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From : Clerk to Panel
To : Members of Panel on Security
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Dr Hon LUI Ming-wah, JP
Hon Mrs Selina CHOW LIANG Shuk-yee, GBS, JP
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\# Hon Audrey EU Yuet-mee, SC, JP

Members of Panel on Administration of Justice and Legal Services
♦ Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman)
Hon Martin LEE Chu-ming, SC, JP
Hon CHAN Kam-lam, JP
Hon Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon TAM Yiu-chung, GBS, JP

♦ Also a member of Panel on Security
\# Also a member of Panel on Administration of Justice and Legal Services

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Panel on Security
and
Panel on Administration of Justice and Legal Services

Follow-up to joint meeting on 6 February 2003

At the joint meeting on 6 February 2003, the Secretariat was requested to circulate for Members' reference the relevant official record of proceedings on the Official Secrets Bill enacted in June 1997.

2. The relevant official records of proceedings are attached for Members' reference.

(Raymond LAM)
for Clerk to Panel on Security

Encl.
c.c. All other Hon Members of LegCo
LA
SALA1
SALA2
ASG2
ALA1

GOVERNMENT BILLS

First Reading of Bills

~~**RAILWAYS BILL**~~

~~**EMPLOYEES RETRAINING (AMENDMENT) BILL 1996**~~

OFFICIAL SECRETS BILL

~~**OZONE LAYER PROTECTION (AMENDMENT) BILL 1996**~~

~~**GOVERNMENT RENT (ASSESSMENT AND COLLECTION) BILL**~~

Bills read the First time and ordered to be set down for Second Reading pursuant to Standing Order 41(3).

Second Reading of Bills

~~**RAILWAYS BILL**~~

THE SECRETARY FOR TRANSPORT to move the Second Reading of: "A Bill to provide for the resumption of land, creation of easements or rights and the exercise of other powers by the Government for the construction of railways and to provide for compensation for losses caused by the exercise of the powers."

He said: Mr Deputy, I move that the Railways Bill be read a Second time. This Bill is new legislation designed to support in general the implementation of railway projects.

The Railway Development Strategy formulated in 1994 accorded high priority to three railway projects for implementation. One of the three projects, the Western Corridor Railway, will be one of Hong Kong's largest heavy rail projects. The sheer length of the railway means that many private lots will be ~~affected and large scale land resumption will have to be undertaken.~~

~~*pursuant to Standing Order 42(3A).*~~

OFFICIAL SECRETS BILL

THE SECRETARY FOR SECURITY to move the Second Reading of: "A Bill to control the unauthorized obtaining or disclosure of official information."

He said: Mr Deputy, I move the Second Reading of the Official Secrets Bill.

This Bill localizes the provisions of the United Kingdom Official Secrets Acts currently applying to Hong Kong. These Acts will lapse on 1 July 1997; we thus need to introduce local legislation to replace them.

The Bill deals with two broad categories of offences: espionage, and unlawful disclosure of official information. In drafting the Bill, we have modified various provisions in the Acts to reflect local circumstances. For the unlawful disclosure offences, the Bill covers six key areas of information: security and intelligence, defence, international relations, information obtained in confidence from other states or international organizations, crime, and special investigations under statutory warrants. These areas of information, if disclosed without lawful authority, would cause or be likely to cause substantial harm to the public interest.

There are a number of provisions in the Acts which have not been reproduced in the Bill. These include provisions dealing with matters already covered in other Hong Kong legislation, such as the power of arrest. We have also removed an outdated provision which requires persons in the business of receiving postal packets to register with the police. We have, in addition, included a new safeguard in the provision requiring a person to give information to the police about suspected espionage, to ensure that the information he gives cannot be used against him in criminal proceedings.

We have not included from the United Kingdom Acts the rebuttable presumption of purpose in relation to espionage, by which a person's guilty purpose is presumed in certain circumstances unless he can prove otherwise. This sort of presumption is out of step with current Hong Kong legislative practice, and there is no merit in retaining it in the localized legislation.

There have been some suggestions that "public interest" and "prior disclosure" defences should be included in the Bill. Such defences, which do not exist in other common law jurisdictions, are not a feature of the existing Acts applying to Hong Kong. As I have mentioned, the Bill specifies six areas of protected information; we believe that, given the nature of the information concerned, any unauthorized disclosure would of itself be likely to harm the public interest. To provide statutorily for a "public interest" defence for disclosing information relating to matters under one of these areas set out in the legislation would be contradictory. Furthermore, the Official Secrets Bill is a localizing Bill, not a law reform exercise. It would thus be inappropriate to include such defences in the Bill. Ultimately, it would be for the courts to decide whether an offence has been committed under the Bill and, if so, what penalties might be appropriate in all the circumstances.

Evidence of prior disclosure will be relevant in deciding whether a particular disclosure does, in fact, cause harm of a kind specified in the legislation. Where there has been a prior disclosure it will be open for a defendant to argue that the disclosure, which is the subject of the prosecution, has done no further harm. This may not always be the case, however, as there may be circumstances in which the timing and placing of a fresh disclosure may cause harm which an earlier disclosure had not. That is why the Bill leaves the matter of prior disclosure to the courts to decide, rather than creating a blanket defence.

We have consulted the Chinese side, through the Sino-British Joint Liaison Group, on our proposals to localize the Official Secrets Acts. The Chinese side have agreed that the localizing legislation should proceed.

Thank you, Mr Deputy.

Question on the motion on the Second Reading of the Bill proposed.

Debate on the motion adjourned and Bill referred to the House Committee pursuant to Standing Order 42(3A).

~~OZONE LAYER PROTECTION (AMENDMENT) BILL 1996~~

THE SECRETARY FOR PLANNING, ENVIRONMENT AND LANDS to move the Second Reading of: "A Bill to amend the Ozone Layer Protection

~~**CIVIL AID SERVICE BILL**~~

Resumption of debate on Second Reading which was moved on 9 April 1997

Question on the Second Reading of the Bill put and agreed to.

Bill read the Second time.

Bill committed to a Committee of the whole Council pursuant to Standing Order 43(1).

OFFICIAL SECRETS BILL

Resumption of debate on Second Reading which was moved on 18 December 1996

MISS CHRISTINE LOH: Mr Deputy, I rise to speak as the Chair of the Bills Committee on the Official Secrets Bill. The Bill localizes the provisions of the British Official Secrets Acts currently applying in Hong Kong, with some modifications to reflect local circumstances. The Bill deals with two broad categories of offences: espionage, and unlawful disclosure of official information.

The Bills Committee held eight meetings with the Administration, including two meetings with the Hong Kong Bar Association, the Law Society of Hong Kong, the Hong Kong Journalists Association and the Hong Kong Human Rights Monitor.

In general, the Bills Committee, supported by deputations, considers that the Bill should not strictly be a localization bill. The British Acts, passed in the first quarter of the century, are unnecessary and undesirable for adoption by Hong Kong at the end of the century. Some provisions of the Bill have no place in present-day Hong Kong. Some are too vague and broad, even draconian. The Bills Committee has therefore proposed a number of amendments to improve and modernize the Bill, and also in order to prevent possible abuse. In drawing up

these amendments, the Bills Committee took into consideration the views of deputations, relevant precedents from Britain, relevant reports and recommendations of the Australian Criminal Law Review Committee and jurisprudence of the United States in the area of freedom of expression and protection of official secrets.

A member of the Bills Committee shares the view of the Hong Kong Bar Association (BAR) that apart from the perceived need to anticipate the requirements of the Basic Law Article 23, there appears to be no pressing reason for having domestic "state secrets" legislation. On the whole, he considers that there is no need to enact specific laws to protect official secrets. He argues that in order to protect official information from unauthorized disclosure, the existence of the common law doctrine of confidentiality (Mr Deputy, that is, breach of confidence) would be adequate to deal with such situations. Therefore, he opposes the Bill in principle. However, other members of the Bills Committee are of the view that breach of confidence is only a civil wrong. Unauthorized disclosure of official information, especially defence information, could have very serious consequences. Such kind of offence should be prohibited through enactment of criminal law. Legislation on official secrets is therefore necessary.

Having stated the general views of the Bills Committee on the Bill (and I am sure other members of the Bills Committee will present their personal views and their parties' view on the Bill); I would like to go into the details of some of its major concerns. Let me begin with the offence of espionage.

Spying (clause 3)

The Bills Committee has very thoroughly scrutinized clause 3 on spying which is of prime concern to members and deputations because it is too broad and loose for an offence liable to imprisonment for 14 years. We also question its compatibility with the International Covenant on Civil and Political Rights (ICCPR) and the Hong Kong Bill of Rights Ordinance (HKBORO).

The relevant offences of spying are set out in subclause (1). Subclauses (2), (3) and (4) are evidential provisions designed to facilitate proof of the offence. Subclause (5) is a definition provision.

In subclause (1), the Bills Committee and deputations are particularly

worried about the absence of a clear and comprehensive definition of what constitutes the "safety or interests" of the United Kingdom or Hong Kong. The exclusion of any clarification on such a fundamental issue gives rise to concern that this vagueness may be abused in future unless some limitation is placed upon the possible interpretation of the phrase. In the same way, the inclusion in this offence of spying of an element of the presence of the accused "in the neighbourhood" of a prohibited place may be open to abuse by the prosecution. Members are also concerned about the lack of a definition for "enemy", which might mean "a potential enemy with whom one might some day be at war". Subclause (2) contains a blatant presumption of guilt on the basis of evidence of the known character and conduct of the accused and the circumstances of the case. Subclauses (3) and (4) shift the burden of proof on to the defendant and conflict with the presumption of innocence. The provisions in subclauses (2) to (4) would make the evidential burden too light. They would be open to abuse and are therefore unacceptable. The definition of "foreign agent" in subclause (5) is also considered too embracing.

After much deliberation, the Bills Committee proposes to amend clause 3(1) by incorporating the requirement of a specific intent, as in the relevant United States legislation and deleting the phrase "in the neighbourhood of". As suggested by the deputations, subclauses (2) to (5) are also to be deleted.

Duty to give information (clause 8)

Clause 8(1) provides that the Governor might grant permission to the Commissioner of Police to investigate an offence under clause 3 in relation to a person whom he reasonably believes to be able to furnish information about the offence. The Bills Committee considers that the permission should be granted by the court to avoid possible abuse of detention of a person. The Bills Committee proposes that clause 8 should be amended to incorporate safeguards in line with those in the Organized and Serious Crimes Ordinance (Cap. 455)

Search warrants (clause 11)

The Bills Committee is of the view that, as in the proposed warrant system of the White Bill on Interception of Communications, a Superintendent of Police should be required to apply for an *ex post facto* warrant from the court within 48 hours of the issuance of any written order in emergency cases.

Mr Deputy, the above concerns relates to espionage. I shall now turn to

the Bills Committee's concerns on the offence of unlawful disclosure.

Relevance of the Bill to the Basic Law Article 23

Some members question how "unauthorized disclosure of official information" in the Bill is related to "theft of state secrets" referred to in the Basic Law Article 23. It would seem that the latter has a narrower meaning than the former. The BAR Association considers that the Basic Law Article 23 does not expressly require legislation that prohibits the dissemination of official information. The "theft of state secrets" provision is a phrase more apt to describe spying. It is open to debate whether the Bill goes further than the Basic Law requires in that it deals with the dissemination of official information which is not stolen but is leaked and then disseminated.

Security and intelligence information — members of services and persons notified (clause 13)

The offence under clause 13(1) does not require that the disclosure in question is damaging, apparently due to an assumption about the responsibilities of members of security services and notified persons. The Bills Committee agrees with the BAR Association that a "harm test" should be incorporated in clause 13, as in clause 20.

Two new clauses (21A and 21B) are proposed by the Bills Committee to build in a public interest defence and a prior disclosure defence.

Public interest defence

Mr Deputy, firstly, the Bills Committee and deputations are unanimously concerned about the absence of a public interest defence in the Bill. This is an issue of vital importance for the protection of freedom of expression. Consideration is given to a wide-ranging public interest defence, and also a specific one along the lines of that in section 30 of the Prevention of Bribery Ordinance which is confined to the areas of serious misconduct, illegality, and abuse of power. After thorough discussion, the Bills Committee decided on the broader version.

Prior disclosure defence

The Hong Kong Journalists Association is particularly anxious to include a prior disclosure defence in the Bill. The Administration argued that a judge would take prior disclosure into account in determining if a disclosure had caused actual harm. However, this is in fact not the case for all clauses in the Bill. The Bills Committee believes that the inclusion of such a defence would not alter the law. If indeed a judge would take prior disclosure into account, inclusion would merely alert a judge to the need to consider this defence in determining whether a prosecution should succeed. The Hong Kong Journalists Association proposed two approaches — a broad one and a narrower one. The majority of the Bills Committee agrees to the inclusion of a prior disclosure defence, adopting the narrower approach.

In closing, I wish to reiterate that the Official Secrets Bill as proposed by the Administration is outdated because it is based on the United Kingdom Official Secrets Bill 1911. It should have been a law reform exercise, not merely one of localization.

Now, please allow me to add a few personal remarks. This is a controversial Bill. We are told that Britain and China had agreed to the Bill, and as such, any amendment to it runs the risk of the post-1997 government throwing it out. If we were to adopt this attitude, then we might as well not have formed a Bills Committee at all. Having scrutinized the Bill, as it is this Council's job, it is hard to go along with all of it, as much of it is clearly unsuitable for the modern day Hong Kong. As such, the Bills Committee kept to what I will call a commendable, positive, legislative spirit. We took on the job of this Bill like we do with every other Bill. We considered every aspect and decided to reform the law in this area. The United Kingdom might have something to learn from our efforts. Perhaps, this is an example of the Empire striking back! We have not allowed the possibility, or even the probability, of the full Council voting down these amendments to debilitate us from our work. If nothing else, the record of our deliberation will prove that we did not shrink from our responsibility as legislators.

I would like to say a final word of thanks both to the representatives of the Administration, as well as our own hardworking staff. The Administration's

representatives were most helpful to the Bills Committee, although their brief was clear. They had to resist each and every of our reformative attempts. Our own staff was most efficient at a time when they must be under intense pressure to serve the final days of this elected Council. I thank them all on behalf of myself and all members of the Bills Committee.

Mr Deputy, with these remarks, I support the Bill subject to the amendments to be moved by me on behalf of the Bills Committee later.

THE PRESIDENT resumed the Chair.

MISS MARGARET NG: Mr President, the only reason I support the Second Reading of the Official Secrets Bill is that I have to accept, in principle, that it is legitimate for Hong Kong to have laws to protect information the disclosure of which would endanger the community. However, I do not accept that the right way to do so is to re-enact the Official Secrets Acts of the United Kingdom. Neither do I accept that there is any compelling need to do so arising from Article 23 of the Basic Law, under which the Hong Kong Special Administrative Region is to enact laws prohibiting the "theft of state secrets", among other things.

The Bill is far too wide in scope. It goes far beyond the legitimate purpose I have just stated. It exceeds even the prohibition of "theft of state secrets".

Leaving aside Part I, which deals with preliminaries, Part II is supposed to be about espionage and related offenses. One may think that the offence of "spying" refers to secretly obtaining sensitive information affecting security. But the provisions are so drafted as to punish people who cannot be described as spying by any stretch of the imagination.

Clause 3(1)(a) provides, for example, that a person commits an offence if he approaches a "prohibited place" for " a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong".

Although the offence can attract a sentence of 14 years' imprisonment, a

very trivial act can be made the basis of a conviction. The "prohibited place" may be the airport. A person may "approach" the airport to stage a demonstration. And yet, if it is established that the "purpose" of being near the airport is "prejudicial to the safety or interests of the United Kingdom or Hong Kong", he may be convicted for spying!

As such, notorious case as *Chandler v DPP*, a case decided in 1965 in England, demonstrates what is "national interest" is pretty much what the government of the day says it is.

Mr President, what is especially objectionable about this clause is the low requirement of evidence to establish the "purpose" referred to in the offence. Indeed, one may say that instead of real evidence, all that is required is suspicion, even if it is described as "reasonable suspicion". Clause 3(2) allows a court to convict a person "if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong".

This is very worrying indeed, because one reading of these words is that a person may be convicted on what is supposed to be his "character". This offends the fundamental principle that one cannot be convicted on the basis of character, and the rule that character evidence is in any case inadmissible as evidence of having committed an offence.

So do clauses 3(3), (4) and (5). These provide for certain presumptions, the effect of which is to reduce the evidential requirement to an extremely low level, and to allow for highly subjective evidence.

It is the opinion of the Bar that these subclauses violate Article 14(2) of the International Covenant on Civil and Political Rights on the presumption of innocence. This kind of legislation is repugnant to this Council and must be opposed.

It is no argument to say that the Bill is simply a local re-enactment of nearly identical United Kingdom Acts applicable to Hong Kong. These Acts, particularly the provisions referred to just now, have attracted the strongest criticism even in the United Kingdom. Clause 3 of the present Bill is lifted from the Official Secrets Act 1911, passed in the United Kingdom in a great hurry under the imminent threat of war. In the debate of the 1988 Act, this part was just not discussed at all. As the Bill is now put before us, we are entitled to

consider the matter afresh, in the light of Hong Kong's own needs and circumstances. We must take into consideration the importance of the protection of human rights to the maintenance of confidence in Hong Kong. The fact must also be taken into consideration that, in the United Kingdom, there is at least the safeguard that an elected government will be more wary of invoking such laws.

Part III of the Bill deals with "unlawful disclosure", and aims at punishing disclosure rather than the "theft" of any secrets. Mr President, as I have said earlier, a government may well have information the disclosure of which would endanger the safety of the community, and it is legitimate to protect it. But we cannot use this as the pretext to apply criminal sanction to all kinds of government information and all kinds of disclosure. In an age when openness, transparency and accountability are taken as principles of government, non-disclosure has to be justified according to very stringent criteria.

It is relevant to consider the closely related question of public interest immunity. The modern development of the law is that a government official can only refuse to disclose a document on specific grounds, and not merely because it belongs to a particular class of documents. The particular harm to the public interest, if the information is disclosed, has to be specified. Usually, a court deciding on a question of public interest immunity will be balancing the public interests involved. It is seldom the case that public harm, or public interests is all to one side.

Yet Part III seeks to protect six categories of information subject only to what is called a "harms test" in some of the categories. Provided it can be established that the disclosure "causes damage" or the information is of "such a nature that its unauthorized disclosure would be likely to" cause such damage, a person making such a disclosure would be guilty of an offence. There are no provisions for any mechanism of balancing the different interests that may be involved, such as the interests of openness and transparency, and the public's right to know.

Apart from defence information, and the disclosure of security and intelligence information by the staff of these services, I see no necessity in

prohibiting non-disclosure by criminal sanction of any other categories of information. In my view, much of Part III of the Bill is an unnecessary restriction on the disclosure of information in the possession of government officials, and should not be there at all.

The Bills Committee has taken a very moderate approach with the Bill from the start. With respect to Part II, major amendments have to be made to clause 3 before it can be accepted at all. But with respect to Part III, the main amendments are only to put in a public interest defence and a "prior disclosure" defence. The public interest defence enables the court to do the balancing exercise the court already considers proper and entirely viable in relation to public interest immunity claims. The defence of prior publication, so that a person is not guilty if what he discloses has already been published, is, in my view, just a variation of the theme of balancing public interests.

Mr President, the Bills Committee was told, from the start, that the Administration will make no changes to the Bill for fear of upsetting an understanding with China that the enactment of the Bill, as is, would sufficiently take care of legislation against "theft of state secrets" under Article 23 of the Basic Law. However, for all the reasons I have stated, the Bill's provisions expose the individual to very grave dangers of being unjustly convicted of serious offences, and unjustifiably restrict the freedom of information. We cannot in conscience allow this to happen. We have to do our best at least to prevent the worse harm by narrowing down the offences and putting in the appropriate safeguards. It is only in anticipation of the amendments that the Honourable Miss Christine LOH will move at the Committee stage on behalf of the Bills Committee that I support the Second Reading of the Bill.

Thank you, Mr President.

MR JAMES TO (in Cantonese): Mr President, I am glad to be able to listen to Miss Margaret NG's speech. I am totally in agreement with her views. I just want to share with you a few particular points. I believe that this is still an assembly that talks sense, a place where better and stronger points are used to

convince each other.

Firstly, just now Miss NG mentioned that the enactment of the United Kingdom Act, especially clause 3, was effected in a totally different social context when the great war was imminent. Apparently consideration was given to the condition at that time or the threat England was subject to and the appropriate corresponding measure to be taken. Similarly, for example, in view of the rampant corruption in Hong Kong 20 years ago, draconian laws which give extensive power to the ICAC were appropriate. However, now, 20 years later, we have already conducted a review, and in 1995 we put many of our laws back onto the right track to meet the needs of the era. Amongst such laws is the enactment of the Bill of Rights and other enactment that meet the needs of an open society.

I feel that it is very irresponsible of the PATTEN Administration if it allows Hong Kong to be subject to such draconian laws, and what is more, allows such laws to remain for use by the Special Administrative Region (SAR), only for the one single reason that we can only localize our laws but not carry out comprehensive review. This will be one of the two shameful acts of PATTEN's office here. The first one is that this law is against many parts of the Bill of Rights, and imposes great restriction on freedom of press and information, and there are too many contradictions. The other one is that, as far as I know, he is adamant in rejecting the introduction of a system whereby interception of communication is subject to the control of the court.

If the originally drafted Bill were to passed, we would be thrown back to the era of the 1950s and 1960s when the Special Branch would resort to brutal means and long-term imprisonment to counter people with a dissenting voice. There is a definite possibility that such a scenario will be repeated. Why do I say so? Let us look closely at clause 8. This seems to be a very simple clause which says that the police may apply to the Governor for a warrant, requiring a person to provide information. However, you may not have seen the trick behind. It is actually the sort of provision under which, decades ago, the police might invite you for questioning, and then you were told that you were suspected of being a spy or something. Whether it was at Mount Davis or any other places,

if you were required to lay bare or provide any information, but you did not comply, you would be kept in detention. That might be a permanent or long-term imprisonment or even disappearance. In that case, no one could have any inkling whether you were alive or dead. If you refused to give a response, they would say that you might be involved in an offence under clause 8(4), and they could further exercise the power of arrest. They would then keep you under arrest until you provide the information.

In our present society, we do not have the defence of public interest, and this leads to an anomaly. Think of the American situation: the reporter who unveiled the Watergate scandal could be put in prison under this law of Hong Kong. We may not have the democratic mechanism to deter the President or the prosecutor from instituting any prosecution. In fact, this poses great restriction and threat to the media. It is inconceivable to me that today the Administration can still agree to the Governor issuing orders that will take away a person's right to remain silent. I am astonished that, given our social environment, the Administration can agree to such a provision. Even in the Organized and Serious Crime Ordinance, we spent more than two years arguing that if we were to take away a person's right to remain silent, and that evidence was not given by he himself but by others, there must be put in place all procedural and legal safeguards. Now I am really astonished that clause 8 is so drafted to give the Governor such a power.

In fact, the provision about search warrants in clause 11 is greatly different from the provision of clause 8. If a search is to be conducted, application must be made to a magistrate for a search warrant, whereas with clause 8, a person can be stripped of his right to remain silent by the Governor. How inconceivable this is! If you said this was out of the interest of national security, I can cite you more examples of countries, including the CIA of America, where they have legislation that give the necessary authority for the exercise of such power. In Canada, an application to the court is required for the authority to exercise such power as tapping, detention for questioning and the stripping of the right to remain silent. It is unthinkable to me that Hong Kong can be so different. There can only be one answer: in the past it was colonial law and as such it could remain so. However, at this point in time, it is unthinkable that such law can still be allowed.

On the other hand, some parts, as Miss Margaret NG has referred to, are drafted too wide. The presumption provisions are examples. It is common

knowledge that if you get in contact with consular officials, or even discuss such matter at consular residence or at a cocktail party, be it in Hong Kong or anywhere in the world, we believe such thing must have happened in Hong Kong, you are netted for information collection. We should not think that all spies are special people like "007"; they are just people quietly doing information collection. In fact, they may be involved in any intelligence work. If we make presumption of any contact, we are presuming that there is an exchange of information, and an exchange of information could mean that we are engaged in acts that may do harm to national security and could be convicted. Where is the reason in such laws? How can such laws go into our statute book?

Miss NG also said that presumptions could be made of her past acts, ways, character or past conduct. I feel that this is very dangerous. The coverage of the clause includes investigation made in respect of crimes. If a person is to divulge any information, we already have the law that targets at any act that may obstruct the course of justice or collude to obstruct the course of justice, and imprisonment may be imposed on those people who provide information to enable anyone to escape. There is also the power of arrest. In the law, there are already many such common law offences and offences provided by the Police Ordinance that can sanction such divulgence. However, if we say that we have no other means to prove each of the harm items, and that we have to rely solely on unlawful disclosure, it will be very dangerous.

Finally, I want to ask who will enforce the legislation. Are we saying that since both the British and Chinese governments have agreed on this offence and the word "superintendent" has been put there, the enforcement of Article 23 or all offences shall be effected by the Royal Police or the future Police Department of the SAR? As far as I know, the Chinese side is studying a certain proposal and some members of the Preparatory Committee have said the Special Branch be re-established again. This agency has given us too horrible a memory. We believe that national security should only be enforced by people, but at the moment when nothing is made clear, if we are to give the authorities such great power, and the law is so harsh and the coverage is so wide, and such law is to apply to our modern society, I feel that that would pose too great a danger and threat to human rights and liberty. I hope that we are all talking sense. I therefore have to take a few minutes to share with you my worries, hoping that you can vote rationally.

MR RONALD ARCULLI: Mr President, I have listened to the Chairman of the Bills Committee, the Honourable Miss Christine LOH, and I simply would like to put the record straight — if she has in fact done so when I was out of the room then I do apologize — and that is, as far as the Liberal Party is concerned, we made it quite clear at the Bills Committee that we support the Bill and not the amendments, and I will therefore like to spend just a couple of minutes explaining why we are doing that.

Firstly, what I would like to do is to ask Members to consider what is the purpose of the Bill. In a word or in a sentence, the purpose of the Bill is to really protect Hong Kong and for the moment, for the next couple of weeks, I imagine, to protect the United Kingdom which I doubt very much would need protection as far as we are concerned, but there may well be some dark secrets lurking around in the corridors of the administrative offices of the Hong Kong Government that the United Kingdom Government may wish to prevent disclosure of. Whether that is so or not I really have no idea, but that is certainly a possibility.

What the Bill seeks to do is really to protect Hong Kong's interest in two areas. One I imagine is what we would call, again, spying, and two, the more general phrase "unlawful disclosure of confidential information". As far as spying is concerned, the section in the Bill sets out relatively broadly and clearly as to what will happen if information which is prejudicial to the interests or safety of Hong Kong is in fact obtained by any individual. And I must say that on first reading, some of the concerns that we have heard here this afternoon are probably not, I would say, totally wild in the sense that if you approach a prohibited place with a certain intention. But if you simply look at it on the basis that the offence is completed by simply approaching a prohibited place without looking at the other elements that are required under section 3, then of course there is great cause for alarm. But that is not the case. In order to establish successfully a prosecution of espionage against any individual, other elements will have to be complied with as well.

In terms of the Bill, we are told that this is a localization of English acts right now, and the Honourable James TO has very eloquently explained why he thinks that we should not blindly follow English law in this particular area, although it was alright for us to blindly follow English law in, I guess, 99.9% of the time.

But I would ask those Members who actually sit on the Mutual Legal Assistance Bills Committee to actually compare the assistance we are asked to give, let us say to a country like the United States, in terms of a treaty that has been signed by the Hong Kong Government and the Government of the United States — and in fairness this will have to be subject to ratification by both legislative bodies — whether or not it will be done in Hong Kong, of course, is still an open question because we are still considering in detail the terms of the Bill. But a mutual legal assistance agreement between two territories actually gives quite a wide scope and in some instances, in my view, unacceptably wide scope for foreign governments to pray in aid the terms of the agreement to carry out investigations. And the word "investigations" is used in the normal sense of the word, Mr President, not trying to get evidence to support a criminal charge or a criminal trial.

We are told that the word "investigations" is necessary simply because in non-common law jurisdictions their methodology of doing things are a little different. So, in some ways there is a sort of inconsistent position *vis a vis* the current Bill that we are considering right now and indeed the Mutual Legal Assistance Bill. I do not want to speak too much on the Legal Assistance Bill but if the agreement with the United States is ratified by this Council then United States authorities can come and make enquiries or make investigations about tax matters in Hong Kong, about foreign exchange control matters in Hong Kong, about customs duties or other revenue matters. So, the scope is extremely wide. So, I think on the one hand we are trying to protect Hong Kong's interests, but on the other we seem to be giving it away in some other form.

But be that as it may, I would like to come back to the Official Secrets Bill. The other area that we find unacceptable and, perhaps I would not say alarming, but of some concern to Liberal Party really, is the introduction of the defences of public interest or prior disclosure. As far as public interest is concerned, I think in a different context we have had a run-in with the Administration recently when the Chief Secretary claimed public interest immunity against disclosing the Operations Review Committee Report to the Select Committee when enquiring into the departure of the former Director of Immigration, Mr Lawrence LEUNG.

So, I think it is areas like public interest and prior disclosure that we are quite familiar with, and indeed in terms of the justification for that it seems to me that, well, if it is in the public interest to disclose it, well, it should come out on the one hand. On the issue of prior disclosure, but since someone else has already disclosed it, what is wrong with talking about it a second time? Well, if life were actually that simple then I perhaps would not be objecting to those defences as strongly as I am. But it seems to me that with the introduction of these two elements, Mr President, whatever protection we seek to try and give Hong Kong under the Official Secrets Bill, or Ordinance if passed, you could literally drive a horse and coach through it. So, is that what we really want, I think as far as Hong Kong is concerned? And I think in terms of the amendments, therefore, Mr President, I respect the views that my colleagues have expounded on and have elaborated on, and I certainly respect the hard work that they have put in. I accept that their views are genuine, but despite that, I think on this particular occasion, I regret to say that we have to agree to disagree.

SECRETARY FOR SECURITY: Mr President, the Official Secrets Bill was introduced into the Legislative Council for its First and Second Readings on 18 December 1996.

The Bill seeks to localize the provisions of the United Kingdom Official Secrets Acts which currently apply in Hong Kong. These Acts will cease to apply in Hong Kong on 1 July 1997; we thus need to introduce local legislation to replace them. This is the so-called localization of laws programme of which Honourable Members are familiar and have indeed, under this programme, passed many Bills in the past.

Honourable Members of this Council have in the main expressed broad support for the need for local legislation to protect official secrets. There is no question that certain kinds of official information must be protected from illegal acts and unlawful disclosure.

We have addressed this problem in a manner which gives us certainty and security, through the continuity of the localized legislation. We have modelled the Bill on the Official Secrets Acts themselves, modified to reflect local circumstances. The Bill deals with two broad categories of offences: espionage

and the unlawful disclosure of information. As regards unlawful disclosure, the Bill covers six key areas of information. These are: security and intelligence, defence, international relations, information obtained in confidence from other states or international organizations, crime and special investigations under statutory warrants. We have deliberately defined these areas in narrow terms, so that the unlawful disclosure of information concerning one of these areas would, in itself, cause or be likely to cause substantial harm to the public interest.

We have proposed to amend or remove various other provisions in the Official Secrets Acts which are either covered in other legislation, or are outdated, or which are not in line with current Hong Kong legislative practices. These changes have been generally accepted by the Bills Committee and, I believe, would be welcomed by Honourable Members.

The Bill I introduced into this Council in December last year is one that will provide continuity through 1 July 1997 and beyond. It is based largely on current legislative practices, grounded in the common law system, and was agreed by the Chinese side of the Joint Liaison Group after detailed discussions, so that its provisions will provide a familiar and reasonable foundation for the future. This is a particularly important consideration when we bear in mind that the Bill encompasses that part of the provisions in Article 23 of the Basic Law, that the Hong Kong Special Administrative Region (SAR) shall enact laws on its own to prohibit, *inter alia*, the theft of state secrets. The Bill as it stands will require minimal adaptation in order for the SAR to fulfil this requirement, thus providing the continuity that we all desire.

Members of the Bills Committee studying this Bill have given it searching and comprehensive scrutiny, for which I am grateful. The discussion in the Bills Committee has already focused our attention on the aims and purposes of the Bill, and has reinforced the consensus that these aims and purposes in their broad sense are entirely correct and appropriate. However, Members of the Bills Committee have raised concerns about some key aspects of the Bill which are the subject of various amendments to be introduced at the Committee stage by the Honourable Miss Christine LOH.

The key elements of these amendments concern clause 3 of the Bill dealing with espionage; the threshold criteria for a harm test; and proposals to introduce

the defences of public interest and prior disclosure.

Section 3 of the Bill as it stands is based on well-established law, as are the criteria in the Bill for establishing whether harm has ensued from any particular act. For the record, it is not and has never been the Administration's intention to propose a law which would restrict a person's rights and freedoms to act in a lawful and socially acceptable manner, within the norms already well-established in our society. Specifically, in response to a question asked by the Bills Committee, I can confirm that it has never been our intention to limit the existing practices for public meetings and public processions in any place — and not merely in the vicinity of a "prohibited place" — by the provisions in the Official Secrets Bill. For these reasons, the Administration find the need for amending clause 3 and the harm tests in the Bill to be at least questionable and, indeed, could be counterproductive.

We also do not accept that there is any justification for the proposed public interest and prior disclosure defences. The six areas of protected information prescribed under the Bill are narrowly defined on the basis that any disclosure of such information would, of itself, be damaging to the public interest. To therefore include a defence allowing that such a damaging disclosure is in the public interest is self-contradictory. Similarly, we consider the proposed prior disclosure defence to be unjustified. Any disclosure, in its particular circumstances, of the prescribed types of information could have the potential of damaging the public interest. Consequently, every such disclosure should be judged by the Courts within its own circumstances, and not by whether or not there has been prior disclosure.

Let me make it clear again that the Bill is a piece of localizing legislation. While we have amended, as necessary, various provisions of the Official Secret Acts to take account of local circumstances, it is not the occasion to undertake a comprehensive review of the official secrets legislation. We do not consider that such a comprehensive review is either necessary or appropriate for a localization of laws exercise. The Administration therefore do not support any of the proposals now before us which seek to amend the Bill substantially. If the key Committee stage amendments are adopted, it will throw open the future of the

whole Bill, and there is no guarantee that such a Bill will survive the change of sovereignty. The law in this sensitive area will then be left in a state of uncertainty, and the future SAR legislature may then be left with no option but to re-open the whole issue soon after 1 July 1997. We strongly believe that this would not be in the best interest of Hong Kong. Therefore, the Administration can only support the Bill essentially as it was first introduced into this Council on 18 December 1996.

Thank you, Mr President.

Question on the Second Reading of the Bill put and agreed to.

Bill read the Second time.

Bill committed to a Committee of the whole Council pursuant to Standing Order 43(1).

~~**INLAND REVENUE (AMENDMENT) (NO. 2) BILL 1997**~~

Resumption of debate on Second Reading which was moved on 30 April 1997

Question on the Second Reading of the Bill put and agreed to.

Bill read the Second time.

Bill committed to a Committee of the whole Council pursuant to Standing Order 43(1).

REGISTERED DESIGNS BILL

Resumption of debate on Second Reading which was moved on 19 March 1997

MR CHAN KAM-LAM (in Cantonese): Mr President, as Chairman of the Bills Committee on Registered Designs Bill, I wish to report to the Honourable Members the deliberations of the Bills Committee.

~~deleting "or" wherever it appears and substituting "或";~~

(v) in the Chinese text, by deleting paragraphs (a)(iii) and (b)(iii) and substituting in both cases -

"(iii) 加入 -

"(e) 《民眾安全服務隊條例》(1997年第 號)所指的民眾安全服務隊隊員,";";

(vi) in the Chinese text, by deleting paragraph (c) and substituting -

"(c) 在第(3)款中 -

(i) 廢除"或基要服務團"而代以"、基要服務團或民眾安全服務隊";

(ii) 廢除"或服務團"而代以"、服務團或民眾安全服務隊"。".

Question on the amendment put and agreed to.

~~*Question on Schedule 2, as amended, put and agreed to.*~~

OFFICIAL SECRETS BILL

Clauses 1, 4, 7, 10, 17, 19, 21 and 23 to 28 were agreed to.

Part II Heading before clause 2, clauses 2, 3, 5, 6, 8, 9 and 11

MISS CHRISTINE LOH: Mr Chairman, I move that Part II Heading before clause 2, clauses 2, 3, 5, 6, 8, 9 and 11 be amended as set out under my name in the paper circularized to Members.

All the amendments are proposed by the Bills Committee to improve and modernize the Bill, and also in order to prevent possible abuse. I have covered the major amendments to clauses 3, 8 and 11 in respect of the offence of espionage in my earlier speech at the resumption of Second Reading debate, and I will not repeat them here. The proposed amendment to clause 3 is most important because it incorporates the requirement of a specific intent for the offence. Clause 3, as it now stands in the Bill, is too broad, vague and loose.

Let me now turn to the other proposed amendments. The Bills Committee considers that an amendment to the Part II Heading before clause 2 is necessary because some clauses in Part II, such as clause 6(1)(b), are not related to espionage. Whilst a heading has no legal effect, we think it would be better to amend it appropriately to "ESPIONAGE AND OTHER MATTERS".

In clause 2, a definition of "defence" is added along the same lines as that in clause 12 under Part III on Unlawful Disclosure.

The other amendments are mainly for the purpose of consistency and modification for clarity.

Mr Chairman, maybe I can just spend one minute responding to a question raised by the Honourable Ronald ARCULLI in the Second Reading debate. He said that as Chair of the Bills Committee, I might not have properly highlighted the reservations of the Liberal Party. The reason that I did not do that was that every time we took the vote, the Liberal Party members were never there. So when I took a look at the support, each one of them was unanimous at the time the decision was taken. Thank you.

Proposed amendments

Part II Heading before clause 2

That Part II Heading be amended, by deleting "ESPIONAGE" and substituting "ESPIONAGE AND OTHER MATTERS".

Clause 2

That clause 2 be amended, by adding before the definition of "document" —

""defence" (防務) means -

(a) the size, shape, organization, logistics, order of battle, deployment, operations, state of readiness and training of the armed forces;

(b) the weapons, stores or other equipment of the armed forces and the invention, development, production and operation of such equipment and research relating to it;

(c) defence policy and strategy and military planning and intelligence;

(d) plans and measures for the maintenance of essential supplies and services that are or would be needed in time of war;".

Clause 3

That clause 3 be amended —

(a) by deleting subclause (1) and substituting -

" A person commits an offence if he, with intent to harm the defence of the United Kingdom or Hong Kong -

(a) approaches, inspects, passes over or enters a prohibited place;

(b) makes a sketch, plan, model or note that is calculated to be or is intended to be directly or indirectly useful to an enemy; or

(c) obtains, collects, records or publishes, or communicates to any other person, any secret official code word or password, or any sketch, plan, model or note, or other

document or information, that is calculated to be or is intended to be directly or indirectly useful to an enemy.".

(b) by deleting subclauses (2), (3), (4) and (5).

Clause 5

That clause 5 be amended —

(a) in subclause (1) by deleting "for any other purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong -" and substituting "with intent to harm the defence of the United Kingdom or Hong Kong -".

(b) by deleting subclause (2).

Clause 6

That clause 6 be amended —

(a) in subclause (1)(a) by deleting "for any purpose prejudicial to the safety or interests of the United Kingdom or Hong Kong" and substituting "with intent to harm the defence of the United Kingdom or Hong Kong".

(b) in subclause (1)(b) by adding "without lawful authority or excuse," before "allows any other person".

(c) by deleting subclause (2).

Clause 8

That clause 8 be amended —

(a) by deleting subclause (1) and substituting -

" (1) (a) A superintendent of police may, for the

purpose of an investigation into an offence under section 3, make an ex parte application to a magistrate for an order under paragraph (b) in relation to a person whom he reasonably believes to be able to furnish information as to the offence.

(b) A magistrate may, if on such an application he is satisfied that there is -

(i) reasonable ground for suspecting that an offence under section 3 has been committed; and

(ii) reasonable ground for believing that the person is able to furnish information as to the offence or suspected offence,

make an order complying with subsection (2) in respect of the person to whom the application relates.".

(b) in subclause (2) by deleting "If the Governor grants the permission mentioned in subsection (1), the Commissioner of Police may authorize" and substitute "The order under subsection (1)(b) shall authorize".

(c) by deleting subclause (3) and substituting -

" (3) (a) Where the Commissioner of Police has reasonable ground to believe that the case is one of great emergency and in the interest of the United Kingdom or Hong Kong immediate action is necessary, he may authorize in writing a superintendent of police, or any police officer not below the rank of inspector to exercise the powers mentioned in subsection (2) without

applying for an order of a magistrate.

(b) Where the Commissioner of Police has so authorized a superintendent of police or other police officer under paragraph (a), he shall within 48 hours of granting such authorization, apply to a magistrate for an order to be made under subsection (1)(b).

(c) If an application under paragraph (b) is refused, the Commissioner of Police shall as soon as practicable stop any action being or to be taken pursuant to his authorization under paragraph (a) and destroy any information obtained.".

(d) in subclause (4), by deleting "authorization under subsection (2)" and substituting "order under subsection (2) or authorization under subsection (3)(a)".

(e) in subclause (5), by deleting "authorization under subsection (2)" and substituting "order under subsection (2) or authorization under subsection (3)(a)".

(f) in subclause (6), by deleting "authorization under subsection (2)" and substituting "order under subsection (2) or authorization under subsection (3)(a)".

Clause 9

That clause 9(3) be amended, by deleting "prejudicial to the safety of the United Kingdom or Hong Kong" and substituting "harmful to the defence of the United Kingdom or Hong Kong".

Clause 11

That clause 11 be amended —

(a) in subclause (2), by deleting "Where it appears to a superintendent of police" and substituting "Where a superintendent of police has reasonable ground to believe".

(b) by adding -

" (3) Where a superintendent of police has exercised his power under subsection (2), he shall, within 48 hours of exercising such power, apply to a magistrate for a search warrant to be granted under subsection (1).

(4) If an application under subsection (3) is refused, the superintendent of police concerned shall as soon as practicable stop any action being or to be taken pursuant to his order under subsection (2) and cause anything seized pursuant to the order to be surrendered to a magistrate who shall have the power to make an order for its disposal.".

MR RONALD ARCULLI: Mr Chairman, I beg to disagree with the Honourable Miss Christine LOH but I do not think we should really waste any time arguing the point. I remember at one meeting when we discussed the breadth of the clause 3 amendment and I said that we were basically on different planets and there was no purpose for my staying behind. Maybe she did not recall my rather emotive language.

MISS MARGARET NG: Mr Chairman, I cannot stay silent about what the Honourable Ronald ARCULLI said on behalf of the Liberal Party opposing the amendments. He did that in the Second Reading debate. With respect, his points are based on some grave misapprehensions about a number of things.

First, spying. He said that if the elements were just the purpose and the act of approaching a prohibited place he would be concerned, but he believes that

there are "other elements". Mr Chairman, there are no other elements. All my honourable friend has to do is to read clause 3(1)(a) again. Therefore, Mr ARCULLI and his Liberal Party ought to be concerned as we are.

Second, my honourable friend refers to the Mutual Legal Assistance Bill which is currently being scrutinized in the Bills Committee. May I say there again the Administration proposes wide powers. The Bills Committee seeks to narrow them down and place safeguards, especially where such rights as the right of silence and again self-incrimination are concerned. Our approach is consistent. Indeed, in that Bills Committee my honourable friend's position is with us. It is he who is being inconsistent.

Third, on the public interest defence my honourable friend expresses .....

MR RONALD ARCULLI: May I ask the Honourable Member through you, Mr Chairman, when she referred to "he is with us", who is "us"? Is that the Government or is that the honourable Member herself and the Royal Prerogative?

MISS MARGARET NG: Mr Chairman, I refer to the Bills Committee of the Mutual Legal Assistance Bill. I apologise if I have been unclear. I am not yet in the habit of using the Royal plural!

Third, on the public interest defence, my honourable friend expresses alarm on the basis of how he saw the public interest immunity as used by the Chief Secretary in the Select Committee. He says it shows that the use of a public interest immunity would "drive a horse and coach through it". This is very bewildering. Mr ARCULLI is a Member of this Select Committee. He is aware of its stance and decision, as indeed are Members of this Council and the public, and that is the Chairman of the Select Committee does not accept the very wide way in which the Chief Secretary proposed to claim public interest immunity. He ruled against her claim. She accepted it and produced the document in question. This illustrates precisely the balance of interest. This example supports the appropriateness of a public interest defence, not cast doubt on it as my honourable friend argues.

In sum, none of the reasons set out by Mr Ronald ARCULLI on behalf of the Liberal Party can stand. They have no valid grounds for opposing the amendments. I urge them to change their minds.

Mr Chairman, with the amendments, the Bill is one we can live with now and seek to improve later. Without the amendments, the enactment of this Bill will be an unmitigated disaster for the people of Hong Kong. Thank you, Mr Chairman.

MR JAMES TO (in Cantonese): Mr Chairman, it seems that this amendment will be beaten, but it is beaten by the June 4 Gathering, as many Members have already left. Anyway, I hope that those Members who remain can support this amendment. Today is June 4, a very sad day. We commemorate those Beijing students killed in the June 4 massacre. Dr The Honourable Samuel WONG, my good friend who used to sit next to me here, passed away today. It is also a day when we are thrown back in our laws and system to the dark old days of the 1980s when the former Special Branch operated with arbitrary power. If there could be hope, then the hope, some might say, would be that Mr TUNG, the Chief Executive and his government would not, or when Mrs Anson CHAN was locked in disagreement with him or begged him for mercy, he would not exercise those powers ruthlessly.

Mr Chairman, if these amendments were not passed today, but the whole Bill was passed, I feel that Mr Chris PATTEN would find himself in great shame. The British Government's exit from Hong Kong would be marred by great shame. What he would leave behind for the colonial government, and the SAR Government are the dictatorial power of the former colony. I hope that those Members who oppose the amendments but allow the original provision to pass can do something in future for this society so as not to allow the Government abuse this power, otherwise we shall be in a dark age. That is what I want to say.

MR IP KWOK-HIM (in Cantonese): Mr Chairman, the Democratic Alliance for the Betterment of Hong Kong (DAB) has not taken part in the work of the Bills Committee studying this Bill because the DAB is of the view that the introduction of this Bill is to localise the 1989 Official Secrets Act to be in time for the handover on 1 July 1997 and the official implementation of the Basic Law.

We are very clear that since 1992 when the Privy Council ordered that the 1989 Official Secrets Act be applicable to Hong Kong, there are problems here in

Hong Kong. However, we also see that up to now, there is nothing in the intervening period that shows that this Act is doing Hong Kong any harm. We must also see, and admit, that this Ordinance is enacted under the historical context of 1920 and 1939. It is therefore understandable, and there is also an actual need, that appropriate amendment has to be made to this Ordinance. But the DAB considers that such complex and important amendments must be made with reference to the Basic Law, and the more appropriate and practical way to go about with such amendment is to leave it to the first Legislative Council in 1998 after it has conducted extensive consultation and has considered the actual condition at that time. Only then will there be an Official Secrets Ordinance that is appropriate for the condition then.

These are my remarks and I support the original Bill of the Administration and oppose any amendment.

MR LEUNG YIU-CHUNG (in Cantonese): Mr Chairman, I originally did not intend to speak, but after listening to the Honourable IP Kwok-him's speech, I find it hard to accept his view. They did not join the Bills Committee of this Bill, but they say that any amendment would only be appropriate after extensive consultation is conducted in 1998.

In fact, why do they still sit on the Legislative Council? They act like this on a number of ordinances. If consultation is to be conducted in 1998, then they can now give up their job as Councillors. If they want to be Councillors, there are a lot of jobs to do. Carrying out consultation is your duty. You do not tell us now that it is very complex, and leave it to be done in 1998. Are you not a Legislative Councillor? I feel that they are very pathetic. While occupying a position here, they say that they should not do this. How can you be accountable to the public? Now, people pay us to take up this position, and to do this job. How can we be accountable to them? Mr James TO and I have the same feeling: Today, June 4, is an unhappy day. If this amendment cannot be passed, it is very pitiable.

I was to host a talk at the Victoria Park, but I did not go. I want to stay here because it is my responsibility to support the amendment of the Honourable Miss Christine LOH. It is my responsibility, and I have joined the Bills Committee and consulted many of my friends. They all think that it is an important issue. I shall therefore perform my duty and act like a Councillor and do what I should do.

Mr Chairman, these are my remarks.

SECRETARY FOR SECURITY: Mr Chairman, the Administration is opposed to the Committee stage amendments proposed or will be proposed by the Honourable Miss Christine LOH for the reasons that I have explained in my Second Reading debate speech. I have nothing further to add, Mr Chairman.

MISS CHRISTINE LOH: Mr Chairman, it is with great regret that many people who supported the Bill will not be here to vote for the Bill tonight.

Question on the amendments put.

Voice vote taken.

CHAIRMAN (in Cantonese): This Committee will now proceed to a division.

CHAIRMAN (in Cantonese): I would like to remind Members that they are now called upon to vote on the question that the amendment moved by the Honourable Miss Christine LOH in respect of the Heading of Part II, clauses 2, 3, 5, 6, 8, 9 and 11 be approved.

Will Members please register their presence by pressing the top button and proceed to vote by choosing one of the three buttons below?

CHAIRMAN (in Cantonese): Before I declare the result, Members may wish to check their votes. Are there any queries? The result will now be displayed.

Mr Martin LEE, Dr LEONG Che-hung, Mr Frederick FUNG, Mr Michael HO, Dr HUANG Chen-ya, Mr LEE Wing-tat, Mr Fred LI, Mr James TO, Mr WONG Wai-Yin, Miss Christine LOH, Mr Andrew CHENG, Dr Anthony CHEUNG, Dr LAW Cheung-kwok, Mr LEUNG Yiu-chung, Mr Bruce LIU, Mr MOK Ying-fan,

Miss Margaret NG, Mr SIN Chung-kai, Dr John TSE, Mrs Elizabeth WONG and Mr YUM Sin-ling voted for the amendments.

Mr Allen LEE, Mrs Selina CHOW, Dr David LI, Mr NGAI Shiu-kit, Mr LAU Wong-fat, Mr Edward HO, Mr Ronald ARCULLI, Mrs Miriam LAU, Mr Eric LI, Mr Henry TANG, Dr Philip WONG, Mr Howard YOUNG, Mr CHAN Kam-lam, Mr CHAN Wing-chan, Miss CHAN Yuen-han, Mr Paul CHENG, Mr CHENG Yiu-tong, Mr CHEUNG Hon-chung, Mr CHOY Kan-pui, Mr IP Kwok-him, Mr Ambrose LAU, Mr LEE Kai-ming, Mr LO Suk-ching and Mr NGAN Kam-chuen voted against the amendments.

THE CHAIRMAN announced that there were 21 votes in favour of the amendments and 24 votes against them. He therefore declared that the amendments were negatived.

The original Part II heading before clause 2, clauses 2, 5, 6, 8, 9 and 11 were agreed to.

Clauses 12 to 16, 18, 20 and 22

MISS CHRISTINE LOH: Mr Chairman, I move that clauses 12 to 16, 18, 20 and 22 be amended as set out under my name in the paper circularized to Members. All the proposed amendments in these clauses are in relation to the offence of unlawful disclosure, so you can all redeem yourselves in this section even if you did not vote for our amendment last time.

As I have explained in my earlier speech at the resumption of Second Reading debate, the proposed amendment to clause 13 is to incorporate a harms test. The amendment to clause 22 is to incorporate a public interest defence. The proposed amendments in other clauses are mainly for the purpose of consistency and modification for clarity.

Proposed amendments

Clause 12

That clause 12(1) be amended, by deleting the definition of "defence" and substituting —

""defence" (防務) has the meaning assigned to that term by section 2(1);".

Clause 13

That clause 13 be amended —

(a) in subclause (1) by deleting "discloses" and substituting "makes a seriously damaging disclosure of".

(b) by adding -

" (1A) For the purposes of subsection (1), a disclosure is seriously damaging if -

(a) the disclosure causes serious damage to the work of, or any part of, the security or intelligence services;

(b) the information, document or article in question is of such a nature that its unauthorized disclosure would be likely to cause such serious damage; or

(c) the information, document or article in question falls within a class or description of information, documents or articles the unauthorized disclosure of which would be likely to have that effect.".

(c) in subclause (3), by deleting "that the information, document or article in question related to security or intelligence." and substituting -

"that -

(a) the information, document or article in question related to security or intelligence; or

(b) the disclosure would be seriously damaging within the meaning of subsection (1A).".

Clause 14

That clause 14 be amended —

(a) in subclause (1), by adding "seriously" before "damaging disclosure".

(b) in subclause (2) -

(i) by adding "seriously" before "damaging";

(ii) in paragraph (a), by adding "serious" before "damage";

(iii) in paragraph (b), by adding "serious" before "damage".

(c) in subclause (3)(b), by adding "seriously" before "damaging".

Clause 15

That clause 15 be amended —

(a) in subclause (1), by adding "seriously" before "damaging disclosure".

(b) in subclause (2) -

(i) by adding "seriously" before damaging";

(ii) in paragraph (a), by adding "seriously" before "damages";

(iii) in paragraph (c), by adding "seriously" before "endangers" where it twice appears.

(c) in subclause (3)(b), by adding "seriously" before "damaging".

Clause 16

That clause 16 be amended —

(a) in subclause (1), by adding "seriously" before "damaging disclosure".

(b) in subclause (2) -

(i) by adding "seriously" before "damaging";

(ii) in paragraph (a) -

(A) by adding "seriously" before "endangers" wherever it appears;

(B) by deleting ", seriously obstructs the promotion or protection by the United Kingdom or Hong Kong of those interests".

(c) in subclause (4)(b), by adding "seriously" before "damaging".

Clause 18

That clause 18 be amended —

(a) in subclause (3), by adding "seriously" before "damaging" wherever it appears.

(b) in subclause (4) -

(i) by adding "seriously" before "damaging";

(ii) by adding "person or" before "public servant";

(iii) by adding "13," before "14".

Clause 20

That clause 20 be amended —

(a) in subclause (1), by adding "seriously" before "damaging" wherever it appears.

(b) in subclause (4) -

(i) by adding "seriously" before "damaging";

(ii) by adding "person or" before "public servant";

(iii) by adding "13," before "14".

Clause 22

That clause 22 be amended, by adding —

" (10) It is a defence for a person charged with an offence under subsection (1), (4), (5) or (6) to prove that it was in the public interest for him to do or fail to do the act which is the subject matter of the charge.".

Question on the amendments put.

Voice vote taken.

THE CHAIRMAN said he thought the "Noes" had it.

CHAIRMAN (in Cantonese): Committee will now proceed to a division.

CHAIRMAN (in Cantonese): I would like to remind Members that they are now called upon to vote on the question that the amendment moved by the Honourable Miss Christine LOH in respect of the Heading of Part II, clauses 2, 3, 5, 6, 8, 9 and 11 be approved.

Will Members please register their presence by pressing the top button and then proceed to vote by choosing one of the three buttons below?

CHAIRMAN (in Cantonese): Before I declare the result, Members may wish to check their votes. Are there any queries? The result will now be displayed.

Dr LEONG Che-hung, Mr Frederick FUNG, Mr Michael HO, Dr HUANG Chen-ya, Mr James TO, Mr WONG Wai-Yin, Miss Christine LOH, Mr Andrew CHENG, Dr LAW Cheung-kwok, Mr Bruce LIU, Mr MOK Ying-fan, Miss Margaret NG, Mr SIN Chung-kai, Dr John TSE, Mrs Elizabeth WONG and Mr YUM Sin-ling voted for the amendments.

Mr Allen LEE, Mrs Selina CHOW, Dr David LI, Mr NGAI Shiu-kit, Mr LAU Wong-fat, Mr Edward HO, Mr Ronald ARCULLI, Mrs Miriam LAU, Mr Eric LI, Mr Henry TANG, Dr Philip WONG, Mr Howard YOUNG, Mr CHAN Kam-lam, Mr CHAN Wing-chan, Miss CHAN Yuen-han, Mr Paul CHENG, Mr CHENG Yiu-tong, Mr CHEUNG Hon-chung, Mr CHOY Kan-pui, Mr IP Kwok-him, Mr Ambrose LAU, Mr LEE Kai-ming, Mr LO Suk-ching and Mr NGAN Kam-chuen voted against the amendments.

THE CHAIRMAN announced that there were 16 votes in favour of the amendments and 24 votes against them. He therefore declared that the amendments were negatived.

The original clause 12 to 16, 18, 20 and 22 were agreed to.

New clause 21A Public interest defence

New clause 21B Prior disclosure

Clauses read the First time and ordered to be set down for Second Reading pursuant to Standing Order 46(6).

MISS CHRISTINE LOH: Mr Chairman, I must express my disappointment that Members did not stay to vote for the second part of the Bill just now because the three parts of the amendments can stand on their own, and it is a pity that people decided to leave in such a great hurry.

I move now that new clauses 21A and 21B as set out under my name in the paper circularized to Members be read the Second time. The new clauses 21A and 21B are proposed by the Bills Committee to build in a public interest defence and a prior disclosure defence. I have given the Bills Committee's view on these new clauses in my speech at the resumption of Second Reading debate, and I will not go into in any further details.

I only wish to reiterate that these clauses are of vital importance for the protection of freedom of expression. I ask Members again in this Council to reconsider as a last go to support these two amendments which will still offer some improvement to the Bill as a whole.

MR JAMES TO (in Cantonese): Mr Chairman, we have a public interest defence. Our belief is that, as the Honourable Ronald ARCULLI said, we cannot allow a law enforcement agency to have the final power to decide what public interest is. The reason can be found in many examples. Even those law enforcement agencies, such as some intelligence and security agencies, that in law are said to have served the public well and are protective of public safety, can

betray the interest of the people and give no regard to such interest. For example, President CLINTON of the United States of America has to apologize to the blacks because the American government had carried out experiments, in which the blacks, after receiving a few hundred dollars, voluntarily (including those who had knowledge or did not have knowledge of what they were doing) allowing themselves to be "guinea pigs" for testing chemical and biochemical weapons.

Decades ago, the United States Administration at that time, including the President, National Security Advisor and the Director of the CIA, might consider that such acts were for the good of state security. Finally, when we reflect on the facts and the judgment of history and the people, even the present President has to give an apology for this. So are we asking too much if we let a judge or a third party to determine what public interest is? Can we feel at ease if we leave the determination of public interest in the hands of the executive? If it is so, then our Select Committee, including those of you who are about to vote, would challenge the decision of the Chief Secretary to disclose the reports of the ICAC and supervisory committee as revealed in the hearing of Mr LEUNG Ming-yin. I think that it is very important that we give the final adjudicating power to the court to balance what the public interest is.

I hope that all Members can clearly consider this issue. What we are discussing now is whether we should give our power of determination, even the power of disclosure, to the executive. Just like the Watergate example I cited, it was inconceivable to us that a President could be brought down by a journalist disclosing a piece of scandal of the President, or when an intelligence agency has done something wrong against the people, and without the defence of public interest, it would finally be sentenced by court to prison. Do you think this balance is appropriate and sufficient? The Honourable IP Kwok-him said there might be amendment in future. I sincerely hope that they will consider this view.

MR IP KWOK-HIM (in Cantonese): Thank you, Mr Chairman. I have listened carefully to the speech of the Honourable Mr James TO. However, I would like to reiterate here that the DAB is of the view that at the present stage, the Bill is for localization purpose. It is therefore our view that this Ordinance be given force after 1 July so that Hong Kong can have as soon as possible an Ordinance like this to implement the Basic Law.

As to the question on public interest, I have already said that it would be opportune to leave the review of this Ordinance to the first legislature of 1998.

Thank you, Mr Chairman.

Question on the Second Reading of the clauses proposed, put and negatived.

~~INLAND REVENUE (AMENDMENT) (NO. 2) BILL 1997~~

Clauses 1 and 3 to 8 were agreed to.

Clause 2

SECRETARY FOR THE TREASURY (in Cantonese): Mr Chairman, I move that clause 2 be amended as set out in the paper circularized to Members.

The 1997-98 Budget proposes to provide certainty in law in respect of the deduction in the assessment of profits of foreign withholding tax paid by a company on income which is subject to profits tax in Hong Kong. This deduction is made available by virtue of the current main deduction provision under section 16(1) of the Inland Revenue Ordinance. However, section 16(1)(c), as it stands at the moment, stipulates that deduction of foreign tax charged on interest income or the like derived from Hong Kong is allowed only for a corporation which is managed and controlled in Hong Kong. The restriction in respect of residency status is in conflict with our intention and casts doubt on the application of the general deduction provision in section 16(1) in respect of foreign withholding tax. We therefore proposed in the Amendment Bill to delete section 16(1)(c).

The Hong Kong Society of Accountants (HKSA) has pointed out to us that the deletion of section 16(1)(c) in its entirety may have the inadvertent effect of removing a deduction currently available in the law. We are grateful to its view and appreciate its concern. Instead of deleting the whole of section 16(1)(c), we consider that it should be adequate, for the purpose of providing certainty in law in the manner we intended, to just remove the reference "which is managed and controlled in Hong Kong" in that section. This arrangement has the support of the HKSA and Members who have shown their concern on the Amendment Bill.

had passed through Committee with amendments. She moved the Third Reading of the Bills.

Question on the Third Reading of the Bills proposed, put and agreed to.

Bills read the Third time and passed.

THE SECRETARY FOR SECURITY reported that the

AUXILIARY MEDICAL SERVICE BILL and

CIVIL AID SERVICE BILL

had passed through Committee with amendments. He moved the Third Reading of the Bills.

Question on the Third Reading of the Bills proposed, put and agreed to.

Bills read the Third time and passed.

THE SECRETARY FOR SECURITY reported that the

OFFICIAL SECRETS BILL

had passed through Committee without amendment. He moved the Third Reading of the Bill.

Mr James TO drew the President's attention to the lack of a quorum.

PRESIDENT (in Cantonese): Will the clerk please do a head count?

7.48 pm

PRESIDENT (in Cantonese): Because there is a lack of a quorum, I order that all Members be summoned back.

7.50 pm

A quorum was then formed.

PRESIDENT (in Cantonese): As a quorum has been formed, this Council shall resume dealing with the motion for a Third Reading moved by the Secretary for Security just now.

Question on the Third Reading of the Bill proposed, put and agreed to.

Bill read the Third time and passed.

~~THE SECRETARY FOR THE TREASURY reported that the~~

INLAND REVENUE (AMENDMENT) (NO. 2) BILL 1997

had passed through Committee with amendments. He moved the Third Reading of the Bill.

Question on the Third Reading of the Bill proposed, put and agreed to.

Bill read the Third time and passed.

THE SECRETARY FOR TRADE AND INDUSTRY reported that the

~~**REGISTERED DESIGNS BILL**~~