  
21 充條文，增加靈活性。正如主席和副主席剛才提問，在這些條文須否經立  
22 法會審議呢？答案是由於這些也屬規則，所以亦須經立法會審議。

23  
24 **副主席：**

25  
26 主席，我明白了。在這款下所訂規則的範圍，只限於“transitional,  
27 incidental, supplemental, evidential and consequential”的條文。如果範圍僅限  
28 於此，我是可以接受的。

29  
30 **主席：**

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1  
2 接着是討論第385條——Codes or guidelines by Commission。各位對  
3 於page 67、68和69有沒有問題？

4  
5 **Deputy Chairman:**

6  
7 Mr Chairman, I just wonder whether the court is obliged to take into account the  
8 codes and guidelines, whether it is intended that the court is obliged to do so, because it says:  
9 “It shall be taken into account” ; or whether the Administration really means that the court  
10 may take it into account.

11  
12 **主席：**

13  
14 如果這款是採用“shall”的字眼，則表示法庭必須考慮這些守則和指  
15 引。

16  
17 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
18 **Securities and Futures Commission:**

19  
20 Well, I think the word "shall" is actually qualified to some extent by the preceding  
21 words, that "it appears to the court to be relevant". I suppose in that sense the court would  
22 have to take into account a matter that was relevant, but I do not think it is intended in any  
23 sense to remove the court's discretion as to what it should take into account in proceedings.  
24 It obviously should take into account only matters that are relevant to the determination of  
25 those proceedings.

26  
27 **Deputy Chairman:**

28  
29 Mr Chairman, in which case I wonder whether it would not be sufficient to say that  
30 “If any provision set out in the codes or guidelines appears to...”. I just wonder if you need

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1 the last part. As Andrew explains, if it is relevant, then the court in fact, by the very rules of  
2 evidence, has to take into consideration any relevant evidence which is adduced before it. It  
3 cannot say “This is a relevant piece of evidence, but I’m not going to consider it”. I have  
4 never heard of such a thing in my life. So perhaps it is enough to say that it shall be  
5 relevant. Maybe this is a bit of sensitivity on my part, as someone who practises before the  
6 court, but I am very loath to tell the court what it has to do in the legislation. Just think  
7 about it. If you think you do not need it, then so be it.

8  
9 **財經事務局副局長區璟智女士：**

10  
11 我們再作研究吧。

12  
13 **主席：**

14  
15 接着是討論第4分部，即Division 4—Miscellaneous。對於Page 70  
16 第386條—Service of notices, etc.，各位有沒有問題？如果沒有，接着是討  
17 論Page 71、72和73。請問各位有沒有問題？

18  
19 如果沒有問題，接着是討論 Clause 387—Evidence regarding  
20 Commission’s records or documents。如果各位沒有問題，接着是討論Page 73 clause  
21 388—General requirements for documents lodged with Commission。

22  
23 **胡經昌議員：**

24  
25 我希望就第387條提問。第387條最後一句提到“...without proof of the  
26 signature or initials of the person purporting to sign or initial the record or document”。在其  
27 他情況下，有關紀錄和文件是否亦需要簽署呢？還是這是一項特殊的安  
28 排？

29  
30 **副主席：**

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1  
2           有關文件是需要簽署的，但這條的意思是控方無需證明有關簽署的  
3 真確性。

4  
5 **胡經昌議員：**

6  
7           這是否很正常的情況呢？我認為控方亦有需要證明有關簽署是真  
8 確的。

9  
10 **高級助理法律顧問李裕生先生：**

11  
12           這情況亦是很普遍的。採取這種做法的用意，是使控方若在提出檢  
13 控時，希望向法院提交某些文件，亦無須證明文件的簽署是否真確。根據  
14 一般證據法令的正常程序，每份作為證據的文件，均須由發出文件的人士  
15 認證有關簽署。這項條文使法院的程序較為流暢。

16  
17 **Chairman:**

18  
19           Andrew, do you want to supplement that?

20  
21 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
22 **Securities and Futures Commission:**

23  
24           Only perhaps to allay any concerns Mr WU might have. That would not preclude  
25 evidence being led that it was not a genuine document. So someone could lead evidence to  
26 the contrary, in which case you might actually be put to proof as to the signature and things  
27 like that. It is really just that most of these documents are very formal, and it is to expedite  
28 and speed up the process.

29  
30           However, if the court raises doubt about the authenticity of a document, then you

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1 are really back into the area of strict proof.

2  
3 **胡經昌議員：**

4  
5 主席，如果簽署文件的人是隸屬於Commission的人士，我亦不會反  
6 對這種做法。但這句所訂的是“...or any person performing any function...”，  
7 涵蓋範圍非常廣泛。要求控方證明有關簽署的真確性會否較好呢？既然法  
8 庭本身亦訂有程序，可以解決這些問題，這個草擬方式也不會造成很大的  
9 問題，但我亦希望瞭解，根據現時的法律程序，如果有關證據涉及“...any  
10 person performing any function...”，是否也無須proof of signature呢？

11  
12 **主席：**

13  
14 陳律師。

15  
16 **高級助理法律草擬專員陳子敏女士：**

17  
18 我希望就這個問題作出解釋。第一，這項是舊有的條文。第二，就  
19 “without proof...”方面，正如證監會的同事剛才解釋，被告人是可以提出反  
20 證的。現時的草擬方式是“...shall in any proceedings be admissible as evidence of the  
21 facts stated in it, without proof of the signature...”。換言之，控方在提供可接納為證  
22 據的文件時，無須事先證明有關簽署的真確性。但當法庭接納有關文件為  
23 證據後，被告人可根據有關文件的可信性而提出反證。

24  
25 **副主席：**

26  
27 胡經昌議員，如果要求控方證明有關文件的簽署屬實，證明的方式  
28 是簽署有關文件的人士須出庭宣誓，證明有關簽署是他的簽署。但如果法  
29 庭對有關簽署的真確性沒有懷疑，進行這項程序便會浪費很多時間。

30

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1 **主席：**

2

3 接着是討論載於 page 74 的第388條——General requirements for documents  
4 lodged with Commission。我們在上次會議上也曾提到，新加入的第(1)(a)款，與  
5 《電子交易條例》是沒有衝突的，對嗎？《電子交易條例》有關條文訂明，  
6 由資訊科技廣播局局長訂明有關的 form。各位對這條有沒有問題？

7

8 如果各位沒有問題，接着是討論 Page 75、76 和 77。如果沒有問題，  
9 接着是討論 page 77 clause 389——General provisions for approvals by Commission。如  
10 果各位沒有問題，接着是討論 page 78 clause 390——Exclusions of provisions of  
11 Gambling Ordinance。

12

13 **副主席：**

14

15 主席，可否請署方就第390條第(2)款下有關 Gambling Ordinance 的修  
16 訂作出簡略的解釋？

17

18 **主席：**

19

20 有關修訂的理據何在呢？

21

22 **財經事務局副局長區環智女士：**

23

24 我希望請 Mr KENNY 解釋。 Joe, do you want to explain on that?

25

26 **Mr Joe KENNY, Consultant, Securities and Futures Commission:**

27

28 Yes. Mr Chairman, this clause came under scrutiny because of some useful  
29 comments that were made by the Assistant Legal Adviser. We considered what the purpose  
30 of this clause is, and in fact there is an equivalent clause in the Banking Ordinance; but for

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1 other reasons we cannot use that. We decided that really this clause is needed for two  
2 reasons: it is needed to make sure that the activities of persons legitimately involved in  
3 dealing in financial instruments will not expose them to prosecution under the Gambling  
4 Ordinance. On the other hand, we do not wish to give such extensive coverage that a person  
5 could take advantage of the exclusion to get around the Gambling Ordinance, for example by  
6 offering as a prize in a raffle 100 block lots of Hong Kong Bank shares. We have tried to re-  
7 design the provision, and in fact we are still trying to refine it to make sure it is  
8 comprehensive enough. We are trying to refine it to make sure that it covers dealers and  
9 advisers, persons engaged in regulated activities as defined in the Ordinance, in the Bill; and  
10 also persons such as professionals who will not need to be licensed. Professionals who deal  
11 only with professionals will not need to be licensed for a regulated activity. We wish to  
12 make sure that all the persons who should get the benefit of the protection will in fact have  
13 that benefit, and that is the whole purpose of this re-draft. It is not finished yet, I am afraid.

14  
15 ***Deputy Chairman:***

16  
17 Thank you. Can you also tell us which bits you are still refining? Is there any  
18 with respect to what is being considered?

19  
20 ***Mr Joe KENNY, Consultant, Securities and Futures Commission:***

21  
22 Yes. It is actually with regard to where the exclusions come in. In the subclause  
23 390 (1)(a) that we have now, with a transaction entered into by one or more of the parties to  
24 the transaction in the course of a business which constitutes a regulated activity, what we have  
25 in mind is to split that paragraph into two, so that it is not necessary that all or even any of the  
26 parties should be licensed for the activity and the regulated activity; or rather that because of  
27 the exceptions in the definitions of the regulated activities, in Part 2 of Schedule 6, there is no  
28 requirement for the person or persons to be licensed. In other words, they fall outside the  
29 ambit of the definitions, for that reason only.

30



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1 **Deputy Chairman:**

2  
3 Thank you. Probably in thinking about how to finalize it, does any of the  
4 amendments currently being considered in the Gambling Ordinance have any relevance to this  
5 clause?

6  
7 **財經事務局副局長區璟智女士：**

8  
9 請劉小姐作出解釋。

10  
11 **財經事務局首席助理局長劉利群女士：**

12  
13 主席，這項條文基本上只是反映現時有關證券及期貨的各條條例的  
14 不同情況，而不是特別的或新訂的條文，亦跟《賭博條例》現時所作的修  
15 訂沒有關係。

16  
17 **副主席：**

18  
19 《賭博條例》修訂後，必然會有所改變。妳已就有關修訂進行研究，  
20 對嗎？由於這項條文提述到《賭博條例》，我只是希望知道這項條文與《賭  
21 博條例》有何關連而已。

22  
23 **主席：**

24  
25 副主席，我明白妳的意見。就第390條，我認為《藍紙條例草案》  
26 原來的草擬方式較直截了當，意思很簡單易明，實在無懈可擊。

27  
28 **財經事務局副局長區璟智女士：**

29  
30 對於非法律專業人士而言，《藍紙條例草案》有關條文的草擬方式

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1 確實清晰。但法律顧問提出的意見也是很正確的。若在法律上作出精密的  
2 闡釋，便會發現原來的草擬方式存有漏洞。如果採用詳盡的草擬方式，我  
3 們便需要考慮如何避免條文出現漏洞，這是較為困難的；但如果採用簡短  
4 的草擬方式，非法律專業人士便會易於理解。

5  
6 **Chairman:**

7  
8 Do you want to supplement that?  
9

10 **Mr Joe KENNY, Consultant, Securities and Futures Commission:**

11  
12 Mr Chairman, yes; thank you. Something I did not mention a moment ago was  
13 that subclause (2) has been introduced in order to provide a rule-making power for the  
14 Commission, but this is to make sure that if the coverage – that is to say the exemption from  
15 the Gambling Ordinance – has been cast too wide, rules can be made prescribing matters or  
16 transactions which will not get the benefit of that exclusion. It is a balancing exercise to  
17 make sure that the coverage does not go too far.

18  
19 **主席：**

20  
21 顧先生，請講。  
22

23 **助理法律顧問顧建華先生：**

24  
25 多謝主席。第(2)款是對於第(1)款所訂內容的例外情況。而第379條  
26 訂明，財政司司長可以把某些證券及期貨合約豁免於這條條例草案的管  
27 限。若這些不受這條條例草案管限的合約違反《賭博條例》的規定時，證  
28 監會是否沒有權力作出豁免呢？如果情況是這樣，這款便似乎不能達致預  
29 期的目的。  
30

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1 制定這款的目的，是希望使金融產品可合法地在市場運作。一般的  
2 證券及期貨合約也可以受到《證券及期貨條例草案》的保護，但由於財政  
3 司司長把某些合約豁免，使這些合約無須受到《證券及期貨條例草案》的  
4 管限，會否反而令這些合約受到《賭博條例》的限制呢？

5  
6 **財經事務局副局長區璟智女士：**

7  
8 證監會的同事剛才提醒了我，在《賭博條例》下，亦訂有類似第(2)  
9 款的條文，在有需要作出carve-out時，便可以採用。這或可解決你的疑問。

10  
11 **Deputy Chairman:**

12  
13 May I ask a simple question? What parts of the Gambling Ordinance do you  
14 wish to apply to the transaction under this Bill? That is question 1. Question 2: what  
15 kinds of transactions under this Bill do you wish to be governed by the Gambling Ordinance?

16  
17 **Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,**  
18 **Securities and Futures Commission:**

19  
20 Those questions are easier to ask than to answer, I am afraid. It is not so much the  
21 transactions that we want the Gambling Ordinance to apply to. It is usually the other way  
22 around – the transactions that we want to keep outside the Gambling Ordinance. These  
23 examples are not clear, but the easiest ones to think about are contracts for difference, which  
24 would be picked up by the Gambling Ordinance, and spread betting is the best example of  
25 those.

26  
27 **Deputy Chairman:**

28  
29 May I pause, Andrew? No disrespect, but certain things should not be caught by  
30 that. Supposing you do not have clause 390 altogether...

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1

2 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
3 *Securities and Futures Commission:*

4

5 Certain things that would be regulated by this legislation would also be caught.  
6 That is right.

7

8 *Deputy Chairman:*

9

10 So that is your original motive for saying: "Please keep the Gambling Ordinance  
11 out of our hair". Right?

12

13 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
14 *Securities and Futures Commission:*

15

16 Yes.

17

18 *Deputy Chairman:*

19

20 Having done that, why do you now think that the Gambling Ordinance has to have  
21 some application in some circumstances to the transactions that you are going to regulate?  
22 Why do you want Gambling Ordinance to have anything to do with you?

23

24 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
25 *Securities and Futures Commission:*

26

27 I think it is only that it is sometimes difficult to know which ordinance certain kinds  
28 of activities should best be regulated under.

29

30 *Deputy Chairman:*

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1

2           No. It does not matter. Supposing the Gambling Ordinance does not exist.

3

4 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
5 *Securities and Futures Commission:*

6

7           Right.

8

9 *Deputy Chairman:*

10

11           Would it hamper your function and power under this Ordinance? What is the  
12 risk you run by excluding the application of the Gambling Ordinance? It does not seem very  
13 clear to me at all.

14

15 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
16 *Securities and Futures Commission:*

17

18           I think the risk we run by just excluding the application of the Gambling Ordinance  
19 is that the activity as a whole may not be fully or adequately regulated by this Ordinance.  
20 There are some things, for example, that involve securities or shares that are adequately dealt  
21 with by this Ordinance, and some things that are not. The best example I have been able to  
22 think of is the one that Joe KENNY gave a moment ago, about lotteries or raffles, where the  
23 prizes relate to securities. In some respects, that would amount to a dealing in securities; but  
24 that is really just incidental.

25

26 *Deputy Chairman:*

27

28           But do you wish that kind of activity to be governed by the Gambling Ordinance?

29

30 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*

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1 ***Securities and Futures Commission:***

2

3 Yes; the raffle or the lottery is a gambling issue, primarily. That is the way to  
4 characterize it. It may incidentally, if someone slips up, fall within the definition of dealing,  
5 and may amount to unregistered dealing. However, that is not really where the issue and the  
6 risk to the community lie. It is not about dealing in securities; it is about running unlicensed  
7 raffles or lotteries.

8

9 ***Deputy Chairman:***

10

11 That kind of activity may not come under this Bill?

12

13 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
14 ***Securities and Futures Commission:***

15

16 No. That would be under the Gambling Ordinance.

17

18 ***Deputy Chairman:***

19

20 Okay. This activity does not come under this Bill anyway. Why should it fall  
21 outside the Gambling Ordinance just because you provide that the Gambling Ordinance does  
22 not apply to this Ordinance?

23

24 ***Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,***  
25 ***Securities and Futures Commission:***

26

27 Can you ask that again?

28

29 ***Deputy Chairman:***

30

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1 I need an answer to that.

2

3 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
4 *Securities and Futures Commission:*

5

6 Yes. Can you ask that again?

7

8 *Deputy Chairman:*

9

10 There is a kind of activity.

11

12 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
13 *Securities and Futures Commission:*

14

15 Right. Can you give me an example?

16

17 *Deputy Chairman:*

18

19 The example that you have just given – this lottery thing. This kind of activity  
20 you are not interested in regulating?

21

22 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
23 *Securities and Futures Commission:*

24

25 Right.

26

27 *Deputy Chairman:*

28

29 You say that the Gambling Ordinance has no application to anything which is  
30 within this Ordinance. Right?

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1

2 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
3 *Securities and Futures Commission:*

4

5 Right.

6

7 *Deputy Chairman:*

8

9 So this kind of activity is not within this Ordinance anyway.

10

11 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
12 *Securities and Futures Commission:*

13

14 Right.

15

16 *Deputy Chairman:*

17

18 Even if you have a provision that the Gambling Ordinance shall not apply to it, it  
19 will have no effect on this activity.

20

21 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*  
22 *Securities and Futures Commission:*

23

24 Right.

25

26 *Deputy Chairman:*

27

28 With the result that the Gambling Ordinance still governs this kind of activity.

29

30 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*



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1 *Securities and Futures Commission:*

2

3 Will apply - - right.

4

5 *Deputy Chairman:*

6

7 So what is your problem?

8

9 *Mr Andrew PROCTER, Executive Director, Intermediaries and Investment Products,*

10 *Securities and Futures Commission:*

11

12 Nothing; but I do not think that is what the section does.

13

14 *Deputy Chairman:*

15

16 Well, there you are. So the Chairman is right. He can keep this simple drafting,  
17 because the one thing you need to carve out does not fall outside the Gambling Ordinance just  
18 by virtue of your not applying this Ordinance to it.

19

20 *Chairman:*

21

22 Thank you, Vice-chairman.

23

24 *Deputy Chairman:*

25

26 Just think about it again in terms of logic.

27

28 *財經事務局副局長區環智女士：*

29

30 曾先生有所補充。

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1

2 **財經事務局助理局長曾俊文先生：**

3

4 多謝主席。我希望就這兩條條例之間的關係作出補充。我們草擬有  
5 關條文時，亦曾跟民政事務局進行磋商。其實民政事務局的政策亦很簡單。  
6 對於《證券條例》所規管的活動或交易，他們不會作出規管，因為無需作  
7 出重疊的規管。至於我們為何制定如此複雜的條文，訂明例外的情況，以  
8 指明某些情況不屬於《賭博條例》的規管範圍呢？正如Mr PROCTER剛才提  
9 到的例子，由於有關獎券活動的組成有證券成分，所以在表面看來，有關  
10 活動似乎應受到《證券條例》的管限。我們制定這項條文的目的是，只是希  
11 望表明，我們的intention是這些活動不應受到《證券條例》的管限。換句話  
12 說，由於該項活動的組成存有證券或期貨成分，而由於這條條例草案有關  
13 定義的草擬方式，可能會使這些活動被視為有需要受到這條條例草案所規  
14 管，但實際上，這些活動是不應由這條條例草案規管的，所以我們便制定  
15 這項條文。

16

17 **Deputy Chairman:**

18

19 I thank you for the explanation, but I still do not think it makes a difference to what  
20 I have just said. Can you think about it, because if you think about it logically you do not  
21 really need to worry too much. Then we can revert to the original drafting, and it will be  
22 clearer. Something which is not governed by the Securities and Futures Ordinance.

23

24 **主席：**

25

26 或許我們讓法律顧問作出解釋吧。

27

28 **助理法律顧問顧建華先生：**

29

30 主席，我發現原來的草擬方式存有兩個問題。第一，原來的草擬方

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1 式會造成一個錯誤的理解，認為《證券及期貨條例草案》是規管有關的交  
2 易，但實際上，《證券及期貨條例草案》只是規管有關的行為，而不是有關  
3 交易本身。因此，這項條文原來的擬稿的第一個部分是沒有效果的。

4  
5 **主席：**

6  
7 你現在是評論草案第390條嗎？

8  
9 **助理法律顧問顧建華先生：**

10  
11 《藍紙條例草案》。

12  
13 **主席：**

14  
15 Okay，請繼續。

16  
17 **助理法律顧問顧建華先生：**

18  
19 第二，據我理解，按照原來的草擬方式，即使有關人已獲發牌從事  
20 有關的受規管活動，但如果該人進行的活動違反了《證券及期貨條例草案》  
21 下的規定或規則，有關的違規活動便不會受到保障，而會被納入《賭博條  
22 例》的規管範圍。我只是把這兩個情況提出，讓政府考慮而已。

23  
24 **主席：**

25  
26 好。雖然我不是律師，但我希望提問，更改一個用字是否已經可以  
27 解決這個問題呢？可否寫成“... to any transaction or activity which is  
28 regulated by...”呢？

29  
30 **財經事務局副局長區環智女士：**

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1

2 我們正考慮這個做法。

3

4 **主席：**

5

6 可以嗎？

7

8 **財經事務局副局長區璟智女士：**

9

10 這個草擬方式很簡單。

11

12 **主席：**

13

14 對，這個草擬方式實在很簡單，亦可避免採用double negation的寫  
15 法，對嗎？Okay，接着是討論第391條。這條的草擬方式很直接，亦沒有甚  
16 麼修訂。李先生，請問中文本的情況如何？

17

18 **高級助理法律顧問李裕生先生：**

19

20 我們已就中文本作出研究，認為沒有甚麼問題需要提出來討論。

21

22 **主席：**

23

24 由於我們較遲才收到中文本，我亦希望讓各位有較多時間研究有關  
25 的中文本，加上我們還有第XIV部的中文本尚未完成審議，所以我們先審議  
26 其他部分、然後才一併審議第XIV和XV部的中文本，好嗎？

27

28 **副主席：**

29

30 好的。主席，我希望藉這個機會，請政府考慮可否使第371條的中

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1 文本更強烈地表達英文本中“material”一字的意思，即有關“在要項上屬虛假  
2 或具誤導性的陳述”的部分。這是胡經昌議員在今天會議較早時提出的問  
3 題。

4

5 **主席：**

6

7 Okay，我們今天的會議就此結束。下次會議定於10月12日舉行，屆  
8 時我們會繼續就第XV部進行討論。

9

10 多謝各位。

11

12

13 m3327