OFFICIAL RECORD OF PROCEEDINGS

Thursday, 3 August 2006

The Council continued to meet at Nine o'clock

MEMBERS PRESENT:

THE PRESIDENT
THE HONOURABLE MRS RITA FAN HSU LAI-TAI, G.B.S., J.P.

THE HONOURABLE JAMES TIEN PEI-CHUN, G.B.S., J.P.

THE HONOURABLE ALBERT HO CHUN-YAN

IR DR THE HONOURABLE RAYMOND HO CHUNG-TAI, S.B.S., S.B.ST.J., J.P.

THE HONOURABLE LEE CHEUK-YAN

THE HONOURABLE MARTIN LEE CHU-MING, S.C., J.P.

DR THE HONOURABLE DAVID LI KWOK-PO, G.B.S., J.P.

THE HONOURABLE FRED LI WAH-MING, J.P.

DR THE HONOURABLE LUI MING-WAH, S.B.S., J.P.

THE HONOURABLE MARGARET NG

THE HONOURABLE JAMES TO KUN-SUN

THE HONOURABLE CHEUNG MAN-KWONG

THE HONOURABLE CHAN YUEN-HAN, J.P.

THE HONOURABLE BERNARD CHAN, G.B.S., J.P.

THE HONOURABLE CHAN KAM-LAM, S.B.S., J.P.

THE HONOURABLE MRS SOPHIE LEUNG LAU YAU-FUN, S.B.S., J.P.

THE HONOURABLE LEUNG YIU-CHUNG

DR THE HONOURABLE PHILIP WONG YU-HONG, G.B.S.

THE HONOURABLE WONG YUNG-KAN, J.P.

THE HONOURABLE JASPER TSANG YOK-SING, G.B.S., J.P.

THE HONOURABLE HOWARD YOUNG, S.B.S., J.P.

THE HONOURABLE LAU KONG-WAH, J.P.

THE HONOURABLE LAU WONG-FAT, G.B.M., G.B.S., J.P.

THE HONOURABLE MIRIAM LAU KIN-YEE, G.B.S., J.P.

THE HONOURABLE EMILY LAU WAI-HING, J.P.

THE HONOURABLE CHOY SO-YUK, J.P.

THE HONOURABLE ANDREW CHENG KAR-FOO

THE HONOURABLE TAM YIU-CHUNG, G.B.S., J.P.

THE HONOURABLE ABRAHAM SHEK LAI-HIM, J.P.

THE HONOURABLE LI FUNG-YING, B.B.S., J.P.

THE HONOURABLE TOMMY CHEUNG YU-YAN, J.P.

THE HONOURABLE ALBERT CHAN WAI-YIP

THE HONOURABLE FREDERICK FUNG KIN-KEE, S.B.S., J.P.

THE HONOURABLE AUDREY EU YUET-MEE, S.C., J.P.

THE HONOURABLE VINCENT FANG KANG, J.P.

THE HONOURABLE WONG KWOK-HING, M.H.

THE HONOURABLE LEE WING-TAT

THE HONOURABLE LI KWOK-YING, M.H., J.P.

DR THE HONOURABLE JOSEPH LEE KOK-LONG, J.P.

THE HONOURABLE DANIEL LAM WAI-KEUNG, S.B.S., J.P.

THE HONOURABLE JEFFREY LAM KIN-FUNG, S.B.S., J.P.

THE HONOURABLE ANDREW LEUNG KWAN-YUEN, S.B.S., J.P.

THE HONOURABLE ALAN LEONG KAH-KIT, S.C.

THE HONOURABLE LEUNG KWOK-HUNG

DR THE HONOURABLE KWOK KA-KI

DR THE HONOURABLE FERNANDO CHEUNG CHIU-HUNG

THE HONOURABLE CHEUNG HOK-MING, S.B.S., J.P.

THE HONOURABLE WONG TING-KWONG, B.B.S.

THE HONOURABLE RONNY TONG KA-WAH, S.C.

THE HONOURABLE CHIM PUI-CHUNG

THE HONOURABLE PATRICK LAU SAU-SHING, S.B.S., J.P.

THE HONOURABLE ALBERT JINGHAN CHENG

THE HONOURABLE KWONG CHI-KIN

THE HONOURABLE TAM HEUNG-MAN

MEMBERS ABSENT:

THE HONOURABLE MRS SELINA CHOW LIANG SHUK-YEE, G.B.S., J.P.

THE HONOURABLE SIN CHUNG-KAI, J.P.

DR THE HONOURABLE YEUNG SUM

THE HONOURABLE LAU CHIN-SHEK, J.P.

THE HONOURABLE TIMOTHY FOK TSUN-TING, G.B.S., J.P.

THE HONOURABLE MA LIK, G.B.S., J.P.

PUBLIC OFFICERS ATTENDING:

THE HONOURABLE WONG YAN-LUNG, S.C., J.P.
THE SECRETARY FOR JUSTICE

THE HONOURABLE STEPHEN LAM SUI-LUNG, J.P.
SECRETARY FOR CONSTITUTIONAL AFFAIRS

THE HONOURABLE AMBROSE LEE SIU-KWONG, I.D.S.M., J.P.
SECRETARY FOR SECURITY

CLERKS IN ATTENDANCE:

MR RICKY FUNG CHOI-CHEUNG, J.P., SECRETARY GENERAL

MS PAULINE NG MAN-WAH, ASSISTANT SECRETARY GENERAL

MRS JUSTINA LAM CHENG BO-LING, ASSISTANT SECRETARY GENERAL

BILLS

Committee Stage

CHAIRMAN (in Cantonese): Ms Margaret NG, Mr Albert HO and Mr James TO have separately given notice to move amendments to the definition of "serious crime" in subclause (1) of clause 2.

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to the definition of "serious crime".

Chairman, the definition of "serious crime" in the Bill is at present divided into two parts. Concerning authorization for the interception of communications, only offences punishable by a penalty that is or includes a term of imprisonment of not less than seven years. Regarding an authorization for covert surveillance, the offences only have to be punishable by a penalty that is or includes a term of imprisonment of not less than three years or a fine of not less than $1 million. Chairman, my amendment seeks to define "serious crime" as offences punishable by a maximum penalty of not less than seven years of imprisonment for the interception of communications and covert surveillance.

Chairman, this is because clause 3 of the Bill specifies the circumstances in which one can make an application to conduct covert surveillance and intercept communications for a certain purpose and that is, to prevent a "serious crime". In that case, should an offence punishable by a maximum penalty of three years' imprisonment be also regarded as "serious crime"? In fact, a Magistrate's Court also has the jurisdiction to pass a sentence of three years of imprisonment on offences. That means many cases tried and sentenced in the Magistrate's Courts already fall into this category. What does "serious crime" mean? Such a definition does not make any sense at all.

We can also look at the practice adopted in other places. Such a general approach is not adopted in other places when stipulations are laid down. The term of imprisonment is not adopted as the criterion. Take our neighbour

Taiwan, as an example, the types of crimes and the offences on which covert surveillance or the interception of communications are allowed are all spelt out. In the United States, the types of offences are also spelt out. As regards the United Kingdom, although the types of offences are not specified in the law, during the Second Reading debate yesterday, I have talked about the approach taken by a Judge in 1950s. For some serious crimes, if the Home Secretary has decided that covert surveillance or interception of communications are necessary for the detection of a crime, the penalty for the crime concerned would have to be no less than three years of imprisonment. Chairman, his explanation was that it should be reasonably expected that a person with a clear record who committed the crime would be sentenced to a term of three years of imprisonment. This is different from the Bill. If a person with a clear criminal record can be sentenced to three years of imprisonment on conviction, then the penalty for the offences should be more than three years of imprisonment instead of a maximum of three years. Therefore, we may be talking about offences punishable by a penalty of five or seven years but definitely not three years. If an offence is punishable by a penalty of just three years of imprisonment or a fine of not less than $1 million, actually it cannot be considered a "serious crime". That means the definition given by the Government is different from what we understand according to our common sense. How can offences with a maximum penalty of three years of imprisonment be regarded as serious crimes?

Chairman, has it been specified in the Code of Practice that although offences with a maximum penalty of three years of imprisonment are included, the offences actually have to be punishable by more than three years of imprisonment? If it has been, firstly, I would not accept this, moreover, secondly, according to paragraph 36 of the Code of Practice, it does not follow from the definition of "serious crime" that one can make an application for covert surveillance as long as an offence is punishable by three years of imprisonment. It is no more than an initial screen. Chairman, to law-enforcement officers, "initial screen" may mean that for covert surveillance on offences punishable by less than three years of imprisonment, they do not have to consider making an application. This may be quite useful to law-enforcement officers, however, this is definitely not very helpful to the general public.

Chairman, the amendments to the definition of "public security" proposed by Mr James TO and me respectively was negatived yesterday. As a result, there is no definition for "public security". In fact, "public security" is not

confined to that of Hong Kong alone. This is "public security" without any confines, furthermore, what is called "serious crime" is in fact not serious at all. Actually, how serious must a crime be before covert surveillance can be conducted? We still have no idea. Therefore, the certainty of law does not exist either. In these circumstances, the threshold will be very low. That means one can apply to conduct covert surveillance on almost any offence and it is difficult for us to think of any offence in respect of which this cannot be done.

Just now, I said that in the law of the United Kingdom, it is not specified on what offences covert surveillance can be conducted. However, there is in fact a scope that is not specified. One of the examples is offences perpetrated by a professional criminal organization causing to obtain money to the prejudice of other people that is, some organized crimes and large-scale fraud. Has the Government set down such codes or guidelines? The answer is no. Since minor or common offences have already been included in this threshold — according to Article 30 of the Basic Law, covert surveillance infringing on the right of privacy of a person cannot be conducted except in very rare and exceptional circumstances. If these powers can be exercised only in very exceptional, careful, prudent and special circumstances, can we let the authorities possess such enormous power as to make the decision by itself and give its definition? The confines in fact exist only as a matter of form but not in reality.

Chairman, in fact, in what circumstances can we conduct "covert surveillance"? If the act concerned does not fall within the definition of "covert surveillance", there is no need to apply for any authorization and one can do whatever one wants. In fact, an authorization for "covert surveillance" can be issued only in special circumstances. First, it requires the use of a device. If no device is used, then it is not considered to be covert surveillance; second, even if a wiretapping device is used, if there is a participant when doing so, then it is classified as Type 2 surveillance and it is not considered anything serious. Therefore, in these circumstances, the person has still to be regarded as not entitled to a reasonable expectation of privacy. In fact, this is no longer needed.

Therefore, when it comes to exempting law-enforcement officers from having to obtain authorization, exemption is actually possible in a lot of circumstances. However, when it comes to when one can apply to conduct covert surveillance, all that is required is that the person concerned is involved in an offence punishable by three years of imprisonment. This definition is not

only disproportionate, but it also runs counter to common sense. Chairman, in fact, we are not very satisfied with our own amendments either because a very general approach is also adopted to define it as any offences punishable by seven years of imprisonment. The ideal way is to lay down clear guidelines specifying which types of offences can one make an application to conduct covert surveillance.

However, Chairman, we cannnot do so. As Members who propose a Committee stage amendment, we do not have the resources and ability in this regard to set out the provisions and offences. At the Committee stage, if the co-operation of the bureau cannot be secured and if the bureau does not take the initiative to do so, it is impossible for us to do it.

Therefore, the amendments we propose are the only ones that are capable of really defining serious crime as serious crime without including minor offences in it. Chairman, since our amendments designed to give a clear definition to "public security" have already been negatived, it is all the more necessary for me to call on Members to make sure that this amendment to the definition of "serious crime" is passed. Thank you, Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr Albert HO and Mr James TO to speak on the amendment moved by Ms Margaret NG as well as their own amendments respectively. However, they may not move their respective amendments at this stage. If the Committee has agreed to Ms Margaret NG's amendment, Mr Albert HO and Mr James TO may not move their respective amendments.

MR ALBERT HO (in Cantonese): Chairman, I agree very much with the comments made by Ms Margaret NG just now that the offences targeted by this Bill should actually be defined by means of legislation. It is indeed inappropriate to define them solely according to their terms of imprisonment and it is also too broad to define "serious crime" as offences punishable by three years of imprisonment. In fact, although a lot of offences are relatively

speaking not serious, they are also punishable by a maximum prison term of more than three years.

However, what I want to focus on in particular is whether the Government will take this opportunity of enacting legislation to achieve some political ends. In fact, during the deliberations of the Bill — the Secretary also said yesterday that the covert operations, surveillance and interception of communications were not designed to target political activities, nor were they designed to achieve certain political ends. Therefore, yesterday, the Government was willing to make some amendments to specify that peaceful assemblies or expression of opinion are not the targets of this Bill. Even so, if the Government defines serious crime too broadly, a lot of what is called unathorized assemblies in the Public Order Ordinance will fall under this excessively broad definition of serious crime, thus enabling the Government to exercise the power to intercept communications or conduct covert surveillance.

Therefore, my amendment mainly targets the offences set out in the Public Order Ordinance, that is, unauthorized assembly or unlawful assembly. Of course, it is another matter if these assemblies involve violence. However, what I am focusing on now are the assemblies to express opinions peacefully. Even though they have perhaps not been authorized, they should not become the target of this Bill.

The relevant legislation, that is, section 17A(3) of the Public Order Ordinance specifies that the maximum penalty for this type of unathorized assembly is five years of imprisonment, so this will precisely become one of the serious crimes. Therefore, I now propose that this definition does not apply to this particular Bill.

Some people would ask whether, if the people taking part in an assembly intend to use violence and they may cause riots and if wiretapping is not allowed, that will have a great impact on the public safety of Hong Kong, that is, our safety? In fact, this is not the reality. Section 19 of the Public Order Ordinance targets riots and if someone tries to cause riots, he can be dealt with pursuant to section 19. Section 19 provides that if someone takes part in riots, he is liable to a maximum of 10 years of imprisonment. If indictment proceedings are instigated in the High Court, the offender is liable to a maximum penalty of 10 years' imprisonment. Therefore, we do not have to worry that we cannot target large-scale and organized riots or acts of masterminding riots. As regards peaceful demonstrations and assemblies that do not involve any violence

but which may breach the law technically for some reasons, they should in no circumstances become the target of wiretapping or covert surveillane. Therefore, I propose this amendment here.

MR JAMES TO (in Cantonese): Chairman, my amendment is basically the same as that proposed by Ms Margaret NG, however, I wish to add one point.

Yesterday, the Secretary for Security mentioned in his speech that if the threshold for carrying out covert surveillance was set too high, for example, if the type of offences were raised to those punishable by more than three years of imprisonment, this would make it impossible for law-enforcement agencies to carry out surveillance on a lot of serious and organized crimes. He gave two examples, so at least we can use these two examples to look at this matter.

First, he cited the example of "possession of counterfeit banknotes". Why did he talk about "possession of counterfeit banknotes" but not "printing counterfeit banknotes", or selling or passing counterfeit banknotes? This is because the penalty for the latter offences are higher. He mentioned "possession" in particular, so we can understand that the situation in question has not yet reached the final stage in which the Department of Justice is about to initiate prosecutions, that is, there is evidence but no charges can be laid as yet, so only the lowest threshold, that is, "possession of banknotes" can be adopted. This is not what he meant, but rather, he meant the initial actions such as covert surveillance that have to be taken at the very beginning, when suspicion is aroused. By suspicion, I mean information has been received that counterfeit banknotes are being brought in or perhaps, suspects are found to have begun passing counterfeit banknotes. The offence of passing counterfeit banknotes is already a serious offence, however, the problem is that when the suspect is perpetrating the crime, the police will definitely wonder if the suspect is the head of a syndicate. The police will definitely harbour such suspicions because such suspicions are reasonable. Therefore, the police will not tell the Judge right from the beginning that the supsect is suspected only of "possession of counterfeit banknotes", then find that such a charge will not facilitate making an application successfully. This cannot possibly happen. It will be self-deceptive to say so.

Therefore, what I hope the Government will understand is that front-line police officers carrying out their duties will not just suspect the suspect of committing the offence of "possession of counterfeit banknotes". When they

take up a case of suspected use of counterfeit banknotes and launch an investigation, offences in respect of counterfeit banknotes which the police have reasonable suspicions of are mostly punishable by more than seven years of imprisonment. Similarly, the offences involving dutiable goods are the same. When the police know that there is a crime involving dutiable goods, at the very beginning, they will not suspect it to be a crime of the most minor nature. If the police launch an investigation — and this type of investigation will of course be carried out by the crack units and not in a piecemeal fashion in the districts — naturally, it will be suspected that the case must be a syndicated crime. At the beginning, probably little is known, for example, perhaps little is known that several suspects are acting as couriers, but are they operating as a syndicate? When the police take statements from them, in fact, the police can learn from their statements about who provides the goods to them, then pursue the threads and arrest the other suspects.

Therefore, what the police crack down on is a syndicate but at the beginning, the suspects detected belong only to the lowest echelon of the syndicate. Therefore, the police are not cracking down on a suspect in possession of several pieces of dutiable goods. This is not the offence suspected, but rather, there are a lot of signs indicatiing that the goods come from the same source and maybe the source is responsible for making the arrangements, laundering money or evading duties. All these are organized crimes. Therefore, once the police believe that the case involves organized crime or networked crime, then the penalty associated with the suspected offence will definitely not be less than seven years. If one argues from this angle, I believe simply lowering the threshold does not conform to the present reality of law enforcement.

CHAIRMAN (in Cantonese): Members may now jointly debate the original definition and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR LAU KONG-WAH (in Cantonese): Chairman, both these two amendments are very important because if the amendments are passed, some crimes cannot be investigated by means of covert surveillance. Just now, several Honourable

colleagues have explained the reasons, however, it may be clearer if we look at some actual examples.

Regarding the Government's proposal to draw the line at three years, some Honourable colleagues propose that the threshold should be raised to seven years when considering what should be regarded as serious ones. We believe the best way is to study what offences punishable by three to seven years of imprisonment under the laws of Hong Kong will escape the net of justice if their amendments are adopted and consequently cannot be investigated using this method. This is the best and the most rational way of making a judgement. Just now, some Honourable colleagues have already cited one or two examples and what I want to cite include counterfeiting currencies, counterfeiting banknotes, going equipped for stealing, administering poison with intent to injure, possession of prohibited weapons, access to computer with criminal or dishonest intent (that is, hacking), and so on. There are countless examples.

If these cannot be considered serious crimes, one can say that this is your view. However, from my point of view, if even the possession of prohibited weapons is not considered a serious crime, I will be very surprised. This is because although the offence of the possession of prohibited weapons may not have led to acts such as armed robbery or wounding with intent to inflict grievous bodily harm, the mere act of possession itself has already fulfilled one condition. If we know full well that a certain person or group of people are in possession of this kind of weapons but no covert surveillance is conducted to detect and crack the case, then law-enforcement agencies definitely have to shoulder the responsibility.

As regards counterfeit banknotes, Mr James TO has put it in a rather complicated way, talking about top echelons and low echelons, but in fact, what he wanted to say was that if it was estimated that the crime is an organized one, according to the Organized and Serious Crimes Ordinance, of course, it is a serious crime. However, law-enforcement officers are no prophets. For example, if they have received information from some newspaper vendors on the streets that they were recently paid with a lot of counterfeit banknotes, it is impossible for law-enforcement officers to tell that the crime must be an organized one. This is not possible and the police have to conduct investigations and carry out surveillance on the person using the counterfeit banknotes in order to reel in the big fish by pursuing the threads and see how the picture at the back is like. In the absence of such means, the investigation of

crime will be very difficult. Therefore, on the basis of these offences alone, I already believe that they cannot be excluded.

In view of this, it is not possible for me to agree with the amendments proposed by the Members concerned.

MR JAMES TO (in Cantonese): Chairman, it may be necessary for me to give a more detailed explanation to those Honourable colleagues who do not have a good understanding of the various stages of criminal prosecution, investigation and legal analysis.

The remarks made by Mr LAU Kong-wah has precisely shown that he has turned the reasoning the other way round. Why? This is because he said that police officers are no prophets. It is precisely the fact that they are not prophets that when they know that counterfeit banknotes are found frequently, quite simply, someone is making counterfeit banknotes because counterfeit banknotes do not fall from the sky. Since a certain person is using them, so it is most likely that this person is making the counterfeit banknotes. Once suspicion has been aroused, it will certainly be suspected that this person is making them rather than that he is merely in possession of them and someone else is making them. This is not what would happen. If it is suspected that this person is making counterfeit banknotes, the offence in question is already punishable by more than seven years of imprisonment. After the police have conducted an investigation, it is found that the source of the banknotes is not this person, so some other people will be prosecuted instead. At a later stage in the process of instituting prosecution, this person will be charged with possession of counterfeit banknotes because they were not really made by this person.

Therefore, this offence will only become a constraint on prosecution at a later stage. At the beginning, the police will definitely have suspicions on this person, however, since no other evidence has yet been found, he will be suspected of making the counterfeit banknotes. Since no other people are suspected of making them, so that person is suspected of making, passing and even of distributing them to other people.

Likewise, I wish to explain in detail that, for example, with regard to weapons, I have studied the so-called offence provisions and clauses about this in detail. Weapons do not refer to arms because offences involving the use of

arms are all punishable by more than seven years of imprisonment. Weapons refer to air-guns with a muzzle energy greater than two joules and they are called weapons. As regards other weapons, knives are also called weapons. The question is, if we encounter this sort of situation, that is, someone is in possession of such articles and the police suspect that he will cause injury to other people, then the threshold of seven years will be exceeded altogether and if the police suspect him to be an assasin, that is, he may kill someone or silence someone by murder, then the threshold of seven years will be totally exceeded.

The whole concept is the same regarding poisons. In respect of poisons, even if there is the intention of administering poisons, if a large amount of poison is stored or if poison is found, and if there is a sign that the poison is involved in some illicit acts — since poison can take lives, any crime involving human lives is serious — the penalty for this sort of offences will definitely involve more than seven years of imprisonment. Therefore, when the police begin an investigation, it will not be limited to suspecting someone of having the intention of administering the poison. This cannot be the reality.

Therefore, when the police have opened a file as they try to convince the Judge, they will say that according to the evidence in the hands of the police, the gravity of the offence is great, however, in the course of gathering evidence, the offence may decline in gravity to the extent that the offence cannot be used to justify a search because the police have gathered more evidence. Furthermore, when it comes to the stage of instituting prosecutions, the police may no longer be able to make use of this fact because after obtaining more evidence, they will be bound by the evidence.

Therefore, the suspicions aroused at various stages, that is, what is referred to as lesser offences, will not pose any obstacles to making applications.

CHAIRMAN (in Cantonese): I wish to tell Members who will move their amendments that I suggest you listen to the comments made by other Members before you give a reply to all of them at one time. Otherwise, if you respond immediately after a Member has voiced some views, then we will only be hearing the Members who have moved their amendments all the time. You will definitely have the chance to speak, so there is no need to rush.

Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): Chairman, the advice you have given is reasonable, however, our Rules of Procedure allow Members to give a reply at any time because there is no way of knowing who else wants to speak, so I hope you would not be too strict about this. I also know that all Members want to conclude this matter as soon as possible.

I wish to respond to the remarks made by Mr LAU Kong-wah just now. Mr James TO's reply just now is well said. We have to know that we are talking about serious crime here. To members in the legal profession, they can tell what amounts to serious crime and what does not at a glance. If some cases involving a maximum penalty of less than seven years of imprisonment occur frequently, some Judges will even query why the penalties are so light, since such cases occur so frequently? That means even though they want to impose heavier penalties, it is not possible for them to do so. In these circumstances, the Government should know what to do. The Government will then table amendments to the Legislative Council to raise the maximum penalties. All countries and regions practising common law do it this way, so there is no need to worry. However, though this may sound quite serious, such cases rarely occur, then there is no need to pay any heed. That is how the situation is like and there is no need to worry about this at all. Should such cases occur all the time, the penalties will have to be raised. One cannot say that since he considers them serious, they have to be covered by subclause (b).

What Ms Margaret NG has said just now is correct. However, of all the Members seated here, I believe I am still the one with the most experience in criminal cases. Just now, Ms Margaret NG mentioned that in the United Kingdom, if the penalty on first conviction is as heavy as three years of imprisonment, the case would be a very serious one.

In Hong Kong, when meting out penalties, there are some principles and that is, offenders will not be sentenced to prison terms lightly. It is only when no other options are open as a solution that a prison term will be imposed. It is even more unlikely that a first offender will be sentenced to a prison term. For a Judge to impose the maximum penalty on such a person, the case has to fall into the worst category.

Therefore, if Members understand the operation of criminal procedures and the Judges' sentencing principles, it is obvious that these amendments are totally correct. Therefore, I hope that the Secretary will reconsider this matter.

MR RONNY TONG (in Cantonese): Chairman, when I spoke yesterday, I have pointed out to the authorities the threshold as stipulated by Article 30 of the Basic Law. Chairman, the threshold is that unless there is a need to investigate crimes, the Basic Law protects our right of communication.

Yesterday, I stressed in my speech that the most important word is "need". What does the word "need" stand for in our present scope of discussion? It represents two different qualities: first, gravity and second, complexity. Regarding gravity, of course, Members all understand that the authorities cannot apply for a wiretap authorization because of spitting. Regarding complexity, the consideration is that when ordinary methods of investigation are not appropriate or effective, or some sort of organized crime is involved. In these circumstances, if the SAR Government considers it necessary to apply to a Judge or the person-in-charge for authorization to carry out covert surveillance, we would find this understandable.

I think Mr LAU Kong-wah has pointed out very appropriately that there are a lot of offences punishable by a maximum of only three years of imprisonment that all of us would consider serious. This is certainly the case. However, our considerations must be comprehensive, we should not make generalizations from partial observations. One cannot include crimes that a lot of people may not consider serious within this threshold of offences liable to three years of imprisonment — I say "may not" because whether an offence is considered serious or not will also depend on the facts in a case.

However, sometimes the law also puts some not very serious crimes into this net of offences punishable by three years of imprisonment. Just now, Mr Albert HO has cited the example of the Public Order Ordinance. However, Mr Albert HO did not mention section 17A of the Public Order Ordinance, which has been mentioned earlier on. In fact, if one looks at subsection (ii) carefully, one can find that it is stipulated therein that one is liable on summary conviction to imprisonment for three years and the other one is imprisonment for five years on conviction on indictment. What is the difference between the two? Prosecution through indictment has to be brought before the District Court or the High Court. However, for summary offences, the trials are conducted in Magistracies and the maximum penalty is three years of imprisonment. The offences mentioned therein include public processions that violate the notification requirement and the use of violence is not one of the elements of this offence. This does not mean that if there has been violence, then no offence has been

committed but that even though no violence has been used, an offence may still be committed. However, if violence is involved, then the offence will be more serious, that is, it will be an aggravating factor.

In other words, in the existing legislation, if section 17A of the Public Order Ordinance is violated, that is, if it is possible that a public procession may involve violence, then it can be the target of wiretapping or covert surveillance. The question is: how can one decide if such actions should be taken? This is the greatest shortcoming. Why do I say that this is a shortcoming? This is because if a piece of legislation is not clear enough and there are gaps that will make matters that are not that serious fall into the net, then the legislation is flawed. This is because law-enforcement officers will have the opportunity to abuse their power. This is obviously the most worrying aspect.

Just now, we have talked about some political offences, that is, offences that violate the Public Order Ordinance. However, if Members make an effort to look at other pieces of legislation, they will find that a lot of offences are punishable by three years of imprisonment and Mr LAU Kong-wah has chosen the most serious ones. However, I have just looked at the Buildings Ordinance and found that in fact, a lot of offences therein are also punishable by three years or more than three years of imprisonment, including section 40(2A), which says that one is liable on conviction to imprisonment for three years if one uses any inappropriate materials or carries out any building works with any unregistered contractors. Of course, the scope of such an offence is such that if I casually appoint someone to make a partition for me, this can also be considered building works. Members all understand that in the Buildings Ordinance, the definition of building works is very broad and even driving a nail can be considered building works. Therefore, if I ask a man in the neighbourhood to cut a wooden board for me, this can also be considered building works and one is liable to three years of imprisonment on conviction.

Another extreme example is of course a case that involves short piles and substandard concrete. Of course, these are very serious offences, however, they are also included. Since the scope of such offences is so wide, there will be room for abuse. For example, if Mr Martin LEE puts up an illegal structure in his home by creating an extra window or building a shed on the rooftop, that will violate section 40(2A) that I have just mentioned. That will already give the Security Bureau sufficient excuse to bug all the phones in Mr LEE's place or to conduct covert surveillance on him to see whom he talks to and what he talks

about. The information so obtained will be included in the intelligence of the Security Bureau and will never be destroyed, since Members all know that this legislation has specified clearly that this kind of intelligence will not be destroyed. When a review is conducted in the future, Martin may be lucky enough to have his case chosen by the Commissioner for a review. It would be found that things are not quite proper and his communications should not have been intercepted simply because he has put up some illegal structures, so he would receive an apology. However, the products of interceptions are not protected and the intelligence would be kept. Due to the illegal structures, the extra window created or the additional nail driven, all the people whom Martin met in three months — I do not know if he has any mistress and I hope he has none — all information would be collected by the Security Bureau as intelligence and it would definitely be kept for more than 50 years. This is not completely impossible.

Some people may say, "Ronny TONG, you are scare-mongering and the things you have said cannot possibly happen. Just trust the Security Bureau!" This is not the issue that I want to discuss now. As I have said just now and yesterday, what I want to discuss now is a fundamental principle in the rule of law: the law must be clear and certain, moreover, there must not be any chance for abuse of power or at least such a chance must be reduced.

I am not saying that only the amendments moved by Mr James TO or Ms Margaret NG are acceptable. This is not so. In fact, when scrutinizing the Bill, Mr James TO put forward another proposal and that is, to add a schedule to set out all the most serious crimes or elements of serious crimes. For example, it can be specified that all offences against the person, organized crimes or those that have a serious impact on the Hong Kong economy or Hong Kong's international reputation will all be classified as serious crimes. We can at least conceive some thresholds of this sort and the Government has the responsibility to do so. The Government should not say in a general and vague manner that surveillance can be conducted on all offences attracting more than three years of imprisonment.

When the Government has specified this in the legislation, it has also created a very big gap and a big loophole that is open to abuse. This is not in line with the respect for the right of communication espoused in the Basic Law, nor is it in line with the fundamental principles of the rule of law which we have respected all along.

Therefore, the amendment that we now propose is very simple. We just hope that the Government will consider if the threshold has been set too low. This will arouse a great deal of public concern. To raise the threshold to seven years is one of the options, however, the SAR Government can also conceive other even more effective ways that can address the concerns raised by Mr LAU Kong-wah just now, and at the same time, protect the fundamental rights of ordinary members of the public in Hong Kong. Since the best of both worlds can be achieved, why not do it? Is this due to indolence or disrespect for the principles of the rule of law? Or is it because it has 40 votes in the Legislative Council? I hope that these several reasons are not considered strong justifications. However, if they are the reasons that the SAR Government is taking such a hardened attitude, I can only say once again, "It is a very, very pathetic political system in Hong Kong.". It is very pathetic because if the political system in Hong Kong is not changed, then all people who can think, who are knowledgeable and who are educated will probably leave this place. What will probably sink Hong Kong are such a mentality and such a system.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, good morning.

The amendment proposed by the Secretary has in fact been discussed in the Bills Committee a number of times. Naturally, in drawing any line, grey areas will always exist and no matter if we use seven years or three years as the divide, the result will not be totally satisfactory. Therefore, in fact, I cannot help but say that without the Court playing the role of a gate-keeper, everything will be futile because in court proceedings, all grey and dubious areas will be expounded on by both sides and a Judge will make the ruling impartially. That was the case when I applied for a judicial review of the order issued by the Chief Executive. Initially, three persons spoke and everyone could speak. Apart from my invective against the Judge (in fact, rebuking the Judge was also allowed), which was considered really disrespectful, no one would stop others from saying anything.

Therefore, every time we talk about those grey areas, in fact, a game of logic is played and both sides will point out the loopholes that may exist in the definition given by the other side. The trouble is, if we do not put one of the most important rights, that is, the freedom of communication and privacy, in a fairer setting, the various points which we have been arguing today should actually be argued in the Court. Ms Margaret NG and Mr James TO are

lawyers, therefore, they pointed out that this will not work in this matter and that even for those offences liable to seven years, his Honour the Judge should not allow those actions to be taken and the persons concerned will never commit those crimes, right?

However, this is not how the present situation is like. Therefore, we are now arguing over this again, over setting a criterion in the dark so that something can be defined instantly when we hear it, as if by pressing a button. In fact, if we want to do so, we can simply find a robot or a computer to do the job. Once a button is pressed, the calculation will be done, just like functionalist philosophy. If one is happy, the score is 5, being unhappy will score 3 and it will then be decided that that sort of thing should be done, because the result of being happy minus being unhappy is +2. Is this how things should be like?

I believe this is not how things should be. When the Government said at the beginning that it was not possible to make applications to the Court and they had to be made to the panel Judges instead, in fact, the root of the problem was already planted. If such an approach is adopted right from the beginning, the entire application procedure will become unilateral in nature, so the stipulations in the Bill will have to be very precise, is that right? This is where the problem lies. Now Members are wrangling here. I believe later on, when the Secretary rises to give a reply, he will again play a game of logic, saying that there are also oversights in giving the definition in such a way. If fact, even if we try our best, there will invariably be oversights in everything because there are discrepancies in human language and thought, so something can be interpreted one way or another, the best thing would be to let a real Judge make a judgement, instead of the present arrangement of letting a panel of Judges do so unilaterally. Under the present arrangement, how can one possibly argue about anything? Whether it should be three years, seven years or 10 years is completely beside the point. Therefore, on this issue, I cannot but repeat, to the point of nagging, that reconsideration should be given to whether panel Judges should be appointed.

All right, coming back to our present topic, take I myself as an example, in the Public Order Ordinance, some are punishable by three years, some by five years and others by 10 years. Hey, man, you are spying on me in the dark, I do not know what you have said, nor can I make any rebuttal. You tell the Judge that the assemblies organized by LEUNG Kwok-hung may lead to violence. Let me give another example: I took part in an assembly held on 9 July 2003 out

there, which was considered an illegal assembly. The authorities warned Mr LEE Cheuk-yan, telling him not to proceed, saying that they did not care how unpopular the legislation on Article 23 was, and that all in all, they would only allow an application for a maximum of 5 000 people to take part in the assembly and if 50 000 people or over 5 000 people joined the assembly, then it would become an illegal assembly. As far as I can remember, the offence of organizing an illegal assembly is punishable by five years of imprisonment and if it may lead to violence, then an additional five years can be imposed.

That is to say, in this very simple example, one can see that they could actually begin to conduct surveillance on Mr LEE Cheuk-yan from that time onwards. Of course, at that time, the pan-democratic camp was not yet in existence, right? After that, all people who had talked with Mr LEE Cheuk-yan would probably be subjected to surveillance because it was possible that he would organize an assembly that he knew well enough would exceed the estimate made in advance by the police as well as the number of people permitted by the police. Moreover, the police also had good reasons to believe that violence would occur as a result, particularly when the assembly would be held around a building. In fact, on that day, I also raised this matter in the Court, saying that it would have been a serious matter if he was charged with preventing Members from attending the meeting. Had the people taking part in the assembly besieged the Legislative Council Building, so that Members could not go inside to attend the meeting, they could have been charged. Alternatively, if they had been too noisy, so much so that the meeting could not proceed in the Legislative Council Building, then they could have been prosecuted and sentenced for offences punishable by more than three years of imprisonment.

Why do I say so much? This is because I want to point out that in fact, for a lot of things, one cannot say that they are permissible or not permissible. That is to say, seen from another point of view, doing a certain thing can have extenuating circumstances. For example, 500 000 people took to the streets to express their opposition to the enactment of legislation on Article 23 and in comparison, an assembly involving 50 000 people was dwarfed immediately and there were extenuating circumstances. However, for the law-enforcement authorities, this offence was unpardonable because they had already estimated the number of people and permitted Mr LEE Cheuk-yan to organize an assembly that was limited to 5 000 participants, yet he assembled 50 000 people and even said that there was nothing wrong in bringing 50 000 people together. How can they possibly not conduct surveillance on him?

Therefore, on this point, we can see that no matter how we draw the line, the law-enforcement departments can still make abuses. Therefore, there are only two feasible options, one being exclusion, that is, to exclude some offences so that no detection can be conducted no matter what; and another option is to set out clearly on what can be put under detection. However, both approaches have their loopholes.

How is the present practice like? At present, naturally, I am of the view that the approaches proposed by Ms Margaret NG, Mr Albert HO and Mr James TO are more reasonable because they have raised the threshold, so that people who intentionally or unintentionally abuse their power will find it difficult to do so, right? This is a very simple rationale, however, I have not heard the Secretary express his astute views and explain why the threshold cannot be raised. The conclusion that I can draw is that — with due respect — the people under the Security Bureau are all law-enforcement officers and that is the reason I often ask why people from the Department of Justice do not come here to give their comments. This is because they are the people who draw up the legislation and only they can speak on behalf of the Government from a legal viewpoint. In fact, Mr WONG Yan-lung and Mr Ian WINGFIELD should come forward together to give their comments. They must not allow the situation in respect of proposed enactment of legislation on Article 23 from recurring. At that time, only the Secretary for Security but not the Secretary for Justice came forward to give comments. This is also the case today.

Therefore, the Government's behaviour clearly shows that it is good at using only one of its hands but it seems that the other hand is useless. In fact, the Government has to use both hands at the same time because it has to explain to Hong Kong people the views of the department in charge of the law in the Government. Of course, it goes without saying that law-enforcement agencies want to be able to do their tasks easily. Maybe a lot of people think that if "Long Hair" speaks less, this meeting can finish earlier. A lot of people think this way and I will not blame those people. If they feel that they are not interested in this issue, of course they hope that "Long Hair" can finish his speech earlier, so that they can go home or go on vacation earlier.

On this issue, the Secretary could not explain why he rejected Members' amendments, whereas his amendment is in fact very bad. He only requested that people should preferably say less and the threshold be raised slightly. Even if someone wants to abuse his power, it will be more difficult to do so, right? It is as simple as that. From the perspective of political transactions, it means that

as a Government practising strong governance, it should swallow everything down in a gulp as quickly as possible because after the passage of this Bill, it can then abuse its power. Therefore, the question is that we can see that a problem exists from another culture, that is, when there are enough votes, there is no need to argue in a sensible way anymore.

Therefore, we can see on sitting here every day that no one will give any reply after the arguments are presented. Do not say that we are playing the lyre to the cow, since this is an insult to cows — we are speaking to a wall and even if there are echoes, they are in fact only the echoes of what you have said and not the sound of other people speaking. Why do we say that there should be some feedback to what one says? Because that is a response. After "Long Hair" has said something, then a response should be made immediately to point out that he is wrong. Hey, man, when it comes to arguing in a sensible way, I have never lost once, but if we talk about votes, of course I will surely lose.

In fact, the Secretary has also to be careful. If you make us angry, we can really resort to other ways to make this Bill of yours pass in unsightly circumstances or even not pass at all, can we not? Therefore, why on earth can you not argue sensibly? At this very last point, if you step back a little, you will find that the vista will open up before you, so why can you not do so? Why can you only see the plank in our eyes? This is what you said yesterday. Therefore, I actually very much want the Secretary to rise later to say why he thinks that the amendments proposed by Ms Margaret NG, Mr Albert HO and Mr James TO are unacceptable. Why would they make it more difficult for the Hong Kong Government to implement Article 30 of the Basic Law?

Article 30 states very clearly that the authorities have the duty to protect — the very first sentence talks about "to protect" and the second sentence says, "No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences". This is exactly the yardstick that we now seek to lay down. The view of the Government is very simple. Offences punishable by a maximum of three years of imprisonment, that is, offences with penalties ranging from three months to three years are targeted. It is all done in the dark (and the Secretary also thinks that it should be done in the dark and he said explicitly that it would be done in the dark), with such an excuse and without going through the proceedings of the Court (that is,

only one side can state its case) in a wanton attempt — it is possible that the panel Judges may cry foul but the authorities will never miss their targets, since I can tell you there is hardly any offence that does not attract such a penalty. I have looked up a lot of legislations and the majority of offences are liable to three months to three years of imprisonment and that means nearly all offences are like this. That is just like saying the goal-keeper is no where to be found and the penalty of a spot kick is imposed, yet there is no wall lined up, so one will certainly score. Man, this is just like a foul in the penalty area and a penalty kick is imposed but there is no wall, so one is sure to score directly from the free kick. This is the crux of this matter.

In fact, if all of us can be fair, nowadays, one can use the computer to find out what the offences in the law attracting three months to three years of imprisonment are. It just takes a click on the computer to have all of them displayed, so why do you not do this? If you have such strong justifications, why do you not refute us using figures and information? Let me tell all of you why. This is because you know you will definitely lose. I will now throw down this challenge again. Firstly, you have to rise to give a reply; secondly, you have to show us all the relevant legislations. Nowadays, this can easily be done with the computer. You can open the eyes of Hong Kong people on how many Hong Kong people will be placed under surveillance if your approach is adopted, or how many people will be placed under surveillance if the approach proposed by Ms Margaret NG, Mr James TO or Mr Albert HO is followed. Everyone will know after having a look and there is no need to argue. It is perhaps better use my head as the stake, but you will surely not do that. If fact, this matter is very simple. Why? Because the more people argue, the clearer the truth will become and facts speak louder than sophistry — or shall we say rhetoric instead of sophistry — facts speak louder than rhetoric. If we talk about the facts and reasons, you cannot possibly win.

Today, if we look up each time we vote here, we will find that it looks as though everything were xeroxed (that is, photocopied), that is, all the results look like photocopies. That is to day, the number of votes are just like the deep-fried dough sticks prepared the day before which I found upstairs at that place where the Chairman has treated us to some porridge. They were all prepared beforehand in the night before. They were all prepared to look this way well in advance the night before. Therefore, I also hope that the Secretary or the Permanent Secretary or Mr Ian WINGFIELD can rise up courageously to his own defence.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MIRIAM LAU (in Cantonese): Madam Chairman, the present proposals of Ms Margaret NG and Mr James TO seek to raise the threshold for allowing law-enforcement departments to conduct covert surveillance to more than seven years. In the Second Reading debate, I also said that if the threshold was raised, the number or types of people who can be subjected to surveillance would be reduced. From a security point of view, this will undermine the degree of security; and from the perspective of human rights, this may provide greater protection to some extent as fewer people will be subjected to surveillance. However, we have to note who those people are — they are suspected criminals, although some colleagues stressed that the offences might be minor. Therefore, Mr LAU Kong-wah mentioned just now some offences that they propose be deleted, that is, the offences punishable by terms of imprisonment ranging from three to seven years. Many colleagues said that those are every minor offences and Mr LAU Kong-wah has named two of the offences which in my view, are not really minor at all.

I really want to see how many fish will actually be able to escape from the net if the proposals made by Ms Margaret NG and Mr James To are adopted. I have looked up some law books. Apart from the offences of counterfeiting banknotes and coins mentioned by Mr LAU Kong-wah (that is, pursuant to secton 98(2) of the Crimes Ordinance (Cap. 200) of Laws of Hong Kong), there are also, as Mr LAU Kong-wah has mentioned, the following offences: administering poison with intent to injure, inflicting grievous bodily harm, establishing quasi-military organizations, claiming to be an office-bearer of an unlawful society, inciting person to become a member of unlawful society, giving possession of arms or ammunition to unlicensed person, keeping a vice establishment, intercourse with girl under 16, sexual intercourse with a woman under guardianship under the protection of the Mental Health Ordinance, publishing any child pornography, publishing obscene articles, possession of prohibited weapons, unlawful production, obtainment, possession or use of controlled chemicals, causing death by dangerous driving, unlawfully conduct of bank business, carrying restricted article in an aircraft, endangering the safety of vessels, and Mr LAU Kong-wah has also mentioned "hacking" just now, that is, making false entry in document, contrary to the Clearing and Settlement Systems Ordinance. In fact, there are many more offences but because of the time constraint, it is really difficult to read out all the offences in all the law books.

The problem is: We have to think about this. Are these offences really very minor, as many colleagues have claimed? Should we care about these trivial matters? Members have to comment on and think about these offences. I have also heard Mr James TO say that these offences *per se* are actually not very serious and they cannot be regarded as serious until further investigations have been conducted. Precisely for this reason, if we think that a crime is basically serious, yet we do not give law-enforcement departments the weapons to conduct surveillance, how can they conduct further investigations to collect more information? Is this really what we want to see?

Here I have to mention one thing. Members may have forgotten that several years ago, that is, five years ago in 2001, there was a person who called himself the "bin Laden of Hong Kong" who threatened to poison the food in supermarkets. In the end, the police traced the source of his phone calls and arrested him. Madam Chairman, if the *mens rea* of the poisoning is to cause harm to other people, yet the law-enforcement agencies are not allowed to conduct covert surveillance, how can the police solve the case and protect the public's lives and properties?

I agree with Mr Ronny TONG who said that among these offences, a lot may be very minor ones. However, at the same time, there are also some very serious instances. Mr Ronny TONG or many other Honourable colleagues have also said that since those offences are minor, all of them had to be excluded. However, what about those very serious offences? Madam Chairman, this is precisely the reason why setting a threshold is a starting point. The police or law-enforcement officers can conduct surveillance on these offences. However, it does not mean that they can take action immediately once they come across these offences. Rather, they need to apply for authorization.

The soul of this Bill lies in clause 3, which gives the approval authority the power to grant authorization. The approval authority cannot grant authorization arbitrarily. There are many hurdles in this process. There must be proportionality, as well as gravity and immediacy. It has to be approved by the authorities. For some very minor offences, hardly any consideration is needed in ruling them out. Mr Ronny TONG, it is not the Security Bureau nor the Secretary for Security but the mechanism that we have faith in. Therefore, if a mechanism is in place and the approval authority is to grant authorization in accordance with some rules and certification criteria, that is a well-conceived mechanism, not a mechanism that allows arbitrary actions. Conversely, if we raise the threshold to more than seven years, then a lot of offences that are

punishable by over three years but less than seven years of imprisonment will fall outside the net. This may not be something that Members want to see.

Madam Chairman, I would also like to briefly respond to a point raised by Mr Albert HO here as not many colleagues have talked about it. In fact, Mr Albert HO has basically adopted the mechanism put in place by the Government, namely, the mechanism of imprisonment for three years or more or a fine of $1 million, but he made an allowance by exempting the unauthorized public meeting, public gathering or procession which are offences liable to imprisonment for five years as referred to in section 17A(3) of the Public Order Ordinance. Mr Albert HO hopes that even if, as a starting point, offences liable to imprisonment for three years or more are also subjected to covert surveillance, at least the above offences can be excluded. I understand Mr Albert HO's worries because here, we are talking about unauthorized public meeting. If it is not authorized, the maximum penalty can be five years of imprisonment. Therefore, law-enforcement officers may make use of this Bill and say that covert surveillance is to be conducted because someone is having an unauthorized public meeting.

However, I want to remind Mr Albert HO that yesterday, we passed the Government's amendment and added subclause (5A) which provides that if for public security …… and what does "public security" mean? Acts of advocacy, protest or dissent are excldued but a little something is added to the Bill, that is, unless it is likely that these actions will be carried on by violent means.

If Mr Albert HO's amendment is accepted, how will the situation be like? Being "unauthorized" is not a problem because according to the Government's subclause (5A), being "unauthorized" does not fall within the scope of "public security". However, under Mr Albert HO's amendment, even those that are "unauthorized" and are very likely to be carried on by violent means will also be excluded. That is to say, no matter if application has been made for the public meeting or if it will be conducted by violent means, it will still be excluded from the definition of serious crime. In this case, I would like to ask if is this what we want?

I would also like to remind Members that during the Conference of the World Trade Organization (WTO) last year, those Korean farmers who came to Hong Kong to stage demonstrations were well-prepared. Everyone in the world knows that they might use violent means to express their opinion, as they did in other places. When they first arrived in Hong Kong, we could see that they

seemed to be staging their demonstrations in a peaceful manner. However, later, it really turned out they clashed with police officers in violent ways and a lot of protest activities became unlawful. Fortunately, our police took resolute actions and restored order very quickly. During the WTO conference, a lot of foreigners came to Hong Kong to stage this kind of demonstrations. At that time, the police also got hold of a certain amount of intelligence and conducted surveillance. If the police just folded their arms and did nothing at that time by collecting information through various channels and did not take follow-up action, would the situation still be the same as that which actually happened, that is, the situation was put under control and social order was restored quickly? I am just citing this example for Members' consideration.

Madam Chairman, as the old saying goes, "Large though its meshes may be, the net of justice lets no criminal through.". We also hope that offenders can be brought to justice. However, unfortunately, today, I can see that the amendments proposed by some Honourable colleagues have made the meshes of the originally well-knitted net of justice loose. In this way, a lot of people will slip out from this net and get away. Madam Chairman, is this what we want to see? Thank you.

MS EMILY LAU (in Cantonese): Chairman, the purpose of the Ordinance is to deal with two things. The first one is the safeguarding of public security. The second one is the prevention and detection of serious crimes. We had already said yesterday that these things might need to be done but there must be very clear definitions. Why? Because if an interception of communications or covert surveillance is carried out, it is a serious infringement upon the privacy of the public.

We even talked about whether to provide for the protection of the people's right to privacy in the Ordinance and include provisions of the Basic Law, international rights conventions and other international conventions in the Ordinance, so that law-enforcement officers would know firstly that every citizen is entitled to these rights. He is not a fish that has escaped from the net but he is perfectly justified to enjoy these rights. It is only due to certain reasons that certain practices are adopted to infringe upon his privacy. However, the authorities have been unwilling to include the above, and it is not until the last day of the discussions that they agreed to put the abovementioned things in the foremost part of the Code of Practice. Some colleagues might have a bad memory, so that they talked about things such as the net of justice and

fish that escaped the net yesterday. Chairman, actually this is already tilting towards one side.

The issue is that we would like to ask everyone to make a judgement and say clearly under what conditions a judgement is made. These are the basic rights of the people. It is only under very special circumstances that they may be infringed upon. We discussed about public security for a very long time. No one could bring out a certain thing casually and say that this is public security. The authorities refused all the way to provide a definition, but later on, as it could be seen from the Code of Practice, what was it? It was terrorists, weapons of mass destruction, human trafficking, and so on. Then the threshold was lowered to such a level that it could be conducted for almost any offence as it was stipulated in clause 3 that the purpose should either be prevention or detection of serious crime or protection of public security. It was very nice to hear someone talk about "public security". It was also said that all of the most serious crimes would be listed in the Code of Practice. However, the threshold for serious crimes was then lowered. It was said that it had to be seen whether it was a specified serious crime. And this was just the beginning. What would happen next? He said, "Right, this is three years. Bingo." And so it was conducted.

Therefore, Chairman, I feel that if that is the case, the message given to the public is that the great majority of crimes can be dealt with in ways that will cause serious infringement on privacy. Not everyone is a crook. As some Honourable colleagues have said, some people may be, but some are not. We have to assume a person innocent until he is convicted. Therefore, what we want to do must be fair and must be weighed. I myself feel that what I want to weigh is this: Regarding clause 3(1)(a)(i) and clause 3(1)(a)(ii), one of them is about serious crimes, and the other one is about public security. If actually they differ greatly, the authorities will tell the public, "It doesn't matter. 'Public security' is very strict. The threshold is so high that it is not easy to reach." When will there be terrorists? When will there be weapons of mass destruction? The ordinary people will feel that the criteria are very strict. However, as seen there, it is applicable to almost any offence. In that case, how will there be any protection?

Therefore, Ms Margaret NG has also said that her proposal is not the best one. It would be the best if the crimes are listed in a schedule in comparison with the most serious crimes under "public security" to see which one is more

serious, otherwise, it would be a joke. Some people may feel that the definition of serious crime is really so loose that a great deal of crimes have been omitted, but then under another item, all crimes are included.

Chairman, the public of Hong Kong are not like this, right? Are there really so many fish that have escaped from the net? I trust that the legislation that we are going to enact aims at striking a balance, explore ways of protecting as much as possible the privacy of the citizens and give the law-enforcement authorities certain powers subject to the condition that they may only infringe on the privacy of members of the public under very strict supervision. I trust that the present definition is unable to attain this level. It will only make the public feel that the authorities are going to do a great deal of things.

What do our Honourable colleagues, be they supporters or opposers, actually think? These kinds of work have been carried out for many years, in the past, at present and in the future. What is the difference? However, I will not yield to fate. Chairman, I will not do what I feel I should not. We will try our best to find a point of balance in the legislation. And if we lose, we can do nothing about it.

However, I disagree very much to the way the Chief Executive handles the matter. In the past, when any Bill was introduced for passage, the Chief Executive or the Director of Bureau concerned would write to all Members to say, "We are introducing a Bill. It is hoped that you will render your support." Now, the affinity theory is so closely adhered to that he only writes to certain Members. Chairman, I do not know if you have received it. This is really ridiculous. People like us have not received it. I really think that it is a shame on Hong Kong that the Chief Executive is carrying out his duty in such a manner.

CHAIRMAN (in Cantonese): Does any Member, who has not yet spoken, wish to speak?

MR ALAN LEONG (in Cantonese): Chairman, I pointed out specially yesterday in the Second Reading debate that the starting point of Article 30 of the Basic Law was not to maintain a balance. We foresee too early a balance with the right to privacy of communication protected by the Basic Law and international human rights conventions placed on one side and the crimes and

things like the net of justice has large meshes, but lets no criminal through, placed on the other side. It is actually not right to weigh them in this manner.

As a matter of fact, this Bill only allows law-enforcement agencies the right of infringing on the privacy of other people, in accordance with the law, to a limited extent under certain necessary circumstances. Therefore, the starting point is that the importance of this right must be recognized. In our system of the rule of law, there are concepts such as a person is innocent until proven guilty. I trust that the officials who are responsible for the present Bill are very familiar with this. We would rather let nine guilty persons go than convict one innocent person. This is the collective price paid by society. If we really believe that the right to privacy of communication is such an important human right, we must ask ourselves under what circumstances it is absolutely necessary and is essential that human rights are to be infringed upon for the purpose of enforcing the law. If you want to use the term "balance", as we have come to such a situation, you may be correct to a limited extent if you say that there is a balance.

Chairman, just now I heard many Honourable colleagues say that it seemed that there had been an misunderstanding caused by unknown reasons, so that it was thought that the law-enforcement departments had to resort to communication interception and covert surveillance, otherwise they would have no other alternatives and have no way of collecting evidence. This is of course not true. Chairman, even if there is no covert surveillance and no communication interception, I strongly believe that the Independent Commission Against Corruption, the Customs or the police will have other means of collecting evidence to bring the criminals to justice. Therefore, there will not be a large number of law-breakers escaping the net of justice if there is no interception or covert surveillance. We must know what the starting point of our enactment is. If we are very clear about what the starting point is, I believe that the amendments proposed by Ms Margaret NG, Mr Albert HO and Mr James TO are based on a footing that is very logical and in line with our spirit of the rule of law.

Chairman, it was too bad that when I was speaking at the ending part of the Second Reading yesterday, I hastily finished my quote, which was the words said by Mr Benjamin FRANKLIN, one of the founding fathers of the United States, in 1759. I quote what he said: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." I believe that what Mr FRANKLIN said transcended his times and it is universally

applicable. I hope that these words of his can linger in the Chamber as the best reminder for our work in the coming few days. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr Martin LEE, speaking for the second time.

MR MARTIN LEE (in Cantonese): Madam Chairman, Mr Alan LEONG said what I wanted to say. What he said is very correct. Article 30 of the Basic Law stipulates, "The freedom and privacy of communication of Hong Kong residents shall be protected by law." This shows clearly that as Hong Kong residents, we have such freedom. It is then stated that "No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences." It is so stipulated. Mr Alan LEONG also said that we should not think that the police would not be able to crack the cases if they did not conduct wiretapping. If it is thought that it is really for this reason that the Bill is passed and I were a police officer, I would feel disgraced and unhappy, "What do you think we are? Do we not know how to crack the cases? Can we not crack the cases without wiretapping?" If application for wiretapping is allowed even for minor offences, I trust that police officers would do something else. They are not going to investigate the cases in their usual ways. Instead, a whole group of them would sit down together to tap telephone conversations together. Of course, this sounds quite funny, and some people may like to do it, as some of our Secretaries have indicated that they can put their mind on two things at the same time. They can tap telephone conversations, play electronic games and browse the webpages, all at the same time. In due course, there will be more people of this kind.

It seemed that Ms Miriam LAU mentioned just now that everything should be balanced. However, it is not so in reality. The rights of the public must be protected first and this power should be exercised only when necessary. Ms Miriam LAU said that everything should be balanced. She said the same thing yesterday and today. I believe that the Government also agrees to what she said. We must be careful not to let the law make the public lose the freedom that is originally protected by the Basic Law after a balance is made. Our freedom should not be lost after the balance is made. Ms LAU is very smart. She cited a great deal of examples to demonstrate that investigations could not be conducted in this way if these amendments were passed. However, it does not

mean that no investigation can be conducted if investigations are not allowed to be made in these ways. She said that there would be great trouble and the law-breakers would be happy if such means were not allowed to be used. However, it is not so in reality.

The point that has to be argued on now is actually whether all cases, even one of dangerous driving, can be investigated by wiretapping telephone conversations if these amendments are not passed. According to section 37 of the Road Traffic Ordinance, the maximum penalty for dangerous driving is imprisonment for three years. Section 39 stipulates the maximum penalty for driving under the influence of drink or drugs is imprisonment for three years. In section 39A, the maximum penalty for driving, attempting to drive or being in charge of a motor vehicle with alcohol concentration above the prescribed limit is imprisonment for three years. I will never breach this Ordinance because I do not drink alcohol. However, those Members who drink — they are not small in number here — should be careful, in particular those who are sitting outside and listening. They may suddenly slap themselves to keep awake when they are about to drink drive, knowing that they should not drive. They may decide that it will be better if they take a nap in the car. But actually even this is not alright as they are being in charge of a motor vehicle. This will also incur a penalty of imprisonment for three years. But is this so serious in nature that it is necessary to wiretap the contents of their telephone communications? No. Can investigation of such cases not be conducted without wiretapping the contents of telephone communications, Ms LAU?" It is not so in reality. Therefore, why should this be done?

Madam Chairman, Ms LAU talked about the case of the Korean peasants. I am very familiar with this case as I was the lawyer responsible for this case. It is quite baffling why she cited this case as an example. I do not know for what reasons she cited this case as example. She was right in saying that many members of the public were in sympathy with the Korean peasants in the first five days and even accompanied them to the Court, but these Korean peasants were not right because they beat policemen with big wooden rods. This was definitely wrong, and so they were prosecuted. The Government prosecuted them without the need of wiretapping the contents of telephone conversations. What would be the result even if the contents of telephone conversation were wiretapped? Eventually they were acquitted. Surprisingly, for cases of violation of the law, for example, illegal assembly or unauthorized assembly, the maximum penalty is imprisonment for five years. Application for the conduct

of covert surveillance can be made for this kind of cases as it is presently provided that application for the conduct of covert surveillance can be made for crimes incurring a maximum penalty of three years. But is this necessary? The citing of the Korean peasants case as an example by the Government shows even more clearly its incompetence.

Madam Chairman, we must remember that the Basic Law ensures that residents have these rights and these rights should not be infringed upon if not really necessary. If necessary, it should only be done so when there is no other means available and it should not go too far. It is also not correct if it is disproportionate. The Bill was drafted by the Government and the words "serious crime" are stated. How can these trifling offences be regarded as serious crimes? Not a single policeman will be able to understand why. The Secretary must have never gone to the front line to catch crooks. He should know what serious crimes are, but everyone knows that these offences are not serious crimes. I trust that not only members of the legal sector laugh at him. Please do not do this. Perhaps he should consider not citing the term "serious crime". If he cites "serious crime", he should not fix the maximum penalty at imprisonment for three years. Very often, in the offence of dangerous driving, the relevant provision of which I read out earlier, will not eventually lead to imprisonment. There will be no imprisonment even if the driving licence is cancelled. Therefore, is it necessary to conduct wiretapping for such cases? Are you sure there is nothing wrong about it?

Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr Ronny TONG, speaking for the second time.

MR RONNY TONG (in Cantonese): Chairman, thank you for reminding me that I am speaking for the second time. Originally I did not intend to stand up to speak, but after I had heard Ms Miriam LAU speak, I felt that I had to stand up to speak.

Chairman, I have always been very respectful of the opinions of my Honourable colleagues, especially those who are lawyers, such as for example, Ms Miriam LAU. But I feel that I have the obligation to stand up in the Council to make a response when the opinions of my Honourable colleagues have become

irrational. I do not want to see our Honourable colleagues deal with this issue in an irrational manner as we have actually seen far too many irrational responses already. For example, the Secretary has publicly indicated to the media more than once that if this Bill is vetoed, "the gangsters will be in control of everything" and that if the amendments are passed, "the gangsters will be in control of everything" too. What Mr Martin LEE has just said is right. Hong Kong was a "den of thieves" and "the gangsters were in control of everything" before there were interception devices. "The gangsters were in control of everything" before there were interception devices and covert tracking devices. This is irrational opinion.

An irrational opinion is dangerous in that a person with a different opinion is pushed to the side of those who are irrational. Thus, a group of barristers are regarded as wanting to let the criminals run loose. The net of justice used to be all-compassing, but a barrister proposed an amendment to punch holes in the net to let the criminals go. This is a pretext. If the amendment is passed, "the gangsters will be in control of everything". Their pretext is that our group of people want to set the gangsters free so that they can spoil the law and order of Hong Kong. This is an irrational argument and an irrational opinion. We have all along had a very clear stance. We have indicated that we can have this piece of legislation made in such a way that it gives law-enforcement officers sufficient power for the detection of crimes that really require such power for detection or crimes that really affect the livelihood of the people of Hong Kong and the stability of society, while at the same time protecting as far as possible the basic rights of innocent members of the public. This is our stance. Our stance is not to punch holes in the net of justice to set the criminals free. We are of the opinion that we can make it and this is the reason for our proposing of the amendments. If we are of the opinion that we cannot make it, why are we proposing several hundred amendments? What is the point of our holding a meeting for 11 hours? After the conclusion of the 11-hour meeting, I flipped open the newspaper this morning and found that the focus of media reports was the number of paparazzi teams that hanged around the Legislative Council Building yesterday. Members talked jokingly yesterday about whether it was possible to change the division time in the debate from three minutes to one minute. What are we after? For this Bill which we may have to spend five to seven days' time for the debate, are we doing this because we want to set the criminals free? What good does this bring to us? The stating of these irrational opinions will degrade the Council. It is alright to degrade me, but please do not degrade this Council.

Chairman, what Ms Miriam LAU said is of course not completely without reason. However, a half-right reason is most dreadful, just like a half-true fact is the most dreadful lie. She said that if these offences were not "serious crimes", the Judge would make his own judgement and there would be no problem. This is right in theory. Of course I wish that what everyone does is right and would not go wrong and no one would have any selfish motives. I also trust that the Secretary does not have any selfish motives. I will not say that the Secretary is shameless, but I will say that the Secretary is irrational. In actual fact, even the Judges do make mistakes. We have seen cases which won all the way since first trial but eventually lost at the Court of Final Appeal. Some of them are not minor cases but major ones. Therefore, even the Judges do make mistakes. What we are dealing with now is the entirety of the Bill. We do not just point at some small place and say that it is wrong. Why do I say so? Even though we are keeping this definition now, if the Government has a reasonable and effective safeguard mechanism, we would accept it. On the other hand, if no effective safeguard mechanism is put in place but there are clear definitions, we may also accept it. Upon reaching the final stage, if we find that the entire Bill does not have all of the safeguards, we will hope to make improvement to each and every clause of the Bill. This is the reason for our proposing more than a hundred amendments. Why would I want to stand in his way? What good is that to me? Are we going to become the Chief Executive by doing so?

I was saying that — I am sorry. Ms Miriam LAU is drinking coffee outside. I hope that she is watching the television — of course we could start by thinking about the mechanism of authorizations by Judges. However, it seems that she has forgotten one thing, and that is crimes that are liable to imprisonment for three years do not require the attention of the Judges. Crimes liable to imprisonment for three years require the attention of the head of department only. When will the Judge come in? Sorry, the Judge will never come. In the next stage, the Commissioner will make a random draw. You will have to try your luck to see if your case is selected. Even if your case is selected, you might not be told that a mistake has been made. If Martin LEE has erected unauthorized structures, he may not win the case. Even if there has been a mistake, the intelligence will be kept in the intelligence database forever. How do we deal with such cases? What Mr Alan LEONG has said just now is right. Under the "one country, two systems" concept and the principle of "remaining unchanged for 50 years", we are still practising common law, that is we are adhering to the system under which a person is presumed innocent until proven guilty. You may disagree or feel unhappy and wish that these 50 years

would pass quickly, so that a person is presumed guilty until proven innocent. But still, you have to respect this system and respect these 50 years. We hope to protect some innocent members of the public. You may think that this is too trivial, but this should not become a reason for opposing the amendments we have proposed.

As a matter of fact, everybody said so yesterday and I am going to say it again today. I will go on even when my mouth gets dry. We all have the same goal. We just do not want to have the Bill so loosely drafted that there would be opportunities for abusing power or misusing power. We hope to reduce such opportunities. If the Secretary feels that our amendments are unable to prevent gangsters from escaping, then can he propose an amendment that has the effect of letting innocent members of the public go? As I said just now, why can the words "endangering personal safety" or "gravely endangering social stability" not be included in the definition? Why is even the hammering of a nail or, as Mr Martin LEE said, offences such as drink driving are included? When there is room for abuse of power, there will be opportunities for abuse of power. Murphy's law says, what can go wrong will go wrong. We just hope to minimize the opportunity of going wrong. Can this even not be allowed? If even this is not allowed, what is the use of having this Council? Simply let the Government draft the Bill in whatever way it wants.

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the second time.

MR LEUNG KWOK-HUNG (in Cantonese): It seems that the entire debate has something to do with paternalism. As a matter of fact, this is the present attitude of the Government — it says, "Trust me. I will strike a balance." Let me tell the authorities. Of course I do not trust you because the Government does not always act in adherence to the rules. Is that right?

Let me cite an example. Even in the United States, a country that claims to be very democratic, there was a fellow called HOOVER. Every President was afraid of him. It was all because he abused his power and collected information of the presidents. When the anti-communist figure McCARTHY emerged in the United States, many people had to report to the authorities whether they were communists or not and those who just refused to say whether they were communists would be put in jail. This was a dark age. The

Government said this: there are so many communists, if we do not ask them or if they do not reply, or if we fail to find out whether they are communists, the United States is going to have big trouble." Things were so crazy at that time. Under a crazy system, people like HOOVER will appear.

Therefore, I just want to remind the Government or Honourable colleagues who are in support of the Government that you have to think about this. It is now not easy to amend the law that you are enacting and the Government does not accept the "sunset clause". Therefore, everybody will get stricter in handling the matter as the Government will have no more trouble once it gets what it wants. Therefore, the government officials should not criticized in their mind Members for setting barriers to the legislative process. They should not do so.

Like all human rights conventions, Article 30 of the Basic Law has actually been drafted in such a manner. There is no balance. Rather, rights are put in the first place. In general, it will be said that rights are essential to democratic societies and several conditions will be listed. I am very familiar with this because I have taken matters to the Court. I know that this type of provisions are so written — rights are put in the first place. Why is it so? Let me tell you. Man is born with a sinful nature; otherwise the *Bible* would not have been produced. It reflects the sinful nature of man. The question is just that whether we should regulate the government or the individuals first.

To be frank, we need not talk about these issues at all had there been no Renaissance in Europe, since then human rights began to be respected. What we are talking about today is that freedom of speech and privacy of communication should not be infringed upon and should be protected by the law. I wish to ask the Secretary, "You are going to enact legislation now. Are you providing adequate protection?" It is so written right at the beginning. Then there is a proviso — "unless" so and so. What comes next after the word "unless"? Let us not get too far-fetched. Is it actually three years or seven years? You are hesitating again. Is it actually three years or seven years? What is your understanding of Article 30? To me, the question is very simple. The answer is that if you raise the threshold, you are imposing restrictions on yourself, though this is in line with Article 30. The relevant provisions are not so written as to turn Article 30 upside down and say, "The freedom and privacy of communication of Hong Kong residents shall be sabotaged by the Government." — they are not written like this — or "……'restricted by the Government' and 'unless' so and so". The provisions are not written like that.

Therefore, I would like to cite another example on the abuse of power. Let us take a look at the human rights lawyers on the Mainland. Is any one of them officially arrested? Of course, some legislation, for example, education through labour legislation, is selected for enforcement. The education through labour legislation on the Mainland is actually very good, because there are not too many prisons and prisons are not required for the enforcement of this type of legislation. In sum, if the administration thinks that someone is no good, it will have him detained for 15 days to see what his attitude becomes. If that does not work, he will be sentenced to education through labour for not more than three years. It is good at the beginning as the employment situation on the Mainland is poor and a large number of people are jobless. However, there will be a problem in enforcing this type of legislation if there is abuse of power. Therefore, if we find during our discussion any piece of legislation that allows law-enforcement authorities to infringe on human rights more easily, then it must be bad legislation.

Secretary, you cannot put things the other way round and say, "If I cannot infringe on your human rights, how can I safeguard your safety?" This concept is totally wrong. I tell you, Secretary, you have said, "The gangsters will be in control of everything" — I do not know whether you have actually said this. I trust that you are not that crazy. If you are, let me tell you, I really saw on the television screen a triad head say, "We are in overall control here after 12 midnight." He said this to all the people of Hong Kong. Do you still have to conduct wiretapping before arresting this guy? I do not think it is necessary. That guy really said such words.

Actually, among the various offences, if we examine carefully (of course I am not a lawyer), we will see that offences liable to a maximum penalty of imprisonment for not more than three years can be regarded as serious but can also be regarded as not serious. It is all up to you. However, as far as the legislation is concerned, when the enactment of legislation pursuant to Article 23 was being discussed, there were already a large number of people who advocated the drawing up of relatively heavy penalties, which at most could be left not enforced. Therefore, most of the laws are draconian laws. In other words, the maximum penalty can easily exceed three years. If you continue to say these things to us, that means you are likely to investigate into most offences in such a manner with no Judge's authorization. All you need to do is to say that you want to do it.

I would like to ask you a simple question: how are you to protect me? If I conduct an investigation on you, would you feel happy? And if some other

people, for example, a paparazzi team, conduct an investigation on you, would you feel happy? No, you would not. As such, how can a law-enforcement agency, which has official power, act like this and conduct investigation at will? Someone may say, "I will not use power in such a manner." If you are not using such a power, they do not get it. It is most cunning to say, "Give me such a power. I will not use it. I will never use it." If I say, "Secretary LEE, give me all your property. I will not use your money. Come and take them back 10 years later." Will you do so? No, you will not, because during the period I can use your money. This is simple common sense.

All those who are desirous of power will say "Give me power. I will not use it unless it is absolutely necessary." Actually, we can put things the other way round and say it in another simple way, "I am not going to give you power in such a manner. If you feel that a certain issue is important and require the use of such a power, come and ask me for it." Such is the spirit of enacting legislation. This is very simple reasoning, but does anybody believe it? If I make the following request to you, will you accede to it? Even if the request is that you give me an object and let me keep it for you, you will not do it. You will of course ask, "How can I trust you?" You have to provide security to the bank even when you want to borrow money from it. This is actually very simple reasoning. Today, the Secretary is saying to all people of Hong Kong, "Trust me. Trust me. Trust me." And what we say is, "Do not trust him. Do not trust him. Do not trust him. More restrictions must be imposed." In actual fact, all disputes stem from here.

We have been severely criticized. Sometimes, I saw on the Internet that all comments were that things had turned out this way because I had taken the matter to the Court. If we set barriers to hinder the Government from enacting the legislation or caused the legislation to be poorly enacted, we would be condemned through the ages. I am really grateful to these newspapers for saying that I am a man to be condemned through the ages. Ladies and gentlemen, I have not yet squared the accounts with you. No investigation has been made on the number of innocent people whose communications had been intercepted according to section 33 of a law enacted by the British Hong Kong Government before this piece of legislation was introduced. Secretary, I have asked you many times about whether you still have such operations after the disbandment of the Special Branch in the British Hong Kong Government. Do you have or do you not? You have given me no reply so far. And I have asked you several times.

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, your speech is getting increasingly farfetched. You are almost talking about the history of Hong Kong. Please go back to the present amendment.

MR LEUNG KWOK-HUNG (in Cantonese): Secretary, I have asked about your understanding on whether there is this kind of operation going on at present. Are you or are you not conducting surveillance on us for offences liable to a maximum penalty of imprisonment for three years? Your department will conduct internal investigation. If such is the findings of the investigation, this criterion will be adopted. Is that right? Therefore, if I continue to be indulgent with you, many things that can be conducted under an executive order issued by Mr TSANG or by Mr TUNG in the past or under the Telecommunications Ordinance can now be lawfully conducted. This is the actual political reality, and that is, the law-enforcement departments of the Government have all along been unsupervised. This time, the Government has to respond to us, though reluctantly, by proposing the drafting of an ordinance simply because it has got into trouble or stepped on a mine (there is no other alternative because the Judge said that what it did was not right). Therefore, it is also because of this that you make addition to every clause in order to get what you should not have got in the past. This is the true face of politics. If not, it is impossible to understand why you are so anti-intellectual. Why did you say no when we proposed "seven years"? Why did you say that "three years" was enough for the purpose of striking a balance? This cannot be explained.

Let me say it again. Had it not been your losing the case, you would not be willing to enact legislation. This is the key point of all our discussions. Therefore, I hope that after I finish speaking the Secretary will stand up to speak again to explain why it was not possible to change "three years" to "seven years" during you internal vetting process. I say it again: you are now doing your own vetting. You do it by yourself behind closed doors. This threshold is very important because the situation now is such that no one is supervising you. We are now conducting supervision for the last time. You have now won everything but you are still thinking about not setting it at "seven years". If it is "seven years", there will be more uncertainties in the result of the random draw made by the Commissioner for the purpose of supervision, so that he will not always draw out those cases that are suitable for the conduct of your operation. Otherwise, what the Commissioner does will be meaningless. If the criteria are too broad, it will turn out that for whatever case selected he is going to say,

"Well, it is again one on which operation can be conducted.". That is how it is going to be. We are making the final supervision. There will be no more of it afterwards. Moreover, the sunset clause will not be introduced.

Therefore, I hope that the Secretary will stand up to speak about why you are so indulgent with your subordinates. You are doing it not for me but for everybody. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any Member, who has not spoken, wish to speak? Mr CHAN Kam-lam.

MR CHAN KAM-LAM (in Cantonese): Chairman, I think that what we have been discussing in the debate today is apparently about whether the threshold should be set at three years or seven years. I completely agree to what Mr Ronny TONG said. We should explore this issue rationally. Of course we should strike a balance here. As a matter of fact, the most important objective of this part of the Bill is on how to avoid and give law-enforcement officers the means of detection.

I believe that no one will deny that we ought to have some means of detecting law-breakers, so as to bring them to justice. Therefore, the difference between us would be whether or not the threshold should be set at three years or seven years. But if we say that there is an infringement on the privacy of residents or on the basic rights of innocent residents, I would feel that such opinions are somewhat irrational. Why? Because it can be seen from the difference in three years and seven years that if it is five years, six years or four years, those offences will be subject to protection. There is basically no such a problem with those under three years too and it is not necessary to employ such means for their detection. Therefore, is it necessary to talk about the basic rights of innocent members of the public? I trust that a large number of members of the public are listening to our debate. Many of them would feel that there would be big trouble if this Bill is passed as even the rights of innocent members of the public would be infringed upon. I feel that this is a problem. As to the basic rights of the public, I feel that to be more precise, the presupposition of "intending to infringe upon the basic rights of residents" should be added. This may result in greater clarity.

Of course, there will be people who worry about the abuse of the means of interception and surveillance by law-enforcement officer to infringe upon the privacy of members of the public. However, if we always refuse to trust the Government and do not assume an attitude of trusting it and even do not believe in what has been basically provided for by the law, I believe that nothing at all can be achieved. Of course, I agree to your saying that in our society we should presume a person to be innocent until he is proven guilty. However, about the law-breakers, would we rather let nine guilty law-breakers go than wrongly convict an innocent person? Have we considered that when we let nine law-breakers go, more than nine persons may be deprived of their rights? Therefore, we have to take this into consideration as well.

Of course, if the means of interception or surveillance is not employed, it does not follow that there will be a large number of crimes in society. But what matters is that if we have the means of interception or surveillance, we really can prevent the occurrence of a large number of crimes or serious crimes. This is an obvious truth, which I think everybody should know. I also agree to Mr Ronny TONG's saying that even the Judges may make mistakes because if not, why should we have three levels of Courts? However, to make things clearer, we can say that solicitors may make mistakes and barristers may also make mistakes. And solicitors make more mistakes. Strictly speaking, at least 50% of solicitors make mistakes. At any trial, the legal representative of one of the parties is sure to lose. However, we will not say whether the lawyer is right or wrong. We will only say that whether he is capable or not. Therefore, as far as this issue is concerned, I feel that we need not be so rigid as to talk about lawyers being right or wrong.

Of course, using counterfeit banknotes may be a minor offence. But if we regard all these acts as minor offences, so that as a result our monetary system is affected, then are they still minor offences that we need not bother about or need not employ certain means for their detection? And are we to tie our law-enforcement agencies up in order to make the detection of this type of offence difficult? Therefore, I am of the opinion that these should also be taken into consideration. Chairman, I think that the Bill is of course meant to protect the rights of members of the public, but surveillance should be conducted on the very wicked and evil, no matter they are going to be sentenced to imprisonment for three years or seven years. Through these various means, their deeds may be easily detected. Of course, surveillance and interception are just some of the means. I trust that the general public of Hong Kong will not like to see people of lesser wickedness or evil go unpunished. When we flip open the daily

newspaper, we will also see that many crime cases of various degree of seriousness have occurred. Is this what we love to see? Thank you, Chairman.

CHAIRMAN (in Cantonese): Is there any Member who has not spoken? I think that the Secretary for Security should be invited to speak at this stage. I trust that Members also have many different views. Mr LEE Wing-tat.

MR LEE WING-TAT (in Cantonese): Chairman, I felt worried after hearing what Mr CHAN Kam-lam said. Both Mr CHAN Kam-lam and I have not received any legal training, but we ought to have basic legal knowledge. The speech that Mr CHAN Kam-lam made just now was of course very gently spoken and appropriately delivered. There were no ferocious gestures or angry looks. The looks may be very gentle, but the words can still be scathing. What I mean is that if we think carefully, the logic in Mr CHAN Kam-lam's speech has the effect of making the present intention of the Government seem quite widely supported by public opinion.

CHAN Kam-lam made a number of assumptions. Firstly, there is not much difference between three years and seven years. I hope that Mr CHAN will think about this: the respective scopes of three-year offences and seven-year offences can both be very extensive and there can be a great difference between the two. Three years and seven years is not just an issue about the number of years. The respective scopes of offences can be very critically and distinctively different in terms of their extent.

Secondly, I have been listening very carefully to what Mr CHAN Kam-lam has said. He always says that those are people who intend to commit a crime or people who have committed a crime. This is very unpleasant to my ear. Mr CHAN also knows that those people who may be listened to, may be tracked or may have their communication intercepted, are people who are considered not yet committed a crime. They are at most suspected of having the intention of committing a crime. Mr CHAN Kam-lam is almost saying that all the people who are listened to by the Government must be committing a crime. That is very dangerous. I wish that Mr CHAN will know that some serious traffic offences are liable to imprisonment for three years. That sort of offences occur every day in Hong Kong.

When Mr CHAN Kam-lam says that those are people must intend to commit a crime or have already committed a crime, his concept is not too close to what he has said in the end. He said that a person should be assumed innocent until proven guilty. But I think that what he said was a person should be assumed guilty until proven innocent. That is, just take one look at those people and it can almost be sure that they must have committed a crime. This will serve to show the great difference between our views on the basis of rule of law. Are we going to assume that people must have committed a crime once we see that they have a little intention to do so, or to assume that they have committed a crime even when there is insufficient evidence?

Both Mr CHAN and I have been returned to this Council by direct election. Sometimes, when visiting the community, I also heard some residents say that it would be better if the cases were handled as serious crime cases because that would facilitate the arrest of the criminals. I also understand that some residents or members of the public wish very much to have the criminals punished under a very strict code of law. But we also have to remember that in modern society, adopting such a practice does not mean that we can we can strike a good balance between the rule of law and human rights. We should know that in the past in Arabia, one who committed theft would have his hands cut off. If the hands are to be cut off, of course no one would dare to commit theft. Do we want Hong Kong to do the same? This is a very strict code of law. Of course, I must say that I do not want to equate this example with the present debate about three years and seven years.

Our concept is that Hong Kong is already such a modernized society. When we judge the seriousness of an offence, I agree to what Martin LEE said. That is, we have to look at the proportionality. Because of this, I cannot accept Mr CHAN's saying that it does not matter whether it is three years or seven years. As their respective scopes are so different, I want to ask a question: our law gives power to the Government, but is it reasonably given and in good proportion and should the Government have such a great power? In fact, the scope of three-year offences is very extensive. Therefore, I hope that no one will say that it does not matter whether it is either three years or seven years.

Furthermore, some words that Mr CHAN said just now made me all the more worried about whether more criminals would escape if the scope was reduced to such a small area? He always thinks that those who are being investigated must be criminals. Therefore, he will also think that "Long Hair",

TSANG Kin-shing (Bull) and people such as KU Sze-yiu are all criminals. It seems that his concept is that those who have been wiretapped or thought to have political acts must be criminals.

I hope that everybody will think about this issue. We always say that we believe that the Government will not abuse powers and will not use those powers recklessly. Actually, we also want to trust the Government. Our Honourable colleagues — Margaret NG and James TO — have made a large number of requests about supervising (even if afterwards) the use of such power by the Government. However, these amendments have not been accepted. Of course, those matters do not fall within the scope of the amendments. I just want to stress that we should not rashly think that the difference between three years and seven years is very small. It can actually be very large. Thank you, Chairman.

MS AUDREY EU (in Cantonese): Chairman, I am not going to repeat what all my Honourable colleagues have said, but there is a point to which I must stand up and respond because I fear that if I do not respond to it, a very naïve mistake would appear in the records of this Council. Earlier on, CHAN Kam-lam said the Judges would of course make mistakes but lawyers would make more serious mistakes and that at least 50% of lawyers would make mistakes as one of the two parties in a lawsuit would lose the case. This is a very naive and fundamental mistake, which I must correct. Barristers in particular, have the obligation of working for their clients upon the latter's request for representation in litigations. A barrister cannot say that he would not represent his clients because they are going to lose. Otherwise, there is a chance that 50% of the people who are parties to a lawsuit would have no legal representative. This is impossible. The situation is similar to that of doctors. They cannot say that the patient is too ill to be cured and refuse to give him medical treatment so as to avoid an increase in the number of death in their patients. This is a fundamental mistake that must be corrected.

Thank you, Chairman.

MR ALBERT CHENG (in Cantonese): Actually I also want to say what Ms Audrey EU has said. Common law presumes a person innocent until he is proven guilty. Losing a case does not mean that the barrister or the solicitor has made any mistakes, because when a client wants to hire a lawyer, the lawyer

must assume that the client is innocent and represent him or her in the litigation. However, one who is innocent may not mean the person is not guilty. It is under the strict scrutiny of the law that the person is proven guilty or otherwise. This is what I know about common law.

I am not favouring lawyers. Actually I do not like lawyers so much. Why? Because I am a victim of organized crime and I hate very much those laws that hinder law-enforcement agency from making investigations to bring the criminals to justice. Being a victim, I wish you would understand me. You will not know it as you have not been through it. I hope that the police can arrest all those who commit organized crimes. If you ask me, I will tell you that I want to have all of them executed by a firing squad.

What we are discussing today is the problem of three years and seven years. This is actually not a problem. It will be better if we face it squarely. It is a fact that basically we do not trust the Government. Some offences liable to imprisonment for three years are very serious in nature. Three years is a dividing line. Martin LEE or Ronny TONG said earlier that a person found to have committed a traffic offence might also be arrested. This is mistrust of the Government as it is impossible for the Government to bug an offender of the traffic legislation. Do you think that "Long Hair" would tell KU Sze-yiu that he is going to drive at 200 miles per hour on Tolo Harbour Road or that he is prepared to knock some people to death? No one will bug these things. However, we just do not trust the Government.

Why do we not trust this Government? The reason is very simple. It is because we have no democratic system. The Government is not elected by universal suffrage, nor is our Chief Executive elected by universal suffrage. Besides, the present enactment is basically conducted very hastily and mainly because the Government has lost the litigation. Furthermore, we have still not enacted legislation to implement Article 23 of the Basis Law. Therefore, Chairman, we can easily see that the Government hopes to include what Article 23 does not have in this Bill through the present enactment attempt. This is what every one of us worries about. I think we must say it out.

Let me talk again on how I feel about lawyers. For my case, a person was arrested at Tai Kok Tsui and four solicitors were already waiting for him at Arsenal Street before he was taken there. Being accompanied by the lawyers, he thought he was in control of the situation and did not have to say anything. I

also heard that the police was investigating a suspected backstage manipulator and when they arrived at his office, four barristers, including a senior barrister, a barrister and partners of a major law firm were sitting there. At that time, the police sent a team led by a Police Superintendent, but the suspect did not utter a single word and everything was spoken by the lawyers.

Although I am a victim, I still support the common law concept of assuming a person innocent until he is proven guilty. The issue that we must pay attention in the present enactment attempt is that we should really be very meticulous and careful in enacting this piece of legislation because it authorizes law-enforcement officers to conduct wiretapping, which infringes upon our human rights. This is what we worry so much about. Let me say it again. Why do we support those amendments and oppose the Government's amendments? It is simply because we do not have a democratic system. It is a fact that we do not trust this Government. Since we do not have a democratic system, the Government has the obligation of protecting our human rights as far as possible when enacting legislation, so as to relieve the people of their worries. This is a matter of fundamental principle. Do not make use of this piece of legislation to fill the gap left by the failure to enact legislation to implement Article 23. This is not right.

Of course, the same rationale is to be applied to this amendment. What we are talking about is a political issue. The setting of the dividing line at three years makes me very scared. Take "Long Hair" as an example. The penalty for the offences he commits is normally imprisonment for not more than three years and perhaps not more than three months. If that is not the case, he would not be sitting here today. We worry that when this piece of legislation comes into force, wiretapping and political surveillance will be conducted. This is what we worry about. I just want to talk about why we are arguing about these things. If we have a democratically-elected government today, there would be no problem with those amendments. I would then think that there is no problem with three years. However, of course I will oppose now.

Thank you, Chairman.

CHAIRMAN (in Cantonese): I am not going to ask those Members who have already spoken to speak for the time being because I think that I should now ask the Secretary for Security, who has not already spoken, to speak. *(Laughter)*

SECRETARY FOR SECURITY (in Cantonese): Chairman, first of all, I wish to respond to what Mr LEUNG Kwok-hung said. The Government is guided by reason. We are a rational government.

Chairman, the amendments on which we are debating today are about the proposal by Ms Margaret NG and Mr James TO to raise the threshold in respect of Type 2 covert surveillance from three years to seven years. Why am I making a clarification for this? Because just now many Members have got a fact wrong. They all think that wiretapping can be conducted on all offences liable to imprisonment for three years. This is exemplified by Mr Martin LEE's saying that by then wiretapping could be conducted for those driving offences and traffic offences as they were liable to a maximum penalty of imprisonment for three years. Our threshold for the conduct of wiretapping is imprisonment for not less than seven years. Therefore, please do not get the two things mixed up.

Moreover, there are two thresholds for covert surveillance. Type 2 covert surveillance is approved by senior officers in the departments, while Type 1 covert surveillance is approved by the Judges. In this connection, I have to correct Mr Ronny TONG's saying that all covert surveillance is internally approved.

MR RONNY TONG (in Cantonese): …… not more than three years.

CHAIRMAN (in Cantonese): It is not time for you to make a clarification. If you wish to clarify, you have to wait until he has finished speaking. Secretary for Security, please continue.

SECRETARY FOR SECURITY (in Cantonese): Chairman, our aim for introducing this piece of legislation is the same as that of the Members. We also hope to minimize the infringement on the privacy and human rights of residents on the prerequisite of maintaining the security and good law and order of Hong Kong. Right in this Ordinance, we are not doing nothing else other than setting the thresholds at three years and seven years. We have a whole set of mechanisms, including a supervisory mechanism related to the granting of approval. When conducting our operations, we will monitor investigations made by law-enforcement forces during the course of crime detection. We will

also monitor it afterwards. This is a response that fully indicates that we will not forget to prevent front-line officers from abusing power inadvertently or deliberately in the course of enforcing the law.

The threshold of three years is a primary threshold only. Police officers are not going to conduct covert surveillance in relation to all offences punishable by imprisonment for three years under the law. At the same time, regarding approvals, the approving authority, be it a Judge or a senior officer of the department concerned, has to vet all documents personally in order to be satisfied of the proportionality and necessity of the operation. Many Members indicated just now that there would be covert surveillance and interception of telephone communications everywhere on the streets. In my opinion, such an inference is incorrect.

The relevant amendments, if passed, will greatly undermine the law-enforcement ability of the law-enforcement agencies. Some Members have indicated that there was no interception of communications in the past or more than a century ago — actually we are not debating on the interception of communications at all — but I can tell everybody that there has been covert surveillance ever since there were policemen. In the past, even though there was no wiretapping of telephone communications, covert surveillance would still be conducted by tracking or other covert means. It was so several hundred years ago and it was so several decades ago. Therefore, covert surveillance is nothing new. Our law-enforcement forces have not set the threshold at three years without any grounds. We have set the threshold at three years on the basis of our many years of past experience and by making reference to the practice of other common law countries.

Take the United States as an example. They have also set the threshold for covert surveillance at imprisonment for at least one year. The threshold for covert surveillance in the United Kingdom and Australia has been set at three years, which is similar to ours. If we raise the threshold, of course covert surveillance cannot be employed as a means of investigation in respect of a large number of offences. I do not want to be repetitive as Ms Miriam and Mr LAU Kong-wah already spoke about it just now. Moreover, there are offences liable to a maximum penalty of imprisonment for two years and a fine of $1 million, which include importing or exporting certain dutiable commodities and forgery of prescribed documents in contravention of our Dutiable Commodities Ordinance or the signing of false document by staff of an authorized institution

for submission to the monetary authorities in contravention of the Banking Ordinance, and so on. Some of these offences involve crime syndicates and will affect our existing monetary system. Of course, even if the minimum criterion is met, the approving officer must, as I have said just now, be satisfied that the conditions of proportionality and necessity as required by our legislation are met before approval is granted to law-enforcement officers to carry out covert surveillance.

If the amendments of Mr James TO and Ms Margaret NG are passed, covert surveillance, which is an effective means of crime detection, cannot be used for the investigation of these crimes. This will definitely deal a big blow to the law-enforcement capacity of law-enforcement agencies in this aspect. I do not want to, as Mr Ronny TONG has said, threaten you. However, I have more than 30 years' experience of working in disciplined forces, and upon sharing my experience with colleagues, the judgement made by all of them is that if this is true, criminals can make use of the leeway and the profits that they have obtained to extend their activities to various kinds of serious crimes, thereby affecting various sectors of the community. Their activities will cause social instability if left uncontrolled.

Therefore, I also oppose Mr HO's amendment because there is no such so-called "political offences" in Hong Kong and what is the reason for its inclusion in the Bill? Mr HO cited some examples in relation to the Public Order Ordinance. However, the Court of Final Appeal has pointed out that the relevant provisions of the Public Order Ordinance is in line with international human right standards and is constitutional. Therefore, I do not see any political elements. Chairman, with these remarks, I urge Members to veto the amendments of Mr HO, Mr TO and Ms NG.

MR JAMES TO (in Cantonese): Chairman, it is fortunate that the Secretary has spoken, otherwise we will not be able to know where the ridiculous nature of his argument lies. Debating in depth and arguing in such manner is actually beneficial as a few Members who are not in the Bills Committee will have a much better understanding after hearing what I have said. Of course, I can do nothing about some Members who belong to the ruling coalition or those who support the Government. They are feeling very uneasy at their hearts now and they will not agree with it. Having heard our arguments, they would feel that the Government has indeed been totally defeated in this debate.

First of all, why should there be different "thresholds"? I can now let everybody know what is in my heart. For the moment, if I were the Secretary now, I would think that the most desirable entry point (actually I have told the Government about this too) should be set with reference to the Schedule to the Organized and Serious Crimes Ordinance. Why? If I remember correctly, Dr Philip WONG was the Chairman at that time. We spent a great deal of time in negotiating with the Government on the definition of "serious" and "the most serious crimes" as well as the exercise of the special powers. I originally promised Mr Ronny TONG to try my best to complete this Schedule and hoped that I could make it or let Members including Mr LAU Kong-wah choose between something like menu B and menu C. However, our human and material resources did not allow us to provide an update on the serious crimes in the preceding 10 years within such a short time. The Government is able to do it because it has several hundred lawyers. However, it has decided not to and I fail to find out the reason why.

I wish to tell everybody the Government's point of reference is in fact quite a good one. There are three categories: the first one involves life, health, safety and bodily harm — I mean those bringing harm to life and the body and serious harm to freedoms. Some of the offences in this category are liable to a penalty of imprisonment for less than seven years, and the scope of this category would even include offences liable to imprisonment for less than three years. Therefore, if you tell me that seven years is now taken as the norm for the interception of communications, I would say that this is not good enough. In fact, I have discussed this with Mr LAU Kong-wah in the Bills Committee. Actually, if the impact is taken into consideration as well, perhaps some offences liable to imprisonment for less than seven years should be excluded. What is most disappointing is that the Government does not do what it should and does not use its head.

What is the second category? The second category involves triads. The third category involves other specific offences not falling within the aforesaid two categories and there is a schedule that lists them out. In brief, they include offences such as operating vice establishments or gambling dens and engaging in drug-related activities, using chemical weapons, serious immigration offences and serious trading offences, that is, forging trade descriptions and brand names and serious offences related to import and export.

Among the vast number of offences, some were deliberately omitted at that time. For example, some offences are not mentioned in the Public Order

Ordinance at all, and it has been deliberately done so. If an offence affects life and personal safety, it is included in the Public Order Ordinance; if it does not, it is not mentioned in the Public Order Ordinance at all. Therefore, what Mr LEUNG Kwok-hung has committed, such as failure to make notification, is not mentioned at all. Moreover, those offences that I mentioned just now, for example, on counterfeit banknotes, were also deliberately omitted.

As to poisoning, of which I mentioned earlier, it has been included because the act of poisoning affects personal safety. Therefore, no matter the term of imprisonment is three years or two years, it has been included because conceptually legal provisions are to protect the safety of life and property. Next come those involving other important and special acts. Therefore, this is the best starting point, but the Government is unwilling to take this as the starting point for its considerations. Therefore, I regret very much about this.

All the things that the Secretary has just said, for example, his threshold theory, his statement that no covert surveillance can eventually be conducted for some of the offences, are based on the same rationale. For what has been mentioned by many Members who are in support of the Government, cannot be applied to wiretapping at all. Are these methods ineffective in curbing crime? No. Would the criminals be let loose if wiretapping is not conducted? Perhaps. In that case, why does the Government still choose not to do it? It is very simple. This involves the concept of striking a balance. It is because certain conditions should be applicable to the most serious crimes only, and we had defined what the most serious crimes were in the past. If we are willing to take this as the starting point, the issue is still open to negotiation. Unfortunately, the Government does not want to start from a good starting point, a relatively comprehensive (we want it to be comprehensive) starting point which has an extensive coverage and can very expressly differentiate the important from the unimportant. The Government is unwilling to do so.

However, the Government is willing to cite other examples, for instance, by pointing out that a certain bank has issued documents to cheat the HKMA (that is where Joseph YAM is) in contravention of the Banking Ordinance (Dr David LI is here now). But what kind of offence is this? This is a regulatory offence but does not belong to the type that we are now talking about. The citing of these examples by the Government only shows its ignorance because those things are totally irrelevant and totally unrelated to what we are discussing about. What we are discussing about is the investigation of the most serious crimes. The offences that have just been mentioned are not minor in nature, but

we can deal with them by making a paper trail, that is, by going through the records and the documents and not by wiretapping and surveillance. The way they are handled and how investigations are conducted are totally different.

Dutiable commodities were mentioned earlier. Offences related to dutiable commodities were deliberately omitted from the schedule on organized and serious crimes. It was deliberately done so. What was the reason? It was not because it did not fall within the scope of organized and serious crimes but because at that time it was thought that this kind of offence generally involved slight losses of revenue. Therefore, it was omitted deliberately after due consideration had been given at that time. Therefore, I hope that the Government will reconsider the matter when there is an opportunity of making a revision in the few years to come. Of course, I would envisage that the Government will have a simple way of handling the matter. That is, upon the completion of the review, the criteria in respect of wiretapping will be lowered, while this will be retained. It must be so. Anyone can guess it. However, I think that is not the way it should be. The Government should study earnestly and in detail what offences, as we think, should be defined as the most serious crimes, in respect of which special powers would be given, instead of including those offences which "can be regarded as serious" or "slightly serious". This is perhaps the reason why the Government is now setting the threshold for wiretapping at seven years.

What we now talking about is a very delicate and subtle balance. We are not talking about some vague major principles. Therefore, the casual inclusion of one or two offences is particularly unconvincing. I feel that this should not be included in the scope of discussion.

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the third time.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman. I know. Thank you.

What Mr CHAN Kam-lam said reminded me of a famous literary work *1984*. *1984* tells about a "Big Brother", who conducts surveillance from the toilet of his house to see if anyone is breaking the law. The world of *1984* is a

utopia, where "Big Brother" checks if anyone is breaking the law. Those who have broken the law will be arrested immediately. This is comprehensive covert surveillance and interception of communications as everyone has a mirror.

Let me tell you, what Mr CHAN Kam-lam said is not good enough. People living in that world should have their thinking checked like what was done during the Cultural Revolution. They are required to ask for instruction in the morning and make a report in the evening. Anyone who tells what is in his mind in the daily meeting will be crime-free. The wisest thing for one to do is to tell his neighbours what is in his mind. One who does not do so will be punched. Thus, the world will not have any evils. This is a utopia. This is the world Mr CHAN Kam-lam fights for. Why do we not do the same? Why has doing evil things become a trend in our country after the Cultural Revolution? Why is everything false or forged? The reason is that human beings should not be like that. We should not treat everyone as criminals.

What we are discussing here today is actually very simple. "Ah TO" has just said it. I do not know if the Secretary would answer. Of course I wish he would. If not, he would be inconsistent again. What I want to say is that it seems that Members who support the Government wants to tell the people of Hong Kong that those who oppose the amendment proposed by Secretary Ambrose LEE would like to see the law and order of Hong Kong not protected. This is wrong, absolutely wrong. Our views are very simple. If there is original sin, the Government has got it. Let me tell you all. This is not a joke. Things remain as they are no matter how many classical works are read.

The Government is a body that gives powers. Why would I trust it especially when its succession cannot be effected through normal procedures? Why do I trust it? Why do I not trust everybody? A person is guilty unless proven innocent. The ratio is nine to one. It is absolutely ridiculous that someone has such an understanding of the issue. The ratio is 9:1. Is this the right explanation? It is said that the nine persons actually stand for other people. Buddy, why should prior action be taken to restrict the freedom of privacy and communication of all people just because the Secretary thinks that someone has committed a crime? Why is it so? No reason can be given. Well, we agree that the Secretary wants to strike a balance and he is enacting the legislation with due respect to Article 30 and freedom in the first place. But now I want to argue with the Secretary on this point. And the Secretary again

can give no reason. Actually, he was quite cunning when he chose to make a reply just now — perhaps it can be said that the Secretary is not cunning but just knows quite well about how to select some of the facts to achieve his aim.

What I am saying to the Secretary is that he has to explain why the amendments proposed by Ms Margaret NG and Mr James TO are not as good as his so that he wants to reject them. The Secretary cited an example just now and said that it was because of this and that. But actually it was something hearsay or meant to confuse us. I have now hit the ball to his side of the court. I do not know if he is going to hit it back. The problem now is..... why am I going on with my speech? (Perhaps the Chairman has already got impatient, thinking that this "Long Hair" is already speaking for the third time.) It is (I wish the Chairman would understand too) because we must argue with logic and because Members who support the Government have twisted the facts and said that those who ask Secretary Ambrose LEE to accept the amendments would (just like what Secretary Ambrose LEE has once said) — give the crooks "control of everything". There is no such thing in this world. As one who has been through it, I have the right to ask whether I am a criminal. Let me tell you all: I bet my head that the Special Branch of the British Hong Kong Government had maintained a very thick file on me. Now the agency that is making investigation on me also has it. I just want to have this point said.

Mr Secretary, you believe in God. You shall not bear false witness. You shall not lie.....

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I have to remind you once again not to repeat what you have said earlier. I am not a computer. I cannot remember clearly every word that you have said, but I remember there are words that you have said several times. I hope you will not frequently repeat what you have said in the same debate.

MR LEUNG KWOK-HUNG (in Cantonese): Understood. I want to remind the Secretary to talk a while later (but please do not bear false witness, do not lie and be fair when you speak) about whether he has made any investigation on me. Is the information about me with him? It is of course with him. What crime have I committed? Does he want to say that I have produced counterfeit banknotes? Or is it poisoning? Have I done these?

Chairman, it is actually very simple. Politics is always, though not entirely of course, connected with common sense. Here, I state clearly with my own words that I absolutely do not trust the Government because I have nothing to do at all with the crimes that the Secretary has mentioned but I have been under investigation for a very long time. In addition, he who laughs last laughs best. Do not ever let me find out who is investigating me. If I find out who is investigating me, history will remember it. Therefore, the words "The people will not forget" are written on the clothes that I wear today. The words that the Secretary has said here today will fade away and vanish, but it will be the proof of his guilt in history. Let me repeat once: I hope that the Secretary will speak with his conscience about whether I have been under investigation. If yes, is it because I have committed the serious crimes mentioned by the Secretary, so that preventive action has to be taken? That is all I want to say. Thank you, Chairman.

MR RONNY TONG (in Cantonese): Chairman, I just want to bring out briefly three points because just now the Secretary has misinterpreted what I have said. The focus of our present discussion is the reasons for having the two different thresholds of three years and seven years. This Bill provides that covert surveillance in respect of penalty of imprisonment for three years requires no authorizations by a Judge but only internal authorization is needed. In that case, the protection mechanism is severely restricted. This also extends to other so-called protection mechanism and the Commissioner's duties, which are subjects of our ensuing discussion. We will debate on this a while later.

Therefore, firstly, why are there two different thresholds? It is because there is such a great difference in the way authorization is obtained. Secondly, just now the Secretary was absorbed in responding to my argument and seemed to have forgotten what the Bill says. This Bill says that covert surveillance requires the use of surveillance devices. Therefore, I asked earlier whether the crooks were in control of everything before there were surveillance devices. That is why I said that. Earlier on, the Secretary made a mistake when responding to me. Now we are focusing on surveillance devices. Operations without the use of surveillance devices are not governed by this piece of legislation and can continue to be conducted without authorization.

At the same time, I also wish to say that the Secretary tried to point out a while ago that I had made a mistake about the interception of communications. He said that the interception of communications required the authorization of a

Judge. We just finished debating on this issue yesterday. We discussed this issue until some time after ten o'clock last night. We considered that the definition of "interception" was so narrow that many other types of communications would not be regulated. Have we forgotten so soon?

The third question is similar to the second one, and that is, the police have adequate investigation capabilities as there is an important means of investigation, that is, undercover operations, which are not bound by this piece of legislation. As a matter of fact, Ms Margaret NG has proposed an amendment which seeks to include "undercover agents" in the Bill for regulation. However, the Chairman's ruling is that as "the use of surveillance devices" is specified in the Long Title, all undercover operations, as a means of investigation, are exempted from the provisions of this Bill. Therefore, what I want to do is to point out these three mistakes made earlier by the Secretary.

MS MIRIAM LAU (in Cantonese): Madam Chairman, originally I wished to ask Mr Ronny TONG to clarify, but as he has just done it I now wish to say that Mr Ronny TONG seemed to have got a certain point wrong. Mr Ronny TONG said just now that covert surveillance was only applicable to offences liable to imprisonment for three years and required no authorization of a Judge. I have read the Bill — if Mr Ronny TONG thinks that I am wrong, he can clarify — I have read the Bill, regarding the type of covert surveillance related to offences liable to imprisonment for three years, only Type 2 covert surveillance is carried out under executive authorization. For Type 1 surveillance, although offences liable to imprisonment for three years are taken as the starting point, the authorization of a Judge is required. If Mr Ronny TONG thinks that I am wrong, would he clarify and correct me please?

MR RONNY TONG (in Cantonese): May I clarify?

CHAIRMAN (in Cantonese): You may speak again.

MR RONNY TONG (in Cantonese): Chairman, I clarify that what I said was about normal circumstances. Of course, a very significant difference, on which we are going to debate, is that where legal professional privilege is involved and there must be authorization by a Judge. However, I did not mention about those special circumstances. What I said was about normal circumstances.

MS MIRIAM LAU (in Cantonese): Madam Chairman, I only said that the Bill was so written. I was not talking about any special circumstances either. Mr Ronny TONG also did not mention about the special circumstances just now. I only wish that Mr Ronny TONG or other Honourable colleagues would, when they speak, help the public get a true understanding of the contents of the Bill instead of making the public confused. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak? Mr LAU Kong-wah.

MR LAU KONG-WAH (in Cantonese): What I am going to say is very simple. Earlier on, I was glad to hear Mr James TO himself admit that the amendment he proposed was not perfect or sound enough. All of us have discussed in great length about this, in particular about the disapproval of the public of the exemption of certain offences from the provisions of the Bill. Today, what is placed in front of us is Mr James TO's amendment. We cannot let such a "risky" amendment be passed, especially — may I refer to the cartoon shown by Ms Miriam LAU yesterday in which some crooks are worshipping the deities, praying to them and Buddha. Of course, the great majority of the members of the public who are watching the television now are good people, though there may also be people who are running vice establishments, printing counterfeit banknotes, about to administer poison to other people or in possession of weapons. They are praying to the deities and Buddha with the hope that Mr James TO's amendment can be passed. It would be disastrous if it is passed. Therefore, I am praying to the deities and Buddha with the hope that his amendment will not be passed.

CHAIRMAN (in Cantonese): Mr James TO, I have lost count of the number of times that you have spoken. Are you speaking for the fourth time?

MR JAMES TO (in Cantonese): Chairman, I think Mr LAU Kong-wah has misunderstood. What I meant is that since such is the situation, the threshold should be put on the same par as that for interception of communications. The reason is that as the Government has given thoughts to it and considers that the threshold for serious crimes for which this special power is to be exercised ought to be seven years, putting the two thresholds on the same par should be based on

the same logic. Therefore, if the Government does not use the Organized and Serious Crimes Ordinance as the starting point — because I think a better way to deal with the matter is to amend the Schedule to the Ordinance — both should be set at seven years. If a review is conducted in future, the Schedule should be reviewed with all items examined one by one. This is what I meant.

The present situation is like what Mr Albert HO has said when he explains why he wants clause 17A to be deleted from the Government's menu B. This is because Public Order Ordinance has been deliberately exempted from the provisions of the Organized and Serious Crimes Ordinance. Therefore, provisions like clause 17A, which has political implications and does not involve violence..... because those that involve violence have already been mentioned in provisions other than clause 17A. Therefore, that is why Mr Albert HO's amendment, or my proposal of raising one of the thresholds so that both are on the same par, is better than the present proposal from the Government.

Of course, all arrangements that we have talked about are not as good as amending the Schedule to the Organized and Serious Crimes Ordinance.

CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak again?

MR ALBERT HO (in Cantonese): Chairman, I will focus on my own amendment. However, I wish to clarify a point that I think is very important first. Several Honourable colleagues have mentioned about the principle of presuming a person innocent until he is proven guilty. That was mainly a strong response to the speech given earlier by Ms Miriam LAU. She said that the meshes are large in the net of justice but nothing can get through. This gave people the impression that she was saying that we should presume a person guilty until he is proven innocent. We, especially Honourable colleagues who are lawyers, will have a very strong reaction and think that there should not be such a wrong concept.

But having talked that much, I trust that there is one point that will cause no misunderstanding, and that is, members of the public who are hearing us talk from the television or the radio or right here will not feel that the principle of presuming one guilty until he is proven innocent is the criterion for testing this Bill. It is not so. Anyone who thinks that it is, would be very wrong indeed. Do not get things wrong or think that when an authorizing department or Judge

has any doubt when vetting and approving an application, the suspect would be given the benefit of doubt and he would not be listened to any more. This is actually not the case.

The starting point of our amendment to the legislation is firstly, a study on whether an act is a serious crime or one that may affect public security. Then there must be reasonable doubt. The presence of reasonable doubt is the triggering point, after which the authorizing body will apply the principles of necessity and proportionality before considering other human rights principles. This is very important. So please do not misunderstand. I trust that my Honourable colleagues will absolutely not have this intention. However, I worry that some people may misunderstand and think that the principle of presuming a person innocent before he is proven guilty is the criterion for testing the Bill. For years the principle of presuming a person innocent until he is proven guilty has been the most fundamental principle in trials under common law: the defendant is given the benefit of doubt. However, this principle is not the criterion for testing this Bill. I feel that this is very important. This is the first point.

The second point is that basically the maximum penalty for a large number of crimes may be three years or not more than three years, or not more than seven years but is five years. An example is the possession of counterfeit banknotes. But if it is known that there is a background to the act, which leads to reasonable doubt and it is learned that it is not simply possession but may involve counterfeiting and there being an organized crime syndicate behind producing counterfeit banknotes, it would likely be some more serious crimes which are absolutely liable to imprisonment for more than seven years. Therefore, what is important is whether or not there is reasonable doubt and whether or not there is evidence that enables the law enforcement agency to obtain from the authorizing authority an authorization for the conduct of covert surveillance. Therefore, we cannot say that an offence liable to imprisonment for three years is a very minor offence as it can be of a very serious nature. If it is serious, a clause governing a more serious offence may be invoked as the basis for the application of authorization, no matter how things will future develop.

Similarly, under the Public Order Ordinance, the offence of unauthorized procession can of course involve violence and may lead to a riot. And in the event of a riot, action can be taken under section 19 and section 20 of the Public Order Ordinance and the maximum penalty is imprisonment for 10 years or more

than seven years. But there must be evidence that it creates doubt. It is not right to think that there may be violence simply because some people gather or that there may be a riot because there is violence. If this is the case anything can be infinitely inflated and there would be no need for any threshold and all we have to do is to allow the police unrestricted use of the most effective power to combat crimes. This is of course absolutely unreasonable.

Let me go back to the Secretary's response to my amendment. I will not repeat the arguments about seven years and three years but leave it to Ms Margaret NG and Mr James TO. I will save some time to focus on my amendment. The Secretary said that as there was no political crime in Hong Kong there is no need to propose this provision. It is right that there is no political crime in Hong Kong, but there are political acts. The Government does not like these political acts or wish very much to monitor them. Political acts refer to processions and assemblies in particular. Processions and assemblies often involve a large number of people who express strong disagreement to the Government. Therefore, I have good reason to believe that law-enforcement officers have a great interest in knowing the reason, whatever it may be. Of course, if there is reason to believe that there is violence, it will be another issue. If there is reason to believe that there is violence, there are two different parts of the Bill that can be applied. For the part related to "serious crimes", I have said that section 20 of the Public Order Ordinance can be applied where a riot is involved. Even if it is not a serious crime, surveillance can be made on the ground of public security since public security only grants exemption to peaceful assemblies and protests but not to violent acts. Therefore, the exemption that I have proposed for inclusion is absolutely necessary.

Just now, Ms Miriam LAU opposed my amendment. She got things confused, perhaps because she was too tired. She said that exemption had already been granted on the ground of public security, that is, a peaceful event without any violence would not be a target of surveillance. However, she forgot that surveillance could still be conducted on the basis that there is a "serious crime". Unauthorized procession is liable to a maximum imprisonment of five years. Therefore, it will not help even if it is peaceful. The law enforcement agencies can conduct covert surveillance on something that is clearly peaceful, rational, having a clean record and calls for no worry or doubt just by applying section 17 of the Public Order Ordinance to say that it is an unauthorized and illegal procession or assembly. As I have said just now,

the Government finds such acts often unwelcome. The Government has a great worry when faced by such political acts. Therefore, there will very often be motives for the conduct of covert surveillance or even interception of communications. In these circumstances, I feel that this exemption should be retained. The reasons for objection put forth by the Secretary and Ms Miriam LAU are far from being valid.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, I do wish to speak, but should it not be Mr James TO's turn as indicated by the script?

CHAIRMAN (in Cantonese): Once a Member has spoken for four times, I will not ask him to speak again. He would raise his hand if there is an opportunity.

MS MARGARET NG (in Cantonese): Thank you, Chairman, I was afraid that I did not read the script correctly.

Chairman, first of all, I would like to thank the large number of Honourable colleagues for their speaking on my amendment. My special thanks to Mr Ronny TONG, who has retorted Ms Miriam LAU for me, so that I need not retort her myself.

Chairman, I also support and agree to the major principle mentioned by a number of Honourable colleagues very much, but I wish to focus my speech on the legislative aspect. Why do we care so much about amending the definition of "serious crime"? The most important point is not whether the threshold should be three years or seven years but whether "serious crime" should be defined by the law or by individuals. Why must it be three years? This has actually been defined by an individual. Two points are very clear. Firstly, as the Secretary has said in the Code of Practice, that there was no need to debate too much on "three years" as it was just a threshold and that we had to look at other things as well. That means that the many offences are actually not serious crimes and a very broad definition can be given to "serious crime". This is the first point.

Secondly, what is the aim? What does the definition matter if it is broad or narrow? Should the provisions of the Bill aim at imposing restrictions on law-enforcement officers or otherwise? Their aim is very clear, and that is not to impose any restrictions, or at least not too many restrictions, on law-enforcement officers so that they are free to make their own choice. Is this the legislative intent? The objective of enacting the legislation is to give law-enforcement agencies certain powers while at the same time impose restrictions on the exercise of such powers. Therefore, if "serious crime" means any offence liable to imprisonment for three years, we would think that they are allowed great freedom in making their own choices and there is no restriction by the law.

Of course, three years or seven years may not be the best. Mr LAU Kong-wah and Ms Miriam LAU have also pointed out some problems. I hope that we do not just judge an offence by its name as we have to see what offences are eventually stipulated in the provisions. If any offence is really very serious, prosecution can be made under other ordinances and we should not discuss about it here today.

There has been be a great deal of opportunities for the Government to discuss about whether covert surveillance is to be conducted for the three-year ones or the seven-year ones as we have spent 130 hours in deliberating on the Bill. Why are they not regulated? Are there drafting difficulties? Absolutely no. Mr James TO has already proposed a method, which is to have the organized and serious crimes listed in a schedule. There are other countries that have adopted such an approach while some have not done so. It is perhaps also three years in some countries, but whether other restrictions or supervision are provided for in their legislation is another matter. We should always look at our own legislative process to see if the aim can really be achieved and to see that there is a clear and precise piece of legislation to very explicitly restrict the power of law-enforcement officers in conducting covert surveillance.

A more important question is whether it is the responsibility of the law or the law-enforcement officers. That is why we say that if the situation is not satisfactory, we want to have it amended to seven years. In other words, a serious crime must befit the definition of serious crime, that is, you should mean what you say. The term "serious crime" matches with offences liable to imprisonment for seven years but does not match with offences liable to imprisonment for three years. That is the reason for our proposing this amendment.

Chairman, why are we spending so much time on discussing "serious crime"? If this barrier is passed, that is, if my amendment is vetoed, we would really become, like what Mr James TO has said, defenceless. Why? Chairman, looking again at clause 3, the Secretary has said many times today that it is just a threshold and that the official or approving officer or the Judge will strike a balance with due regard to proportionality and necessity.

Let us see how the balance is struck. We may look at clause 3 first. Chairman, I will move a while later an amendment in this aspect. Therefore, I am not talking about clause 3 now. However, "serious crime" must be provided for in clause 3 as I have said many times before that it is the definitions that determine the scope of power of the Ordinance. First of all, it is stipulated in subclause (1) that an application for authorization must meet the following conditions: the purpose has to be stated and it must be for public security and the situation is that a serious crime is involved. Therefore, if "serious crime" is very broadly defined, it will be necessary to state the specific serious crimes, for example, the serious crime of dangerous driving, or the fact that someone has done something on a certain day of a certain month in a certain year. This is the threshold.

Now that a threshold is there, how is the balance struck? We will have to look at subclause (1)(b). What is it that is balanced? It is the targets of the balance. Paragraphs (i) and (ii) says, "…… the purpose sought to be furthered by carrying out the interception or covert surveillance concerned……" We should judge from this purpose, the balance is made with regard to the extent of the crime which is about to be committed or has already been committed. In that case, what balance is struck? It will depend on its intrusiveness as well as the immediacy and seriousness of the crime as seen from paragraph (ii). In other words, the purpose must be determined first. And within this framework, there is no longer any need to ask whether the offence is a serious crime. The gravity of the serious crimes under discussion now is of no importance. Does the gravity of the offence warrant the conduct of wiretapping of a very high degree of intrusiveness by the Government? No, it is the immediacy of the crime, that is, how immediate it is, that has to be weighed. Therefore, I am not going to comment anymore on whether the said crime is serious or not at this stage. Once a particular crime has been included, it is going to stay there. Therefore, it cannot be discussed at all.

Furthermore, for "necessity", we should look at subclause (2)(b), which is about "the purpose". Please take a look. All that follows is all symbolic

literature. The purpose is to deal with the relevant crimes. What is the value of the information on those crimes obtained through covert surveillance? If the information obtained is able to substantiate the said crime, it will be of great value and excessive proportionality — sorry, the two items here are also related to proportionality. As to necessity, if covert surveillance is not employed for the detection of certain crimes, can some simpler and less intrusive means be used? Therefore, the purpose has always to be set first and we should not wait until it is the relevant stage that we ask the authorizing officer to help decide whether we have got it wrong and whether it is three years or not. Although it is three years, it is a very minor one among the three-year offences. However, he does not think so and will take proportionate, balanced or necessary action against the offence once it has been included in the list.

Chairman, they said that it did not matter if it is broad. This is absolutely wrong. Chairman, just now we have said a great deal of "for example". For example, what is the safeguard when an application is made? Is it the panel Judge or an ordinary authorizing officer? We can look again at Type 1 surveillance and Type 2 surveillance. I will be proposing an amendment in this aspect a while later. How is it done according to the Bill presented by the Government itself? That which is not Type 2 surveillance is Type 1 surveillance. Only Type 1 surveillance cases will reach the panel Judges. Therefore, it can be seen from the breadth of the scope of Type 2 surveillance that most of the Type 1 surveillance cases will not reach the panel Judges. As a matter of fact, according to the figures provided to me by the authorities, among several hundred cases, only a few dozen of them are dealt with by panel Judges. We do not know what the future situation will be.

Let us see under what circumstances Type 2 surveillance is conducted. Type 2 surveillance can be conducted for any case in which there is a participant and for which there is no need to force open a door to get in. We may take a careful look at what Type 1 and Type 2 are about. Chairman, if we look carefully at the definitions as provided for in the law, we will find that those safeguards that the Secretary has told us will not serve any purpose at all.

Chairman, I do not want to mislead anybody. We may look again at the definition of "Type 2 surveillance". Please look at paragraph (b) of the definition, which says that if some optical surveillance devices or some tracking devices (I do not know what it is in Chinese) are used, it is not necessary to enter into other people's private premises or private vehicle. Therefore, we will

understand why most of the applications for authorization for covert surveillance will not reach the panel Judges. Only a very small number of cases are able to reach the panel Judges.

Chairman, let us ask again what the definition is, that is, what it means. If "serious crime" is so broadly defined that law-enforcement officers are free to make their own choice, there are very few provisions in the Bill that can restrict them after they have done so. They can cause the great majority of the cases to reach the internal authority (if it is necessary to reach the internal authority) and not the panel Judges, with no regard to the difference between Type 1 surveillance and Type 2 surveillance. If no device is used, no internal authorization is required. However, even if it reaches his lordship — I mean a panel Judge. I cannot say "his lordship" as he is not in Court — he still has to strike a balance with due regard to the proportionality and necessity as mentioned in clause 3. The Judges can only make their judgement in this manner because they have to enforce the law. They have to act in accordance with the law and cannot make their own judgement as to whether authorization should be given. The purpose, that is, the threshold has already been set by the law and they can only make consideration within the bounds of the threshold.

Therefore, Chairman, if we let go of our hold of this line, that is the main threshold, we would become, as Mr James TO has said, defenceless. Chairman, as Members, we are not to protect the crooks but to protect Article 30 of the Basic Law. We are enacting the legislation to achieve this aim; to achieve the aim of protect the privacy of the public. Therefore, we must guard this threshold firmly.

Chairman, I urge all Members to support my amendment.

I would like to mention in passing that only a portion of Mr Albert HO's amendment can be deleted. This is already quite gratifying to those who worry about political vetting. However, to uphold the legislative principle and objective, we must take a serious attitude in amending the definition of "serious crime".

Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, speaking for the fourth time.

MR LEUNG KWOK-HUNG (in Cantonese): Originally I did not want to speak. However, I feel that there have been too many attempts of disguised swapping of concepts here. Mr LAU Kong-wah said that there were people who were praying to the deities and I am not sure if Ms Miriam LAU had also displayed a cartoon.

I had a dream yesterday. I dreamed that the people who had been wiretapping my conversations were praying to the deities that Secretary Ambrose LEE would win today. It is so in reality. If the Secretary considers that those crimes are really very serious, why does he not raise the penalty to punish the bad guys? Who has let the bad guys go? The bad guys are just sentenced to imprisonment for two years even if they have committed some serious crimes. So, why not tell them to go ahead and do whatever they want as the cost is low. Does the Secretary not feel ashamed? If the authorities think that those crimes are so serious that if no investigation is made on them Hong Kong will meet its doom, why are they only jailed for two years? Is this possible? I really wish that they would explain in person. There are so many cases of serious crimes in Hong Kong and they cannot be prevented if there is no wiretapping, no covert surveillance and no interception of communications, but the offenders are only sentenced to very light penalties. I really want to know and I really hope that the Secretary will provide me with relevant data and tell me what the number of such cases is, how many people have been arrested.....

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I remember that you have asked this question three times. I request that you should not repeat what you have said when speaking on this amendment.

MR LEUNG KWOK-HUNG (in Cantonese): OK. Understood. But this time your memory may have failed you. I remember that I have not said this before. I have just asked the Secretary to provide information on poisoning, the use of small-denomination counterfeit banknotes and tell us about how many people have been arrested or whether any people have been arrested. But I am sure that no arrest has been made as so far I have not learned about it from the newspaper that I read.

What are we discussing about now? On one hand a cartoon was put up for display and try to fool people with lies. On the other hand it was said that

the crimes were very serious. Why do the authorities not impose heavier penalties? I wish to seek the personal opinion of Secretary for Justice WONG Yan-lung on whether penalties for those crimes should be raised. Why are the penalties not raised? Many Members of this Council have also said that those crimes are of very serious nature. I now read out once again the main purpose of Article 30 of the Basic Law (Article 30): "The freedom and privacy of communication of Hong Kong residents shall be protected by law." However, this is no longer a prerequisite but has become another thing.

What are we discussing about? Originally I did not want to speak but people are watching the live telecast of the Legislative Council meeting and they might think that we are allowing the thugs to commit crimes more easily. Have we done this? It is the Government that has done it because it has not amended the law for so many years. If it is two years, I can employ a certain person and give him $10,000 a month to cover the expense of his family. Well, if that is not enough, I will give him $50,000 a month. It takes me $600,000 for 12 months, that is, $1.2 million for two years. Thus, he will have served his sentence for the serious crime and can go out of prison proudly. What are you guys talking about? Do you really think that I am an idiot? Of course I wish that they would explain why they do not see this loophole. If the threshold is changed to seven years, I will no longer argue with them, right? I really have not heard that those offences liable to a prison term of two years are actually very serious crimes. I think that this is not an honest act in a political debate. Surprisingly, it has been said in the so many rounds of debates that we are giving criminals an easier time. I think that this is inappropriate.

I see many people in the Liaison Office of the Central People's Government praying to the deities — I am not sure if there are comic shows. I see Mr TSANG. He is praying, "Don't lose; don't lose; don't lose." Let me see if the Twins have drawn those comics. If they have, I will be able to display them.

Ladies and gentlemen, the problem that we are facing today is very simple. Ms Margaret NG has said that the meaning of "public security" and "serious crime" here in Hong Kong is rather vague. If either one of them gets through, we will be in for a "defenceless" situation. I am quoting what others have said only. Is that okay? In other words, when we have passed the legislation, we are unable to meet the provision of Article 30 that "the freedom and privacy of communication of Hong Kong residents shall be protected by law". The reason is that this book allows the law-enforcement agencies to

easily make their operations constitutional. In other words, the authorities are able to legitimatize the infringement on freedom and privacy of communication given the loophole in Article 30. This is the actual problem.

I wish the Chairman would understand that I am actually not a very long-winded person. I want to say this today to clarify and to clear any misunderstanding. Thank you, Chairman.

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendment to the definition of "serious crime", I will remind Members that if that amendment is agreed, Mr Albert HO and Mr James TO may not move their amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted against the amendment.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, six were in favour of the amendment, 19 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 24 were present, 14 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr Albert HO, you may move your amendment.

MR ALBERT HO (in Cantonese): Chairman, I move that the definition of "serious crime" be amended.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr Albert HO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert HO rose to claim a division.

CHAIRMAN (in Cantonese): Mr Albert HO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted against the amendment.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, six were in favour of the amendment, 19 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 24 were present, 14 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO's amendment is actually included in Ms Margaret NG's amendment, and since Ms Margaret NG's amendment has already been negatived by the Committee, I have got Mr TO's agreement of not to proceed with his amendment.

MR ALBERT HO (in Cantonese): Chairman, I move an amendment to the definition of "surveillance device" in clause 2(1).

Chairman, according to clause 2(1) of the Bill, "surveillance device" means (a) a data surveillance device, a listening device, an optical surveillance device or a tracking device; (b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a); or (c) a device of a class prescribed by regulation made under section 62 for the purposes of this definition. My amendment is to delete paragraph (c), that is, to delete "a device of a class prescribed by regulation made under section 62".

What is section 62 actually about? Section 62 allows the Executive Council to make regulation after obtaining the approval of the Legislative Council and may add some new devices in the regulation to widen the scope of the definition that I have just mentioned. I propose to delete paragraph (c) on two objection reasons or a reason with two levels. The first reason is that the most important area of regulation on "covert surveillance" in the entire Bill is the monitoring of the use of surveillance devices. Therefore, surveillance device is the core portion of the Bill. Its definition should be explicitly stated in the legislation. I am of the opinion that we should not allow the presence of another mechanism under which regulation can be made to add new definition to this clause; otherwise it would have the actual effect of amending the clause.

We all know that the Executive Council of course follows a set of procedures different from that of the Legislative Council. The Executive Council holds its meetings behind closed doors. Although the approval of the Legislative Council is ultimately required, the matter is dealt with by way of a resolution and not by way of amendment to the Ordinance. I am of the opinion that since this part of the Bill is so important and involves the core elements of the Bill, there is no reason that the matter is to be dealt with by way of enactment of regulation by the Executive Council and not by way of amendment to the legislation. This is not the right approach to take. This is the first point.

The second point is a general issue. I wish that the Secretary is aware that this is an issue that involves the fundamental legal policy. Should we allow the primary legislation to be amended through a process which is inferior to the legislative process after the primary legislation has been enacted? In other words, do we allow the content of the primary legislation to be amended with a simpler method? From the point of view of legal policy, I consider this

incorrect. If it is an annex to the legislation, which is relatively unimportant, I would accept the adoption of a relatively simple process, for example, the formulation of regulations by the Executive Council or the Director of Bureau, followed by the gazetting of the regulations, which are submitted to the Legislative Council for positive or negative vetting. However, only the most important things are included in the provisions of the primary legislation, and I think that no process inferior to or other than the legislative process should be employed to achieve the aim of amending the provisions of the primary legislation. I think that strictly speaking, this is not in line with the procedures and the spirit of the rule of law.

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Actually this is not the first time that I point this out. I have also pointed out in respect of several other ordinances that this should not be employed; that we should not allow provisions in the primary legislation to be amended by way of amending the subsidiary legislation. If we allowed this to be done, we are putting the incidental before the fundamental. We should not authorize other bodies to do this to the provisions of the primary legislation either. I hope that all Honourable colleagues will take note of this. On the legislative principle, I feel that actually the provisions of paragraphs (a) and (b) have been very loosely drawn. We can also see that this definition is a very generic definition. For example, tracking, optical, data surveillance devices. These are actually very generic, very generic definitions. What else can be added? If anything is to be added, it will also be very generic. If it is a specific type of device, the authorities should amend the legislation. The second point — I will not repeat — is that it is undesirable to allow a body other than the Legislative Council, that is, a body that has a power inferior to legislative power, to amend our legislation through any other process.

Proposed amendment

Clause 2 (see Annex)

DEPUTY CHAIRMAN (in Cantonese): This Council will now have a joint debate on the original definition and the amendment proposed by Mr Albert HO thereto.

DEPUTY CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

DEPUTY CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, the Government opposes the amendment proposed by Mr Albert HO. If the amendment in question is passed, the authorities can only add new types of surveillance device to the provisions of the Ordinance by amending the primary legislation and not by formulating subsidiary legislation.

At the meeting of the Bills Committee, members have detailed discussions on the regulation of new types of surveillance device to be added. The Legislative Council Secretariat has also pointed out that the addition of new types of surveillance device by way of subsidiary legislation is in line with the arrangement for other legislation. Furthermore, in view of the concern of a number of Members, I have agreed to and proposed an amendment to the effect that the regulation under clause 62 will be subject to vetting before its enactment, that is, the prior endorsement of the Legislative Council is required. We consider that the relevant arrangement is appropriate.

Deputy Chairman, the Government opposes Mr Albert HO's amendment. I urge Members to support our original stance, in order that the original arrangement will be retained. Thank you, Deputy Chairman.

DEPUTY CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak again?

MR ALBERT HO (in Cantonese): It seems that the Secretary has not responded to the most important reason for objection that I have put forth. "Surveillance device" is the core portion of the entire legislation and not some technical provisions or just one of the numerous provisions or some technical details on the implementation of an important policy. If it is just technical details, there may not be any great objection to it if it is amended in such manner. As I have said

earlier, such technical details are normally put in annexes. We may consider it in line with procedure and the legislative spirit if an annex is amended by way of subsidiary legislation. But such is not the present case. The authorities have chosen to put the definition in the primary legislation but the primary legislation will be amended by way of subsidiary legislation. This is absolutely, absolutely unacceptable. This is absolutely against the spirit of "due process", which is a very important element in law-making.

MR JAMES TO (in Cantonese): Deputy Chairman, I wish the Secretary knows where the problem lies. Why are those devices listed out in paragraph (a) of the definition? This is because conceptually, the use of these types of devices may infringe upon privacy.

Overall speaking, we know that the use of devices will be involved because if that is not the case, it would not be necessary to include them in the Bill. The problem now is that even if surveillance devices are involved, we will not know how serious the infringement on privacy these devices are going to be as technology is developing. That is why the primary legislation has to state explicitly what devices may infringe on privacy and amendments should be effected by way of legislative amendments. In other words, we will consider whether the infringement on privacy can be allowed within the framework of the primary legislation.

For example, where the data are related to information, we would consider in what kinds of information system the privacy of a person, or his whereabouts, that is, his personal freedom and sphere of activities, are put. We know that listening devices are related to speech and optical devices capture images. The focus of the issue is how a person's privacy is infringed upon. This is the area where these devices are to be supervised. Therefore, it will be a matter of great importance to the legislature if any device is not kept within this area of supervision. There may be such infringement or supervision in future. And there may have to be community-wide discussions as well as a due process, that is, amendment by way of First, Second and Third Readings. It is only when this due process has been through that the legislature may point out that the infringement is very serious. Why do I say so? It is because in general, the optical and data devices are of a generic nature. They constitute a very solid and extensive infringement on the privacy of members of the public. Of course, we have other criteria at the same time, that is, the conditions that must be met. However, if a new type is included, especially under the present situation, its

infringement will be even more profound. If the inclusion does not go through the due process of three readings but is only dealt with by the enactment of subsidiary legislation, I feel that this cannot compare at all with the seriousness of formal legislative process in terms of incubation and seriousness. If it is to go through the three reading process, normally it has to undergo discussions in one of the panels of the Legislative Council, and consultation may even have to be conducted beforehand. But for the present legislation, no in-depth consultation at all has been conducted and the amendments will be effected by a resolution without any consultation. We have handled a great deal of resolutions in the past. In general, resolutions are incubated for a short while. Shortly afterwards, a number of meetings are held to discuss the resolution. Then the task is completed. It will not involve the entire community or allow all people to discuss whether the infringement of this new type of devices on privacy is acceptable to everybody. I am of the opinion that any amendment should be effected by amendment to the primary legislation.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak? Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, I do not agree with Mr James TO's view. As I have pointed out, the Legislative Council Secretariat has done some research on this topic and we also think that our approach is perfectly reasonable.

MR JAMES TO (in Cantonese): Perhaps, let me talk about this from another dimension so that the Government can understand it.

For example, if we want to make amendments based on the model of a type of surveillance device, then that will possibly be dealt with by enacting subsidiary legislation because that can be considered the details. By the same token, take the legislation relating to chemicals or the Fire Services Department as an example, the relevant legislation specify what items are prohibited goods in a general way. For example, for explosives, chemicals in various formulae are set out in the subdivisions of a class and additions will be made when necessary. Take dangerous drugs and drugs as another example, the general situation is that the penalties for the offence of possession of a dangerous drug is stipulated, then a definition is given on what amounts to dangerous drugs. It will be very

detailed and the type, nature and specific formula will be specified. For example, a newly added type of dangerous drug is ketamine. In this case of a new drug, a definition for dangerous drug is first given and the laws, prohibition, and control relating to dangerous drugs in the entire legislation will be based on this concept of dangerous drugs since new types of dangerous drugs will constantly be added to this concept of dangerous drugs.

However, we have to bear in mind that we are now talking about a very distinct matter, a completely new direction that may infringe on our privacy and it is different from certain types or models of data surveillance devices. Although at present, no surveillance of this kind has been carried out, such a situation may occur. However, this is a comparison between different levels. In our laws, there are a lot of such comparisons and the detailed classifications are set out in the subsidiary legislation whereas the major principle should be set out in the principal legislation.

DEPUTY CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

(The Secretary for Security shook his head to indicate that he did not wish to speak again)

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

DEPUTY CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr Albert HO be passed. Will those in favour please raise their hands?

(Members raised their hands)

DEPUTY CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert HO rose to claim a division.

DEPUTY CHAIRMAN (in Cantonese): Mr Albert HO has claimed a division.

(When the division bell was ringing, the Chairman resumed the Chair)

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Jeffrey LAM, Mr Andrew LEUNG and Mr KWONG Chi-kin voted against the amendment.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, six were in favour of the amendment, 17 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 21 were present, 12 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

MR JAMES TO (in Cantonese): Chairman, I move the addition of subclause (5C) to clause 2. This amendment is comparatively speaking simple and can be easily understood. Members can refer to note A7 of the amendment. As Members all know, there are a great variety of devices and they come in all sorts of shapes and sizes. Members may think that those devices refer only to those that are minute and can be easily taken — not orally but taken around and installed in the human body — however, devices also include enhancement devices, that is, devices with a higher power, or what is commonly referred to as voltage. I believe it is necessary to be very careful when using these devices. For example, when officers from one's own department use such devices, the issue of industrial safety is involved because a device may have to be placed on the body of the officer concerned in order to carry out recording, or installed at a place that he has to face for an extended period of time. In some cases, members of the general public acting on the orders of the authorities may also be involved. These people already have to put themselves at risk to carry out the missions for the relevant authorities. Is it not necessary for us to consider whether doing so will affect their health and safety?

In addition, why is it necessary to first obtain certification from the Director of Health? I remember the Government once said that — I am giving a rebuttal in advance — since there are such a variety of devices, will our Director of Health have such a lot of work to do that he cannot cope with it? I believe that a lot of devices are in fact procured by us. Most of these devices

are made in the United States, Japan and Germany. Certificates have in fact been issued by the exporting countries. After our Director has examined the health certificates issued by these countries, if he considers that these products are in compliance with international standards and he can be satisfied with the certificates, then he can issue certification on reasonable grounds. My amendment does not require the Director of Health to take the initiative to commission a laboratory to carry out examinations anew and the Director only has to certify that the health authority of the exporting country concerned has conducted such tests. One can rely on these comparatively speaking safe certificates. Of course, this arrangement can only be applied to international organizations and countries that have reached certain standards. If local products are chosen because they are cheap — frankly, I myself do not know which countries produce such products but they are probably some not very advanced places — if we want to use such products but the Director finds some products to be problematic, however, since those products are cheaper (I am just giving an example) and more competitive, the authorities may choose to buy these cheaper products. However, in the procurement, the authorities should also take into account the safety of the employees and members of the public, so it may be necessary for the Director to carry out checks.

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Therefore, as far as I know, the Director of Health must take care of the health of the public and this is a fundamental duty of his department. It is also for this reason that the Chairman allowed me to move this amendment, otherwise, she would have said that the amendment involved the use of public funds and disallowed it. The Director of Health has the duty to take into account the health issue in this regard because this has to do with occupational safety. Honourable colleagues from trade unions should also pay special attention to this issue because the disciplined forces are our valuable assets. Should we be more concerned about their safety in using this sort of equipment? We have to know that whereas some devices are hidden in some obscure places, others are placed close to the body because only in this way can information be obtained. The Government will move an amendment later to provide that the authorities cannot require other people to ingest small devices. However, as far as the employees of the authorities are concerned, in extreme circumstances, it is possible that such devices are placed in the cavities of the human body in order to

place the devices at the most obscure places. This approach is very intimate and even if our law-enforcement officers are willing to take such a risk, we should treat them fairly by having the Director of Health to certify the safety of the devices concerned. It is in such reasonable circumstances that I propose this amendment.

Proposed amendment

Clause 2 (see Annex)

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR HOWARD YOUNG (in Cantonese): Deputy Chairman, when the Bills Committee was scrutinizing the Bill, I also heard the same comments from Mr James TO. I understand that he is well-intentioned in doing so and I think no one wants to see any hazardous device being used. However, after all, I am still worried about one thing and that is the wording of the amendment. Of course, Mr James TO has already explained today that he was not asking the Director of Health to conduct his own tests. If that is the case, I think he really will not be able to manage. To talk about some very common instances, for example, concerning some people's claims that the use of the mobile phone on board a plane will interfere with its systems, I have also asked if anyone can prove that is indeed the case. However, what I found was that it would be very difficult to find anyone who can prove that doing so will not cause any adverse effects, whereas if we want to prove conversely that doing so is harmful, it seems no one has ever talked about it. Of course, concerning this amendment, if the Director of Health can really assume the responsibility, this job can be done more easily and I can set my mind at ease. However, if the Director of Health cannot do it at all, or if the products from some countries really do not come with any certificate, then what can we do? I think that this concern has to be addressed first before I can feel more comfortable with making this amendment, so as to avoid imposing too many constraints.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

DEPUTY CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, first of all, I thank both Members for their concern for the health of our front-line officers. In fact, we are even more concerned about their health than Members are.

There are a great variety of surveillance devices. The Director of Health does not possess all the relevant professional knowledge, such as that of measuring the intensity of the radio transmission given by these devices. Therefore, we think that this proposed arrangement will not work in actual practice.

Most important of all, we think that there is no practical need for such a proposal. For example, at present, the Office of the Telecommunications Authority (OFTA) has drawn up a code of practice on the use of telecommunications equipment and there is also control in laws on some special equipment, such as radioactive equipment. Therefore, it is adequate to regulate the devices concerned under the present mechanism.

In fact, as we have pointed out in the Bills Committee, it is not in our own interest at all to use any surveillance device which is known to be harmful to health. Therefore, it is our policy not to do that because in many cases, the surveillance devices are used by the law-enforcement officers, victims of crimes or informants. We will not use any harmful device at the expense of their health and safety. Our usual practice in the procurement of new surveillance device is to pay particular attention to ensure that the surveillance device will not cause any harm to the health of either the target person under surveillance or our officers.

We have also reflected the present control measures in our Code of Practice. We think that the amendment moved by Mr James TO is not just unnecessary, but will also cause difficulties and confusions in its implementation. Therefore, I call on Members to oppose the amendment.

DEPUTY CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): Deputy Chairman, after hearing what the Secretary said, I am really caught between tears and laughter because what the Secretary has said is actually self-contradictory and contradicts his own logic. His said in closing that they definitely would not use devices that were known to be harmful to health. But prior to this, he pointed out that the authority in charge of health (that is, the Department of Health) had no knowledge in this area.

I cannot help but wonder how we can make a decision if the Department of Health does not have the knowledge in this area? In other words, a decision will be made according to information provided by others. As I have said just now, if other people have judged that a device is harmless and the decision is made by an international organization, or certain standards have always maintained, then the Director can simply certify the certificate for the product concerned and the device can then be used. That is what I mean.

However, if the Administration wants to buy some cheap or local products and certificates are really not available or tests have not been carried out, of course, in that case, we have to make an inspection. Otherwise, without any knowledge, how can we say that we are being responsible to our colleagues, front-line officers or the general public? Or he may as well say that he does not have any knowledge in this regard but they are still willing to take risks and will not complain even if they die. If that were so, I can do nothing but say that it is the price for enforcing the law and that all people have to shoulder some responsibilities and this includes members of the public.

However, we have to bear in mind that these operations are carried out covertly. As regards one's own employees, even though they know that it is harmful or they are not sure if it is harmless, they may be willing to take the risk because they have to work and are just wage earners. Someone will be brave enough as long as there is a handsome reward, so even though they are aware of the risks, they are still willing to do the job. However, Members must bear in mind that this may affect other people because the users of such devices may get very close to other people and certain devices may emit electric waves or other substances and the intelligence can be obtained only if the devices are used within a short distance. Let me give a rather extreme example. The authorities know that someone and his wife are both crooks, or drug pushers. The authorities send someone sneaking into his home to install a device under his pillow or behind the headboard of his bed. The transmitter and the receiver will be with

him throughout his sleep. I do not know how long he will sleep. Anyway, the device will be with him throughout his sleep and this goes on every day. Moreover, the transmitter will remain there for three months. If it is not convenient to retrieve it, one can choose not to apply for an order to retrieve the device and just leave it there and then disable the operation without retrieving the device. In that event, the device will make transmissions day and night. It will be better if the device works with batteries because there will be a duration (that is, a lifespan) and the device will stop working once the batteries are flat. However, if it is installed behind the headboard and connected to a power source, it will work infinitely. Such devices can even be connected to solar panels and placed on air conditioners. They can be recharged as long as there is sunlight and one can go on listening. If one is granted renewal continually three months after three months, then it is possible that the person concerned will sleep next to a transmitter for a whole year.

I think that the Director of Health should also be a bit fairer. Even a thief is entitled to human rights. Their health should also be taken into consideration. One cannot allow radiation to have fatal effects on him or allow other transmitters to cause any harm. My present request is that if the Director of Health find that the certifications done by either the FAA — that is, the institution responsible for certifying radioactive devices in the United States — or the relevant authority of the European Union are displayed in the manual, then he can put his mind at ease.

Some cheap devices — I do not know which countries manufacture them and they are probably developing countries — some very cheap local products are still made by these countries nowadays. However, these devices have not been inspected and they may even contain other chemicals that may cause poisoning on leakage. Our officers undertaking undercover operations may indicate that he does not mind and will allow the device to be installed. However, for the sake of recording information, the transmitter or the receiver must be placed at a certain location — I do not want to make it too explicit but it is a hole in the human body and there are only a few of them — in the event that the substances in the device leaks out, be it the batteries or any other substance, this can be fatal.

Should we not stipulate that under what conditions a device can be used and should the Department of Health not at least provide some sort of guarantee? Even if the Department of Health cannot carry out an inspection, it can outsource

the testing because the testing does not have to be done quickly and the purchase made in great urgency. Firstly, as far as I know, not many devices are made in Hong Kong and even if any is, they are just some sort of local products such as the reflecting mirrors that the Customs and Excise Department use to inspect the underside of trucks — the design is in fact quite clever — but these are not sophisticated surveillance devices and all the sophisticated surveillance devices that we use are purchased. Since they are purchased, testing and certification will certainly be carried out. Therefore, there is no great urgency as they do not have to be purchased within three days or used immediately. That is not the case. Basically, they will just be upgraded continually. For example, the authorities have already got data surveillance devices and listening devices but they just want to introduce some new models. They also have to undergo testing and it takes time. Therefore, instances of extreme urgency will certainly not appear. The actual situation is not like that.

Therefore, I hope that the Secretary can accept this amendment. Perhaps he can tell me his justifications. Do not just tell me that he has no idea and the Department of Health does not have any knowledge in this regard, or that they will not use a device if they know that there are problems with it. As he is living in ignorance all the time, of course he will not know which devices have got problems.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak? Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, I do not have such a fertile imagination as Mr James TO has. He is considering this issue from a science fiction perspective. I think we should consider and deal with the relevant matters by looking at the facts and scientific findings. In my opinion, our arrangement has worked well and has provided very good protection to the health of our front-line colleagues. Therefore, I think the amendment of Mr James TO is unnecessary.

MR JAMES TO (in Cantonese): Deputy Chairman, could the Secretary please point out which part of my speech is science fiction? If he is not familiar with the work of the front-line officers, then please say so. However, in theory, since the Secretary used to be the Head of the ICAC, he should know such

things. Yet, I am not sure if his colleagues have ever given him any briefing in this regard. In fact, in the past, there were really instances of installing listening devices close to the headboards. This has definitely happened before.

Moreover, I have talked about how undercover agents had to attach devices to their body, in particular, to places close to the genitals. This has also happened before and the device was not just tied here but underneath. If that device is harmful, should we at least provide some basic protection to them? This is not science fiction, rather, our front-line colleagues are working very hard and in very difficult conditions. However, the Secretary just turns a blind eye to their safety.

DEPUTY CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, I disagree totally with the closing remark made by Mr James TO. We are very concerned about the health of our colleagues.

MR JAMES TO (in Cantonese): Deputy Chairman, can the Secretary tell us from what sources he gets his so-called knowledge on health and safety? If he said that it was not a job undertaken by the Director of Health, does it mean that there are medical consultants in our Police Force who are in charge of such matters? The Department of Health is exactly responsible for this kind of work. In the entire Government, the Department is responsible for this kind of work. However, can the Secretary tell me from where he can get the knowledge? Since he said that if something was known to be harmful, it would not be used, how does he learn about that and where can he learn about that? If he says that he can learn about this from the manuals of the products, that means other health authorities have carried out the testing. In the entire government structure, is the Director of Health (instead of the Chief Superintendent or the Secretary) who is the most appropriate person to inspect the certificates?

DEPUTY CHAIRMAN (in Cantonese): Secretary for Security, do you have anything to add?

SECRETARY FOR SECURITY (in Cantonese): I have nothing to add.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

DEPUTY CHAIRMAN (in Cantonese): If not, I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

DEPUTY CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

DEPUTY CHAIRMAN (in Cantonese): Mr James TO has claimed a division.

(When the division bell was ringing, the Chairman resumed the Chair)

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 20 were present, four were in favour of the amendment and 16 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to the definition of "surveillance product" in subclause (1) of clause 2. Chairman, may I speak now?

CHAIRMAN (in Cantonese): Yes.

MS MARGARET NG (in Cantonese): Sorry……

Chairman, let me explain why I want to add some requirements here. Originally, "surveillance product" refers to any material obtained pursuant to a prescribed authorization for covert surveillance, and includes a copy of the material. Chairman, my amendment contains two parts. One of them is to delete "a prescribed authorization for" and the other is to add "any information derived from the material, and any document or record containing such information". In other words, concerning the deletion of "a prescribed authorization for", as we said earlier when commenting on "interception product", Mr James TO and I have explained clearly when moving the amendment that the surveillance product obtained from unauthorized surveillance should of course be given the same protection. Therefore, "interception product" and "surveillance product" are actually the same, only that they are obtained through different channels. This is the first point and I believe the deletion must be made.

Secondly, it can be seen from the definition of "protected product" to be brought up later that "protected product" only refers to the recordings or a dialogue in the interception of communication, that is, certain raw materials. If the surveillance conducted has generated some films or audio recordings, only the raw materials will be protected. However, if these raw materials are turned into intelligence, then it is not protected in any way.

Members can see from clause 56 that a lot of restrictions are attached to the protection. Why are there so many restrictions? The Government pointed out to us in explanation that this Bill offered a great deal of protection to privacy and the right of secret communication, since authorization could be obtained only for specific purposes and after certain fairly cautious and stringent thresholds are met, moreover, the results obtained can only be used for that specific purpose and nothing else. After they have been used for that specific purpose, they will have to be destroyed. In future, should instances of improper authorization occur, for example, in the event of emergency authorization that is subsequently not confirmed, the results will also have to be destroyed. The above requirements give one the impression that the entire process is very stringent. However, it is only right that this is so because Article 30 of the Basic Law protects the freedom of secret communication and privacy of members of the public. What the Government obtains by invoking a very specific reason and infringing the privacy of members of the public, cannot be used arbitrarily and

this is clear enough. This is just like asking other people for money. If one asks other people for money because of some urgent matters or some natural or man-made disasters, one cannot use the money as one pleases after getting the money. If it is intended for a specific purpose, then it should be used for that specific purpose.

Even after becoming intelligence, the product is in fact still the same thing. The only difference is that it cannot be submitted to the Court as evidence, but it can be used in whatever way one likes. What we are worried about is that the information and intelligence obtained by invoking serious crime or public security as an excuse can be used for political purposes. The Secretary has said in the debate just now, before the debate, to the Bills Committee and to the public that the information obtained will not be used for political purposes, however, which clause, which chapter or which subclause in the Bill tells us that this is not allowed?

In fact, Members should take a good look. These provisions are all very treacherous. They only tell Members that the products will be protected, however, the information derived from the products will not be protected. This is no coincidence because it can be seen from the Bill that in some circumstances, the information must be destroyed, for example, as I have said, in the event of emergency authorization which is subsequently not confirmed, the information will be destroyed, moreover, be it the products, the first-hand materials or the raw materials, they will all be destroyed. However, on overall protection provided for by clause 56, it is provided that only the raw materials will be destroyed. Why is it like that? Why is such a loophole left in it?

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

We believe that if other requirements are not added here, in future, the intelligence will certainly be used by all sorts of people for all sorts of purposes. This will also violate our rights which the Basic Law wants to protect. Therefore, I hope Members will support this amendment. Thank you, Deputy Chairman.

Proposed amendment

Clause 2 (see Annex)

DEPUTY CHAIRMAN (in Cantonese): Members may now jointly debate the original definition and Ms Margaret NG's amendment thereto.

DEPUTY CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR LAU KONG-WAH (in Cantonese): Deputy Chairman, in fact, in the Second Reading, I have already said that the amendment proposed by Ms Margaret NG was highly unacceptable and it was also a very dangerous amendment. Just think about it: if law-enforcement officers made an application to carry out wiretapping or covert surveillance and they obtained some products, which might involve some other matters and they were turned into intelligence. Assuming that the case was about the counterfeiting of banknotes which we have mentioned earlier on, law-enforcement officers conducted surveillance on this case and they found that the person who printed the counterfeit banknotes might be planning a case of kidnapping, murder or arson. All these are considered to be intelligence. According to Ms Margaret NG's amendment, even when such intelligence is obtained, it cannot be kept or used. In that case, how can we protect members of the public who may soon be victimized? Doing so is to let off and condone the criminals completely. Therefore, the amendment is not worthy of any support whatsoever.

In Ms Margaret NG's eyes or in her mind, intelligence is something bad and dirty. However, this is not the way I see it. May I ask where in this world is there no intelligence? May I ask which law-enforcement agency does not have intelligence at its disposal? Therefore, having scrutinized this Bill for such a long time together with Ms Margaret NG, I find that she always has the thinking and the suspicion that the Government is using various tactics and means to achieve certain designs or even certain political ends. However, this is only an assumption. Moreover, the Secretary and the Government have already repeatedly stated that the intelligence would not be used for such purposes. If it will not be used for such purposes, the other intelligence will be used in areas relating to other crimes. Does it mean that these crimes are not worthy of further investigations by law-enforcement officers? Regarding this point, in fact, when Ms Margaret NG raised this issue in the Bills Committee, I repeatedly asked her if it would be worthwhile to conduct investigations in this regard. However, it seems she still cannot give me an answer. I would like to ask Ms Margaret NG to answer this question here.

MR LEUNG KWOK-HUNG (in Cantonese): In fact, the answer is very simple. If a kidnap case is found when investigating a case of counterfeiting banknotes, it will only be necessary to investigate the person concerned and there is no need to turn the information into intelligence because the authorities must stop him and this can be done, so what is the need to turn the information into intelligence? The authorities concerned should only make an application to its own people or to a panel Judge, stating that there is a need to go on tracking the person concerned because this person is doing something suspicious, that it is true he is involved in banknote counterfeiting and he is now also involved in a kidnap case. Nobody prohibits you from doing this, so what do you want the intelligence for? What is the use of keeping the intelligence? Intelligence is collected for use, so one may just as well continue to investigate.

Even if it is necessary to preserve the intelligence, it is only necessary to make an application again. This is possible. If it were to turn out that "Long Hair", apart from being a Member of the Legislative Council, also prints counterfeit banknotes, and if this were true, then just hunt him down! Darned, this is how it should be like. So the point is really simple. I believe there is intelligence in this world but if we allow intelligence to pile up, then that will be terrible. Take for example the bombing of the Rainbow Warrior. Frankly speaking, if the French secret service were to say that the purpose of keeping the intelligence was to blow up the boat, then that would definitely not be allowed. Do you understand? If the intelligence was retained with a view to knowing the whereabouts of the boat and then blowing it up, of course, that would not be allowed. This is just like what you do, keeping the intelligence with a view to blowing someone up, planting a bomb to blow someone up after knowing his whereabouts, however, it is known only afterwards that the aim was to blow someone up. That would really be a big deal.

Therefore, there is in fact a point of equilibrium. On this issue, I fully understand Mr LAU Kong-wah's view. However, in fact, there can be a solution, which is to continue to investigate suspected new offences under the original mechanism, since it is written clearly in the legislation and Article 30 also provides that "except..... to meet the needs of public security or of investigation into criminal offences", so it is only necessary to investigate by following these two principles. There is no need to turn the information into intelligence, since there is no more intelligence. It is dead as it has been turned into products and the products are also dead. It is possible to continue to investigate but the core of the problem is in authentication, that is, what is called

the "once and for all" problem, that is, to obtain exemption once and for all using some pretext and then keep on accumulating intelligence. I absolutely agree that not only is it necessary to retain the intelligence, furthermore, if a panel Judge or his superior consider it necessary to continue, it can go on investigating, so as to continue to obtain more intelligence.

The problem is, if it is found that something has gone wrong and it turns out that the suspicion is unfounded, then a new approach has to be adopted. If it turns out that someone is not printing counterfeit banknotes but is actually involved in kidnapping, there should not be any problem. In fact, this problem can easily be understood. But why does the Government insist that the products have to be turned into intelligence and then preserved? This is the most suspicious point.

I have said that there are good things in things good and there are also good things in things bad. For example, it is possible that the CIA, KGB and even the American Government are conducting surveillance on me, right? The problem is that we should make things more difficult for them and I guess this is probably what Ms Margaret NG means. According to Article 30, if it is about the public security of Hong Kong and serious crimes, then one can go on, but things have changed now. However, without authorization, of course, everything has to be dumped.

Therefore, the solution is in fact very simple. If the intelligence is kept with a view to conducting further investigation and surveillance, to prevent crime, to safeguard the public security of Hong Kong and prevent serious crime, and it is on this basis that the intelligence is kept, instead of doing so without justification and purely for the sake of not wasting the products, this actually does not comply with the stipulations in Article 30, that is, "The freedom and privacy of communication of Hong Kong residents shall be protected by law…… except……to meet the needs of public security or of investigation into criminal offences." If it is found on investigation that the suspicion is unfounded, why should the information still be kept? If the suspicion has already been confirmed, why should the information still be kept? That is because you are still using it.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR JAMES TO (in Cantonese): Deputy Chairman, this problem was originally raised by me but of course, eventually it is Ms Margaret NG who proposed this amendment. In that case, why did I not propose this amendment? In fact, whenever I consider how this issue should be handled and find that the attitude of the Government is not very co-operative, I have been very upset and I have struggles.

What is actually the subject of our discussion now? Take wiretapping as an example, the Government may have obtained an authorization — for example, in the case of banknote counterfeiting which Mr LAU Kong-wah has mentioned, it has obtained an authorization in justifiable circumstances. Therefore, it may have tapped a telephone for tens of hours — the person involved would speak with various people on the phone, including bankers, his wife, his sister-in-law, his friends in mahjong games, friends with whom he may dine, wine and chat with, his good friends and bad friends — and the total duration may be as long as 100 hours and it is found that not only a case of counterfeiting banknotes is involved but a drugs case is also involved. However, a situation relating to drug trafficking can be handled more easily. If drug trafficking is really involved, another application can be made immediately, as Mr LEUNG Kwok-hung has said. What is most unfortunate is that other non-criminal information may also be gathered by wiretapping. If this person has two illegitimate children, five wives, two other bank accounts, three German shepherd dogs, and so on, carrying out wiretapping on him will enable others to know a lot about his lifestyle. All right, do Members consider all these facts criminal intelligence? I think if they can be considered criminal intelligence but cannot be completely retained, this will in fact pose difficulties to the police in accumulating information for the purpose of law enforcement.

The worst thing of all is how the line should be drawn. I have tried to ask the Government about this because I know this will be an infinite black hole and I also know that in the past, some operations incidentally discovered some non-criminal intelligence, however, they still decided to keep a record of such intelligence, including the personal history of an incumbent senior official, that is, information relating to the person's sex life. In this situation, the senior official concerned was not the target but they still keep the information. What should be done then?

If we look at the example given just now, say, if that person has some peculiar sexual preferences, is that considered a piece of criminal intelligence? Or if the person who has that sort of peculiar sexual preference is his sister-in-law and not the drug trafficker himself, theoretically this should not be

relevant. In view of this, how should the line be drawn? Or, if he has two illegitimate sons, theoretically speaking, is it criminal intelligence? Since it is claimed that he is a drug trafficker and he has illegitimate sons, maybe on the birthday of one of his illegitimate sons, he will turn up to celebrate with his illegitimate son and the Government can arrest him at that time. The Government can offer such an explanation. Or maybe he has two mistresses and when one of them has passed away, he would pay tribute to her in her funeral, so the Government can lay an ambush on that occasion. Therefore, it is really difficult to draw the line.

I can only say that if we use such mandatory power as wiretapping to obtain information and if we do not have an external mechanism, we cannot merely trust the police. For example, we should have a commissioner and we cannot rely solely on law-enforcement teams because if we rely entirely on law-enforcement teams, they definitely will be inclined to accumulating a lot of information, then make people have confidence in them, saying that should anything happen, one can sort it out by then. If this is the case, after information is accumulated and a database is formed, it is possible that it will become a tool for political surveillance and control. I am not saying that things will definitely turn out this way but the database is in itself a very dangerous thing.

Why do I say so? Members should not just think of drug traffickers and let me talk straight here. If the ICAC wants to conduct investigations into certain commercial crimes and when it comes to the respectable directors of listed companies or financial consultants nowadays, innumerable people are in fact connected to them. Members can just imagine: if the financial consultant of a listed company is suspected of taking bribes, of course, it will be necessary to carry out wiretapping on him and this is a correct thing to do. However, how much information can be obtained by wiretapping? It will be such a lot that it will be beyond description. In our city, there are a lot of tycoons and it is possible that they will discuss if they should buy certain assets or on what they should spend billions of dollars, or when they go out to have fun, they may do something sexual or erotic and the aim is just to have fun and socialize. Therefore, from such a case, you can see that in what appears to be a case of corruption, the information gathered may be related to the most important and prominent people in town or even just some low-life characters. Anything is possible.

Moreover, I hope Members will understand that in the past few days, some reporters often came and asked me what would be the impact of this piece

of legislation. Even on this score, it is all-pervasive. If the person concerned is a director of the Bank of China and he may be discussing a deal, if he is suspected of corruption or money laundering, what is involved may be a money-laundering, drug-trafficking or human-trafficking syndicate. Members can imagine how broad the range of information is. If someone who is the Chief Executive (I am not talking about the incumbent Chief Executive) or someone with evil design and with such powers to exploit this system, he will actually be sure to discover some intricate human connections. Together with our advanced computers which have large memories to record a lot of things, searches can be easily done and say, it will be found on searching that a certain Secretary of Departments or Director of Bureau is a primary schoolmate of the suspect and they know each other. Of course, the Secretary of Departments or Director of Bureau concerned may say, "I cannot choose my primary schoolmates but I am a good guy and he is a bad guy. Is that right? I become a Secretary of Departments/Director of Bureau but he becomes a triad boss, but we have no contact with each other.". However, it may so happen that in a gathering of primary schoolmates on the 30th anniversary of their graduation, the kingpin drug-trafficker is the target of a tailing operation. The Secretary of Departments/Director of Bureau had no idea either and one has to bear in mind that the Secretary of Departments/Director of Bureau does not work in the security department but may only be working in the financial domain. In this gathering of old schoolmates, it so happens that the people carrying out the investigations are already tracking his primary schoolmate and when they see the Secretary of Departments/Director of Bureau come and then socialize with the drug trafficking kingpin, since the Secretary of Departments/Director of Bureau does not know that he is a drug trafficker at all. Not having seen him for 30 years, how possibly does the Secretary of Departments/Director of Bureau know that his schoolmate has become a big crook? Afterwards, the Secretary of Departments/Director of Bureau will become one of the targets and this is how things will develop on and on. Therefore, the database that we have been talking about can serve good ends as well as bad ends.

The present problem is that the Government gave us a closed-door briefing, a briefing that could not be simpler, then said that it would conduct a review. The Chairman of the Bills Committee is the Deputy Chairman today and originally she wanted to give the Government a way out, so she suggested to the Permanent Secretary, Mr YING, that the review would start within one year. However, he replied, "This is not possible, since things have their priorities and I still have no idea what I will do next year, so I cannot promise you anything." However, what was suggested was that a review should commence and not that it

should be completed, is that right? Furthermore, he talked about things not related to this legislation, how can this be possible?

What we want to say now is that what was done in the past all amounted to illegal interception of communications — what was done in the past was all illegal interception of communications. From 1997 to the present, a lot of information has been collected by means of illegal interception of communications and I have not yet settled that score with the Secretary yet. Just think about this: all the information was obtained by means of illegal interception of communications and they should be destroyed. I have not yet settled that score with you yet. Although I know that you had the actual need when enforcing the law, from a technical point of view, the wiretapping was illegal and unconstitutional. It is correct to discuss this after 9 August because the Declaration Order will be effective only after 9 August. However, before 9 August, I have to say that a lot of information was obtained by illegal wiretapping in the past seven, eight or nine years and we have not yet settled that score with you properly. I do not know how to handle this. As someone who takes an important part in matters of security, I cannot teach you how to deal with this either. I myself also feel very troubled. If I request you to destroy all of it, this will actually lead to some problems in law enforcement. However, how should this matter be dealt with? Is it necessary to put in place a piece of legislation to mandate such power? If there is none, when there is a challenge, will everything collapse? All these make me very worried.

This may probably be a rude awakening to the Secretary and he has not thought about the problems in this regard. I do not know if Mr Ian WINGFIELD sitting behind him has thought about this but I myself am very worried. In fact, it is not just "Long Hair" but a lot of people involved in other cases who may challenge the information. They will not accuse you of wiretapping and it would be better if they only say that you are wiretapping, because you have dealt with this according to clause 58 and such a situation will never occur again. However, you have to bear in mind that if a database exists, some people may apply for a search warrant in relation to certain information in the criminal intelligence system, obtain something in this way, then pursue along this line by investigating whether it was legal to use the information in legal proceedings and finally discover that the information was actually obtained illegally.

Of course, on hearing me say so, the Secretary may smile and say, "Do not worry, I have already told you in my speech that the water, butter, eggs,

baking powder and flour cannot be reverted to their original states and since they cannot be reverted, I do not have to be afraid of you." However, you have to remember that large though its meshes may be, the net of justice lets no criminal through. Sometimes, it is not necessarily true that they cannot be reverted. I can tell you that this is very complicated and it all depends on whether a lawyer knows how to handle the lawsuit and his skills in cross-examination.

Of course, after they have been cross-examined for a period of time, they may choose not to answer, abandon the case, and close the matter without securing a conviction or end up accepting that they have lost the case. The aim is to preserve the whole system and this is possible. A lot of cases are in fact dealt with in this way and this is also the case with regard to tailing and other types of covert surveillance. However, I am very concerned about this area and I can only say that at this time, if the Government does not conduct a comprehensive review of surveillance, then this database is one thing that I am most worried about. On the operation of the database, put it simply, the Government described in the briefing that things duplicated a lot, but in reality, I think the Government should appoint an independent committee to conduct a comprehensive review of the information stored in it. The Government cannot appoint its own people to conduct the review because the information kept therein can be very terrifying and very extensive. Furthermore, I want to remind people who support the Government in particular that the information kept in the database is in fact extremely wide-ranging, no line is drawn and there is no differentiation between people who are described as being close or distant.

If in history, some people in this world were once subjects of investigations and these people had telephone contacts with Members who express their support today, there can be records of any minor incident. Let me give a very simple example. A retired Member of this Council — I will not divulge his name and I respect him very much — said that in his former profession, he used to provide services to LAI Chang-xing. As someone pro-China and favoured by the Chinese Government, Members can just imagine how many of his particulars are kept in such a file? How many of the particulars can be considered criminal information and how many cannot? I hope the Government can clarify this matter. Up to now, I am still in a mental struggle and I have not decided if I should vote in support of Ms Margaret NG. Up to now, I am still struggling very hard. However, if the Government responds in a more positive and active attitude, we will not vote in favour of it, otherwise, I will be forced to..... Members should also remember that the Secretary still has a lot of other sources of information. The Secretary said in

his speech at the resumption of Second Reading that there were many sources of intelligence.

Of course, if these sources of intelligence refer merely to those so-called anonymous letters, not many restrictions can be imposed because the information is provided by other people. However, if the information is obtained in a compulsory way by invoking the law, I think there should be a specific department responsible for monitoring because only in this way can it be ensured that the purpose of gathering the information is in line with the items and functions for which the information is used, rather than saying that no one can make queries after the job is done and the information has been loaded into the database. This is because in the tapes lasting 100 hours, of course, words such as "ah" and "oh" and banters are not recorded. But the essence of the interception of information is the part lasting about 10 hours. If this is the case, then all the information is recorded, what is more, what is legally obtained is recorded and what is illegally obtained is also recorded. In that way, one of these days, what will this database be used for? Honestly, this database can be used for anything and can be even used to make political threats. However, this is slightly different from what happens in a democratic system where there is a rotation of the governing political party because in practising a democratic system, every party will demand the same things. In Taiwan, when a smooth transition was made in the Ministry of National Defense or the intelligence departments, initially, everyone wondered if the Democratic Progressive Party would respect the constitution after the Kuomintang had conducted surveillance and control for several decades. How many of the top officials in the intelligence departments belong to the blue camp? In the end, on the whole, they succeeded in making the transition. However, since there is the rotation of the governing party, the intelligence departments will definitely be more impartial and neutral in the course of gathering information in future.

However, looking at the present situation, although in the past, we had a comparatively speaking professional team of police to undertake the collection of objective intelligence, there is no telling if one day, the nature of this database and the situation may change. What are we supposed to do? I hope the Government can provide a more complete and satisfactory answer, so that I will not be compelled to support Ms Margaret NG with respect to this amendment.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak? Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, first of all, I have to reiterate here that although Mr James TO claimed that the information we obtained, that is, our database so to speak, could be used for good ends as well as bad ends, I can tell Members that it will be used solely for just one end. Our database will be used to protect the public security of Hong Kong and detect crime. Therefore, the authorities oppose Ms NG's proposal to expand the definition of "surveillance product" and to delete the reference to "pursuant to a prescribed authorization" in the definition. The amendment will include information obtained from the product and any copies or records of the information in the surveillance product.

As I have pointed out in my speech at the resumption of the Second Reading debate, if the regulation of the products is extended to cover the information which is converted into intelligence from the relevant products, this will pose considerable difficulties to actual operation. This is because the relevant information is derived after it is analysed and merged and transformed together with the information obtained from other sources and it is irreversible. This also runs counter to the principle of destroying the relevant product as soon as possible in order to protect privacy. The amendment concerned will significantly undermine the ability of the Administration to protect the public and it is not in line with public interest. Therefore, I oppose the amendment proposed by Ms Margaret NG. Thank you, Deputy Chairman.

DEPUTY CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Deputy Chairman, this amendment is in fact a touchstone for the entire Bill. Should we be generous or stringent when enacting legislation? This can be seen here.

On the face of it, a lot of control points have been set up in this Bill but each of them is bogus. This is because it can be seen from clause 3 that although it is said therein that this power can be exercised only according to stringent requirements, however, after dismantling all these control points, what is actually the aim of this Bill? In the final analysis, it is to confer on law-enforcement agencies powers that can be exercised extremely easily to intercept communications and conduct covert surveillance to obtain intelligence and such intelligence can be used for any purpose.

Just think about this: on the point that I have raised just now, where in the Bill is it specified that law-enforcement officers cannot do so? None of the provisions can provide such a safeguard. This is precisely the main touchstone: After obtaining intelligence relating to some serious crimes, since the information is obtained on grounds of public security, for what purpose will it be used after such information has been obtained covertly? The information will be kept in an intelligence database and there, it can be used for whatever purpose one likes. There is no restriction whatsoever and what we have got is only the Secretary's solemn statement that it will not be used for other purposes.

If such is the situation, how can any abuse of power be prevented? Mr James TO, not only is the Secretary unable to prevent any abuse of power, he is even encouraging law-enforcement officers to abuse their power. The simplest thing is that they can intercept any communication and no one will know what they have bugged. Law-enforcement officers can eavesdrop on A, then go on to B, then to C and to D. As Mr James TO has made it very clear earlier, if the intelligence obtained through covert surveillance is used to rule Hong Kong, it would cause change in the nature of Hong Kong society. The public is now only a little apprehensive because the authorities are doing this in violation of the law. However, after the passage of the legislation, the law will empower them to do such things legally and they will be done only for the good of Hong Kong.

Just now, Mr LAU Kong-wah said that he was very concerned that law-enforcement officers would not be able to listen from A to B, and that they could not intercept communications even if they happened to have eavesdropped on intelligence concerning a kidnap. Why can they not? In that event, they can apply for an authorization. We are only saying that an authorization cannot be used for obtaining other information by wiretapping. Law-enforcement officers have to apply for an authorization for each case. If one chances upon urgent intelligence relating to kidnap, an application can be made for an emergency authorization. This can definitely be done.

Secondly, clause 3 stipulates that law-enforcement officers cannot get the authorization to carry out wiretapping unless there is a reason to do so, and the condition is that the value of the information is such that it is adequate to convict criminals. I hope this will be the interpretation of "value" and it will not be interpreted to mean "value for the political future of the Chief Executive". This will target crimes and the value is to bring criminals to justice. If the information obtained by wiretapping serves only to increase the information in

the intelligence database, then truly law-abiding law-enforcement officers should not casually use the information obtained through wiretapping.

The Secretary said in reply just now that it would be difficult to revert information already loaded into the intelligence database. What I request is that the Secretary refrain from loading the information into the intelligence database because such special information obtained through special channels for special purposes should be handled in a special way. In the Bills Committee, I compared it to a chromosome. All information can be traced to their sources and must not be mixed together. If information that has been mixed together is not subject to regulation, then I will mix the information together first of all because after I have mixed it up, no one can do anything about it. Therefore, Deputy Chairman, as I have said, this is a touchstone. According to this definition, the Government tells us that it is necessary to obtain intelligence and intelligence can be obtained through secret channels. As regards how the intelligence will be used, nobody knows. We know full well that the aim of formulating this legislation is to legalize acts of obtaining intelligence and that is all it is about.

I believe there is no need for Mr James TO to put up a struggle and I can explain two matters to him. First, concerning ways of handling old databases, I invite him to refer to clause 65 of the Bill. There are two points in the amendment proposed by the Government. The information in the old database can be regarded as authorized for the purpose it is intended for and the information will be destroyed after the aims have been achieved. Therefore, the information obtained from this source is also not protected. Mr McWALTERS said to the media worldwide that it did not matter even if the information was obtained by unconstitutional ways, as the Court would consider whether the intelligence would affect the fairness of a trial when deciding whether the information could be submitted as evidence, and that we did not have to be worried since intelligence obtained by unconstitutional ways and even by illegal means could also be submitted by the Government to the Court. Since the law vests the power in the law-enforcement officers, so why will they not do it?

Secondly, Mr James TO, our present debate is on the enactment of a piece of new legislation. We are now debating issues such as the authorization and information obtained after the passage of the Bill into law and the intelligence derived from such information. Therefore, it is right to begin to narrow things down at this stage.

Deputy Chairman, I wish to tell a story which I read about in the magazine *Children's Paradise* when I was small. It is called "Hong-xian Steals the Casket" is a story in *Tai Ping Guang Ji*. The person named Hong-xian was a handmaid with extraordinary talents. When TIAN Cheng-si wanted to persecute her master, she told her master that she would solve this problem for him. She made use of her tour de force to sneak into Tian's bedroom and stole a golden casket placed next to his pillow and gave it to her master. She asked her master to return the golden casket to TIAN the next day and he would then understand. The next day, when her master returned the golden casket to TIAN, the latter decided immediately that he dared not persecute him anymore. Why? That was because if Hong-xian could steal something placed right next to his pillow, then she must have got hold of a lot of information about him, therefore, this would pose a threat to him.

Intelligence can be used for such purpose. Is the Secretary for Security interested in serving as the Secretary for Intelligence? I bet he is not. Therefore, concerning this Bill today, it is better for us to enact a stringent piece of legislation and stipulate that the information obtained will be strictly protected and will not be used for all sorts of purposes after it has been converted into intelligence. The Secretary himself may not necessarily want to use the intelligence for such purposes, but does his master above him think the same? Can the Chief Executive ask him to hand over the intelligence? Which provision specifies that when the Chief Executive makes such a request and if the Secretary refuses, the Chief Executive will not be able to obtain it? Can other officials on political appointments obtain such information? Can their political rivals obtain such information? Can their business rivals obtain such information?

Of course, the Secretary will answer in the negative. However, may I ask which provisions in the Bill have laid down the requirements? Deputy Chairman, this amendment is a touchstone. I reiterate that if a lot of very general reasons can be used to obtain the authorization provided for by this Bill, one can even use the authorization for Type 2 surveillance to obtain a lot of information and the information so obtained is called the interception product or surveillance product. After all these products are turned into intelligence, they are not subject to any legal regulation and can be used for a number of purposes. Can the Secretary tell us which provision in the Bill prohibits the authorities from doing so?

Thank you, Deputy Chairman.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LAU KONG-WAH (in Cantonese): Deputy Chairman, the speech given by Ms Margaret NG was still focused on her conjecture that the intelligence will definitely be used for political ends. She still could not answer my question, that is, if such intelligence — and this is also the reality — is used to protect the public of Hong Kong and detect crimes, what is so bad about this? Is it also necessary to destroy it? It seems she has not responded to this point. In fact, this is really a touchstone. We hope that the legislation will not be too lax or too stringent. It will be ideal if it is just right. However, if the amendment proposed by Ms Margaret NG is adopted, it will be so lax that a lot of crooks will be very happy.

In fact, on the tour de force mentioned by Ms Margaret NG when telling her story, I really wish that law-enforcement officers would really have such a *tour de force* when solving cases and dealing with crooks. Without such a *tour de force*, how can cases be solved? If law-enforcement officers can only use the commonplace skills, they can never solve the cases.

The second question of mine which Ms Margaret NG has not yet responded to is that since there are such intelligence systems all over the world, why is it that it is only in Hong Kong that it should not be adopted? She has not yet answered this.

Mr LEUNG Kwok-hung and Ms Margaret NG has only answered one of my questions, that is, if one case is found to be related to another when wiretapping is carried out, an application can be made immediately. Mr LEUNG Kwok-hung has a pet phrase, which is, "This is very simple." Indeed, if a case is so very straightforward, an application can be made immediately and this is of course very simple. However, intelligence is what it is and sometimes, it comes in a very piecemeal and disorganized form and may even be illogical. We have to construct the whole picture from bits and pieces of information. According to his suggestion, in this process, everything has to be discarded and all these fragmented pieces of information cannot be used or stored. Without such fragmented pieces of information, how can a full picture be constructed? Without the small pieces in the jigsaw puzzle, how can the full picture come about? If his opinion is followed, nothing will come out of nothing.

Deputy Chairman, the reason I want to lobby Mr James TO to oppose Ms Margaret NG's amendment is that in the process of scrutiny, the initial reactions of Mr James TO were that he did not quite agree with the proposal put forward by Ms Margaret NG. I found that Mr James TO also looks quite bothered today and he is in a struggle all the time. He spoke a lot but he still could not answer the queries. Mr James TO is the Chairman of the Panel on Security and he is very concerned about the security of Hong Kong. When criminal cases occur in Hong Kong, the mass media will ask Mr James TO what should be done, for example, when there were many cases of smuggling illegal immigrants, he will be asked what should be done. There are lots of cross-boundary crimes, so what should be done? Mr James TO (including I myself) would say that it may be necessary to exchange more intelligence with the Mainland or mainland law-enforcement officers and Mr James TO also says so frequently.

Where does the intelligence come from? If we do not keep such intelligence, how can we exchange it? Do we have to tell the whole world that this amendment passed today is designed to tell the whole world that there is no intelligence in Hong Kong? In that case, how can intelligence be exchanged? How can cases be cracked? Therefore, I think there is no need for Mr James TO to struggle. He should adhere to his initial response, that is, the amendment moved by Ms Margaret NG is unacceptable. This proposal is a crazy one and cannot be allowed to exist. If this amendment is passed, Hong Kong will descend into mayhem.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR JAMES TO (in Cantonese): Deputy Chairman, the problem is that Mr LAU Kong-wah thinks it is very simple but in fact it is not. As he thinks only of one aspect, it is naturally very simple. Why is it not simple? Ms Margaret NG has pointed out one point and that is, the most disturbing thing is that at present, there is no statutory framework to monitor the information obtained.

I do not oppose stepping up intelligence collection. I often point out that this is the right thing to do. The problem is that if it is left unregulated, as it is now, I can tell him how the present framework is like. It is very simple. To give an extreme example: the Chief Executive is the superior of the Commissioner for Police. Pursuant to the legislation regulating the police

force, he has the power to give direct orders. The Chief Executive is also the superior of the Independent Commission Against Corruption (ICAC) and they are two separate law-enforcement agencies. In the bureaucratic framework, the system in the Criminal Intelligence Bureau of the police is managed by a Chief Superintendent and a unit of officers in the ICAC is also specifically responsible for such duties. Theoretically speaking, through the two departments heads, the Chief Executive can order the Commissioner to submit the information required to the Government House. The job can be accomplished quickly as the chain of command is direct. To search for the information, they only have to key in some words and the job can be done.

In such a system, if a society is a democratic one and if the Chief Executive is elected by "one person, one vote" and in other places, he has to be accountable to an intelligence committee, there would be checks and balances. However, there is none now. Do Members understand? The same system can of course be used to achieve good ends as well as bad ends. The present difficulty is……I hope the Government can give a response and undertake to review how such matters can be regulated from this direction.

To regulate does not mean adding — if my memory does not fail me — an assistant secretary responsible for conducting random checks. This cannot solve the problem because the operation of the entire framework is oriented to this end. Why? Let me give an example. To a certain extent, in some operations, the ICAC — please bear in mind that this is not intelligence gathering — there is something called the Operation Review Committee, which is a committee that reviews complaints of corruption and it is made up of various people, for example, Ms Margaret NG and Ms Audrey EU have also been members of this committee. At least, some outsiders can raise questions on operation matters. However, for this framework, which is so central and sensitive, there is not a single outsider in it.

Since it is a Judge or the Commissioner who is responsible for monitoring the collection of such sensitive information, I think it is very appropriate for this Commissioner to monitor this intelligence system, including monitoring the input of information. If the information input can be classified as criminal intelligence, then it may be used for good ends; however, if the input is a piece of political intelligence or non-criminal intelligence, then this system can be used for something bad. The present problem is how to let a lawful and trustworthy system handle the information.

In the Bills Committee, I proposed that the Government seriously consider letting the Commissioner do the job — however, of course, the Commissioner should not be one at the present level and he should not be appointed only by the Chief Executive. If he is appointed by the Chief Executive, does he not belong to the same chain of command? The candidate must be an outsider, for instance, the appointment of this Commissioner must be agreed by the Legislative Council and we will discuss this point later. As such, the Commissioner will then have some credibility.

The intelligence committees in overseas countries can actually have some say but this is not the case in Hong Kong. The Government even considers this inappropriate, as a result, we are "defenceless". With such a lack of protection, this system will degenerate, its nature will change and it will be used to do something bad. We still face such a difficulty. And I am still waiting for the Government to respond.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): On this subject, Mr LAU Kong-wah was overstating. Ms Margaret NG's amendment just now was only to explain that the so-called products obtained from unauthorized or authorized communication interceptions and covert surveillance may not be converted into intelligence which will not be subject to any supervision. As a matter of act, I can see the "Ah TO" has been rather down-hearted during this discussion. LAU Kong-wah has also pointed this out a number of times (usually he would not do so). When the "sunset clause" cannot be passed, there is a feeling of being "fooled". We would require so much time to argue about this. But we have so little time to argue this over.

In a country where things are quite normal …… Of course, there are different categories of intelligence. In our country, there are different security departments, like the Ministry of State Security and the Ministry of Public Security. There are countless categories of intelligence in the National Security Bureau. They may talk to you or me when they do have the spare time. I am getting in touch with the National Security Bureau every day. Some of them came over saying that they were scholars, and some businessmen. In fact they are all coming over to collect intelligence about us. These are simple examples. The Ministry of State Security is coming over to Hong Kong to collect

intelligence and bring it back. However, we do not have such an organization in Hong Kong. Therefore, Mrs FAN's repeated reminders that I should not be drifting sway from the subject matter notwithstanding, I would still like to ask Secretary Ambrose LEE that whether there is such a department in Hong Kong. If the answer is in the affirmative, then we know that the information about us is classified clearly and tidily, and I would ask about it some time when I have time. Would Members guess whether the central intelligence service of Hong Kong would have any intelligence about me? I certainly would not ask the Hong Kong Police Force about it. I know for sure that they would not do it. Jobs are mixed up nowadays and the police are not doing only police work. And the information is all "rolled" in the same database. This is the truth. Right?

Mr LAU Kong-wah is correct. He is actually a rather frank person. Collecting intelligence is a universal activity. I can tell you all that there is political intelligence all over the world. Governments are collecting intelligence about dissidents. What is the purpose of collecting such intelligence? Would it be for their physical well-being? Yes, it is for the concern of their physical well-being — whether they are dead already. It is a truth, man. If the Government would really wish to change — that is why I think the "sunset clause" is important — it should take after China or other countries to have a separate establishment to deal with these things, and have a separate group of people to do the job. Man, who should I talk to? Who is responsible? If I talk to the ICAC, they would say, "No, 'Long Hair', we have done none of the things you talked about." If I asked Dick LEE, he would say, "I am sorry, man, no." It is because all is stored in a barrel. That barrel is a database, for which no one is specifically answerable: "sorry, that is only a barrel." The Secretary for Security is probably in charge of it. He probably is. He is the most senior official; he probably is controlling things from higher up. From a dichotomy point of view, it is a problem. People may think that Ms Margaret NG is rather unreasonable because in a world like this, there will surely be intelligence collecting. The question is who is handling it, and how it is used under strict control.

I have already quoted some examples. The French special agents detected the whereabouts of the ship Rainbow Warrior and blew it up. The purpose of Israeli agents in detection is to kill. In Hong Kong, of course, nobody may get killed in the end, but this special intelligence is really — man, you are right — a jigsaw. The problem is we do not know what this jigsaw is for until it is completed. I can say without hesitation that there is no opposition

party is Hong Kong. Even the Chief Executive is saying that there is an opposition party in Hong Kong. He "treats" us, the opposition party, and attacks us according to our affinity with him. Honestly, I do not believe that the Hong Kong Government does not wish to collect intelligence to serve its own purpose, for a political cause. Therefore, on a matter like this, there should be some control. Do we need an organization similar to the Ministry of State Security of the Mainland? Do we already have a Ministry of State Security? Is there anyone responsible for it? If intelligence is really needed, I will not mind you collecting it, but you should let us know what it is used for.

The second thing is do not ever think that you will not be targeted because you are not involved in politics. This is the way governments are controlling the tycoons. You may like to take a look at those publications available at the street stalls. They tell of the ways the United States President manipulates his political rivals and the tycoons, or how the British MI5 or MI6 is dealing with its own ministers. Anyone may be summoned if he is not obliging. He will be told that it appears that he was "meddling with women" the night before. He will be asked whether he wishes this affair to be published in a tabloid. He is then fixed up. As a matter of fact, "meddling with women" is misconduct. It will cause a politician to lose face. But it is not a crime. However, if the government does this sort of thing, the result will be a great shock, particularly for the tycoons. Let me tell you, do not ever think that the matter I am now talking about does not concern you. It certainly does. This will certainly be done. When we play with a Russian roulette, we will always think that there is no bullet in our pistol. Other people have got bullets in their pistols. Let them be shot. This is absolutely how a person without insight will think.

Let me give you an example. According to the affinity theory, today, this political party may be close with the government. The information may therefore be kept unused. When the relationship turns sour, it will be used. Every one could be involved. Take for example, will that telecommunication company launch an acquisition? Or, will the son of the tycoon contemplate a takeover of that company? When there is information about him, he will be fixed accordingly. It is as simple as that. A certain PCCW has enraged the Central Authorities. Someone will be fixed.

Therefore, Ms Margaret NG is doing something for us on this matter. This is the reason I have to ask, why such useless information, collected through legal or illegal means, has to be kept as intelligence. Mr LAU Kong-wah may be right in saying that we may still need this information. My question is, who

is in control of it? Hey man, who is in control of it? Nobody is, for the time being. You may say to me, "'Long Hair', do not play this game again. Why do you not make any suggestion?" Hey man, the rule is that they can only make law according to the Basic Law. If they do not do it, how other people can be bothered? What qualification do we have? People will certainly be objecting to us attempting to make the law. There are numerous obstacles to overcome in making the law, and Article 74 will be used to fix us. We cannot make the law ourselves. Therefore, the question is if the Government cannot do its job well in making the law, as a result others are forced to oppose or propose amendments, it should take a reflection upon itself. Like Mr TO said yesterday, is it "shameless" or is it "shameful"? When I was on a minibus, someone asked me, why was James TO so agitated? Where is the "shame"? I wish to point out, and I wish you all to understand by saying it once again, that it is the Government who is proposing the legislation. It has done it so badly; and it came out to ask why Members of the opposition had not raised their views earlier. Shall I suggest the Government to swap its role to become the opposition for six months and let James TO take its place for six months. Let him write up something for you to consider. Let him take the responsibility. All right? Actually ……

DEPUTY CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please address your speech to the Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Deputy Chairman, perhaps we should ask Mr Ambrose LEE to vacate his post for six months and ask Ms Margaret NG to assume the role of Secretary for Security. Or we should ask Mr WINGFIELD to let her be the Law Officer for six months and ask her to write up something. The question about you people is: you have got the authority in hand but your work is lousy; and when your work is queried, you query in return why they have not written better. Both "Ah TO" and Ms Margaret NG have worked overtime, they have become so ragged. *(Laughter)* I can see that they are ragged. They propose their amendments here and they are slated. It is very unfair. Right? Mr LAU Kong-wah would not have to argue with us if you people have other better ways out. Mr LAU Kong-wah may actually be a person like this: he criticizes Ms Margaret NG's when he considers her amendment not good enough. He probably really thinks that way. He will not care how she has done it. He criticizes her amendment as not good enough when he thinks it is not good enough. But man, have you ever thought

of criticizing the Government, telling them that they should have done their job better?

As a matter fact, what is the crux of the argument? In the beginning, why did we not trust the Government? I would not go back to the past. Matters of many years back in time, I would not bother to recount, or else I would be accused of wasting time. I wish only to point out that the Government only listened to very, very few of Members' views when the law was being drafted, as a result of this now it cannot take on those correct views of the others to enrich itself. Now there are arguments day in and day out. What influence will this make? Those Members who are now supporting you may probably be regretting on reflection. However, what we can do now? There is nothing that we can say. At the end, however, I would wish Members to see that our arguments here would serve no purpose. We are sweating here arguing, and Mr LAU Kong-wah has raised so many important views here. But it serves no useful purpose for him to have said so much here: he has not indicated his support or his objection. Therefore, the "sunset clause" is important. The meaning of the "sunset clause" is that we will be forced to discuss the subject again in two years' time. More important is that other citizens may also express their views in the meantime.

(THE CHAIRMAN resumed the Chair)

At the end, therefore, if information illegally collected may become intelligence, when intelligence is without monitoring or supervision and if it can be used for an indefinite period, the consequence is as Mr James TO has said, far-reaching. Everyone, man or woman, old or young, and officials senior or junior irrespective of ranks, will be subject to scrutiny like being exposed in the sunlight. There is no escape unless they put up an umbrella. I do not know if the so-called intelligence is called intelligence there, it seems that it is called information. Talking about intelligence, it is only called information, not intelligence. To call it information and not intelligence is only to play around with concepts. There is no point saying it again, they have always been playing around with concepts. Information is certainly meaningless, but it has in fact be turned to intelligence.

As such, how can we pass a law like this? I would wish Mr LAU Kong-wah can seriously think about it. Maybe he is right is saying that

intelligence is indispensable. But man, who is in charge of it? Will they be put in charge of it again? No way. Therefore, I would wish you all to support Ms Margaret NG's amendment. The reason is simple. If Margaret NG's amendment is carried, the Government will have something to do. It will have to say how this and that piece of information is managed. If LAU Kong-wah's opinion is supported, the Government will not have to do anything, but it will just sit there and smile, "We win again. Goodbye."

I would therefore wish you all to really support Ms Margaret NG, forcing the Government to make some clarifications as to how it will handle information that has been collected through illegal means, who is in charge of this information, and how this information will be used. This is the crux of the problem. The most important thing in Ms Margaret NG's amendment is that she is opening the Pandora box and let us see all the ghosts. She lets us know how many ghosts there are. Overcoming those ghosts will be the responsibility of the Government, not ours. We do not have the authority to decide how the Government should act, therefore I would wish you all to support Ms Margaret NG to open up this magic box. Thank you.

MS MARGARET NG (in Cantonese): Chairman, I would only wish to respond in brief. Chairman, I do not have any ambition nor vision to manage all the Government's existing intelligence databases. I am only amending one of the definitions in the Bill. I am only saying that when the Bill is passed, information obtained through communication interception and covert surveillance authorized under this law, whether or not they are turned into intelligence, must be under monitoring and supervision. This is all that I want.

Mr LAU Kong-wah asks whether this is crazy. Yes, it certainly is. According to his thinking, I am trying to control the intelligence database of Hong Kong since time began through the amendment of such a small definition. I would indeed be crazy if indeed this is what I want. I am not saying that all intelligence will be used for political purposes. I am saying that, unless there is a monitoring system, information obtained for purpose "A" should not be used for purpose "B", particularly if "B" refers to a political purpose. There is certainly intelligence all over the world but it is controlled and monitored. Only we in Hong Kong are relying on the Chief Executive abiding by the Basic Law. Is the situation elsewhere and in Hong Kong the same, please? I am only asking for such situation to be monitored. Why would Mr LAU Kong-wah consider that I am crazy?

Excuse me, Chairman. I have got logic in my brain. I can see in logic that all intelligence is collected through communication interception and covert surveillance. And all crime detections nowadays rely on communication interception and covert surveillance. All intelligence will therefore be affected when I ask for the monitoring of communication interception and covert surveillance. Chairman, how could I wish the situation to be like this? I am only asking for the monitoring of a specific situation. Since the Government has said that the coverage of the Bill is so narrow and that things are obtained to meet some very limited and specific goals, then let us just monitor such a narrow area. Chairman, this is all that I want to say. I am glad that so much information can be obtained from this debate. I did not know there was so much to know before this. Thank you.

MR LAU KONG-WAH (in Cantonese): Chairman, I am glad to hear that Ms Margaret NG finally acknowledges that intelligence for non-political purposes is useful. This is a fact. You cannot ignore this function of intelligence.

Just now, it is clearly heard in both Mr James TO and LEUNG Kwok-hung's speeches that they have conceded to the point that it is not that we cannot have intelligence but that it must "be monitored". The question of who should be responsible for this intelligence is a separate matter. It is the subject of monitoring. This may have already been covered in the provisions of the later parts, and there may be reviews in the future on how to prevent reckless input and reckless output. It is not the question of this amendment. For those questions targeted at this amendment, I find them not acceptable.

I may have to look at the issue from another level. Mr James TO has said just now that the basic problem is that we do not have a democratic system. Some old friends often put it this way this couple of days. When they are short of arguments, they would say it is due to the lack of a democratic system that when our laws are not in order, the Government's work is also not in order. I would like to remind these few Honourable colleagues that if they do feel that all laws made under the absence of a democratic system are not in order, they are setting a real bad example.

We passed many laws this year. The legislation against red light jumping and drink driving were all carried, as you put it, in the absence of a democratic system. Do you wish the citizens not to abide by these laws. Anti-smoking law will be enacted soon. Will you be telling the citizens that given this

non-democratic system, they should not be abide by the laws passed by Legislative Council Members? Do we have to do this? It is a very dangerous, and not exemplary, behaviour. Therefore, I would wish that we argue by fact and reason, and not in a sweeping manner that all is not in order since now we do not have a democratic system. If such is the case, there will be no need for any debate. Chairman, you may as well save your time in co-ordinating discussions between the various parties, because according to their thinking, all legislation enacted under an undemocratic system is improper and unreasonable. There will be no use in debating, and things will be finished very soon. I think, therefore, we had better base our debate on reason.

MR JAMES TO (in Cantonese): Mr LAU Kong-wah is really good in sophistry. It is a pity that the debate will be prolonged because many people will rise and speak.

We have to be careful about laws that are made under an undemocratic system, particularly those related to political issues. Honestly speaking, would laws made under an undemocratic system, like the anti-smoking law, affect the rights and privileges with which the citizens are most concerned? Nonetheless, this is not the topic we wish to discuss now.

We are discussing what it would be like in a democratic system. There would be a matching legal package, including an intelligence committee, or intelligence committees in the House of Lords and the House of Commons. That is the package system.

The problem is not only that an undemocratic system is affecting how the law is drafted. It affects also the package system. I have explained here already that if we have two ruling parties like the United Kingdom, it would be more difficult to fall into the predicament of owning the intelligence in an unchecked manner because each party may have its turn to come to power. When the other party assumes power, the intelligence will be theirs. The civil servants are relatively neutral — I have pointed this out in one of my speeches. They will not lean towards one side and dare say things like "I will serve the Blue Camp, since it is always in power."

Furthermore, a two-party system will encourage the media to expose. When something out of order happens within the civil service structure, the system will facilitate people to expose. As long as the population structure of

the place supports the sufficient sale of his book which exposes things, the author may very well just publish one book and retire. He does not have to worry about his living.

Now, why some people who carry out wiretapping and evidently have served only a few years are fast-tracked for promotion to become an inspector or a sergeant, whilst others are still walking beats sweating? These people are awarded for their tight lips. This is how the current system works, to prevent them from causing problems. This is why we must have a matching package in order to prevent the abuse of powers. I am not saying that all laws that were made under an undemocratic system should not be enforced. This is not what I meant.

MR ALBERT HO (in Cantonese): I think I need to say a few words. So far, nobody has ever said that, since Hong Kong does not have a democratic system, we need not abide by the laws. I have not heard anyone say this.

I think every word should be understood in its context, and in the circumstances it is said. From the very beginning, we have said many times, and we said it once again earlier today (which is actually a matter of common sense) that power is corrupting, and it will be abused. Therefore, in a civilized and lawful society, the use of powers must be monitored and put under control. It is that simple.

The rule of law and the measures for the protection of human rights that we are asking for is not targeted only at undemocratic systems. I can assure you that it is also targeted at democratic systems. Similar situations may arise in democratic countries. There is, however, a further layer of protection under a democratic system: there are elections; and elections can provide checks and balances to an irresponsible government. Furthermore, under a democratic system, powers are divided and the constitution is more comprehensive. That is all.

As a matter of fact, all powers are only a double-edged sword. Would people believe that powers can only be used to do good things like fighting crime? The sword can be used to kill or hurt oneself. It may also be used to do all the bad things. We should actually not be talking about this subject in today's debate. I only wish we would all not argue on a premise which contradicts common sense and twists other people's words.

MR LAU KONG-WAH (in Cantonese): My response is very brief. I am not the person who started touching on the subject of democratic systems. I was only giving advice to my Honourable colleagues. It is a fact that power is corrupting. We are therefore fully supportive of providing controls to law-enforcement officers in the legislation. However, we must all be aware of this: should the amendment be carried, the law and order of Hong Kong will deteriorate.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman ……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung. You may speak.

MR LEUNG KWOK-HUNG (in Cantonese): I think it is a rather irresponsible statement. Actually, there is one thing that Mr LAU Kong-wah does not understand and that is, we only wish to narrow down the area of coverage, to the effect that those things, that is, those "products", that have been collected through certain means will be destroyed once they have become not useful. When they are destroyed, they will not become intelligence. In other words, our question is whether there will be any control for such information after it has been obtained or when it has become intelligence. As a matter of fact, if we have more time discussing this Bill, with your intelligence, you can surely come up with a new system, for example, setting up a new department called "Hong Kong Security Bureau". Would that not solve the problem? We may then appoint someone to take charge of it. When we have the time, we may ask him whether or not they have carried out surveillance against Mr Jasper TSANG. It can also work this way. We can ask him whether he has done it. He may very well answer in the negative. However, the problem is that we do not have such a department as of now. I am not against having intelligence. And I know it is very foolish to be against bacteria. You would have to destroy them. But bacteria will survive, and they will mutate.

Whether it is a division of three powers or four powers, there must always be checks and balances. The subject we are talking about today is checks and balances. To me, there should better be some fundamental changes. It is however not possible now, because he is the person in charge, he is responsible for drafting of the law. We are down below and are catching up with great difficulties. This is where the problem lies. We have to be careful if law and

order in Hong Kong will get worse because the stock market may plunge. You are a man of considerable importance. What we are talking about today is not that someone is opposing the Government at the expense of Hong Kong's law and order. Conversely, in the past all these concepts were unclear. For example, what constitutes intelligence? How can intelligence be preserved? Perhaps the Government has been wrong in erasing the products. But what is the purpose of retaining those wastes? There should be a reasonable explanation to all these questions and it is what we are talking about. Just as I said to Mr LAU Kong-wah a long time ago, if you could provide proof and if you got reason, you could always apply to the relevant department or person to preserve the relevant information. Going back to the example of Rainbow Warrior, had there been proper supervision, the application of dynamite or underwater surveillance might not have been done so meticulously. They also did not have to wait until afterwards to know that the purpose of the intelligence collection is to blow up the ship. This is what we are trying to guard against.

On this matter, Mr LAU Kong-wah does not have any responsibility. He is only well-intentioned. It should be Secretary Ambrose LEE who should come out and tell us how many crimes there will be, and how many terrorist organizations that are now being followed up by the authorities will get away from the law, should Ms Margaret NG's amendment be carried. It will be more convincing this way. Unfortunately, it is Mr LAU Kong-wah who has come out. Perhaps Mr LAU Kong-wah would make a good Deputy Secretary for Security. I should recommend him for the job when I have the opportunity. It seems that the Government would not care less. It is Mr LAU Kong-wah who knows about security operations who has come out to tell us that the amendment does not work.

What is happening now? I wish Secretary Ambrose LEE will testify to Mr LAU Kong-wah's statement, that is, should Ms Margaret NG's amendment be carried, to what extent Hong Kong's law and order will deteriorate. We all have the responsibility. If you can convince us, I may perhaps support you. Secretary Ambrose LEE, I shall now take my seat, and listen to your response to the comment of Mr LAU Kong-wah, that is, how chaotic Hong Kong will be at a time without intelligence. You should know very well, since you are the Secretary for Security. Please tell us, so that we may know.

MS MARGARET NG (in Cantonese): Chairman, I would not like to drag on with the debate. I wish only to read out a few words. The scope of our

discussion is so broad. But what is the purpose of the amendment? If the amendment is carried, it means that intelligence derived from the information will be protected under clause 56.

What is the protection provided by clause 56? Chairman, I wish to simply read it out. Clause 56(1) provides that "Where any protected product has been obtained pursuant to any prescribed authorization issued or renewed under this Ordinance on an application by any officer of a department, the head of the department shall make arrangements to ensure that the following are limited to the minimum that is necessary for the relevant purpose of the prescribed authorization ....." What protections will these products have?

First, the extent to which the protected product is disclosed; second, the number of persons to whom any of the protected product is disclosed; third, the extent to which the protected product is copied; and forth, the number of copies made of any of the protected product. All practicable steps must be taken to ensure that the protected product is protected against unauthorized or accidental access, processing, erasure or other use. This is all that I want to say. Chairman, I implore Members to support my amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Mr WONG Kwok-hing, are you not going to vote?

(Mr WONG Kwok-hing cast his vote)

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, five were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 21 were present, 12 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): At this stage, I must point out to Members that the progress of our examination is very slow. Based on the progress that we had made during the past one and a half days, I estimate that the five-day slot for this meeting will not be enough. Certainly, we can continue on 7 August. However, even if we have that additional day, it is still not enough.

Therefore, the first step that I shall take is to suspend the meeting at midnight. Members should be psychologically prepared that I shall make other arrangements tomorrow depending on the progress of the meeting. At this stage, all I can tell Members is that I cannot rule out the possibility of continuing overnight.

I wish to tell Members that this meeting is specially convened to complete the examination of this Bill before 8 August 2006. As the President, I am neutral as to whether the Bill will be passed or voted down. This is not my responsibility. My responsibility is to complete the examination before that day. If we do not have other options, I may have to make a decision which I am most unwilling to make. I am telling Members honestly that if we have to continue overnight, I think Members will have a hard time, so will the staff and government officials, but it will be the hardest for me *(laughter)*, because unlike you, I cannot have a coffee or take a break outside this Chamber, and I can only rest for a short while during meal breaks at the most. So, this is actually the last thing that I wish to see. However, the choice is not in my hands, but in the hands of Members. If Members can focus on the clause or amendment under discussion in their speeches, rather than speaking on issues that only seem to be relevant but not necessarily so, I believe we will make better, faster progress in our examination than at present. Certainly, Members have the freedom of speech, and when Members speak on issues that seem relevant, I will allow Members to continue with their speeches. This is also my duty. Therefore, as to how many hours we will need to complete the meeting, in what manner and at

what hours should the meeting be held, all these actually rest with Members. I only wish to make this clear to Members.

Ms Margaret NG, do you have a point of order?

MS MARGARET NG (in Cantonese): Yes, Chairman. On the question of whether we must complete the examination of the Bill before the deadline, there is something that I do not understand. Certainly, I understand that the duty of the Chairman is to preside over the meeting, and I would try my best to be co-operative and would not speak if I do not have to. I feel a bit puzzled about whether it must be done before the deadline……that is, whether it must be a "guillotine" procedure, but normally, there will not be a date before which a Bill must be enacted. Of course, I hope that we can make it, but I do not know on what basis this date or deadline is set for the passage or otherwise of this Bill. Chairman, I hope that as I move on, and if we have to work round the clock, I may just fall down when I cannot cope any longer and perhaps, the matter can be solved then. But I personally feel a bit puzzled about the procedure.

MR LEUNG KWOK-HUNG (in Cantonese): I agree……In fact, I would like to say that I was the first to raise my hand. Chairman, of course, I very much respect your decision, but this actually does not work. If there are a lot of ambiguities, it is not possible to examine a piece of legislation. Of course, it is now too late to say this and in fact, the problem might be solved if the meeting were arranged for 25 July. This is really the Government's responsibility. It is the Government that wants to introduce this Bill, is it not? It wants to present the Bill to us on 2 August, and Members, like me, have a lot of things to say about it. It is unreasonable to give Members, especially you, Chairman, such a hard time just because Members have a lot to say. What if you get sick? Haste will only make waste. If you are taken sick, Ms Miriam LAU would have to chair the meeting for you, and I do not wish to see this happen.

So, I implore you to take care of your health. If it is impossible to complete the examination, tell the Government so. Perhaps no one has put this plainly and that is, the Government may have a legal vacuum for a day or two. In fact, they have said so, they would still do it. Secretary Ambrose LEE had said that they would still do it. In fact, Chairman, I am really saying this sincerely, what if you are taken ill? The quicker you wish to complete it, the slower it will be completed. So, in fact, I think the latest……

CHAIRMAN (in Cantonese): What relevance does it bear to your remarks?

MR LEUNG KWOK-HUNG (in Cantonese): ……It is because you, my respected Chairman, have said that the meeting may be held overnight and that we have to be psychologically prepared. This, I do not agree, because your health is more important than the fault of the Government, right? Now that you have offered something, and you, my respectful Chairman, said that you had to sacrifice yourself and that you preferred to go through a very hard time in order to help. I think this is most inappropriate. In fact, in any case, whether be it executive-led or whatever, the Legislative Council has its own way of operating. In fact, the Government can think of a solution by itself, rather than relying on a respected elderly like you to sacrifice her health.

CHAIRMAN (in Cantonese): Have you finished?

MR LEUNG KWOK-HUNG (in Cantonese): I hope that you will take care of your health.

CHAIRMAN (in Cantonese): You have been making just this point in your entire speech. Thank you for your concern.

MR LEUNG KWOK-HUNG (in Cantonese): There is no way that it should be like this. How come?

MS AUDREY EU (in Cantonese): Chairman, I have a point of order and I must raise it here. Mr LEUNG Kwok-hung said just now that there would be a legal vacuum of only a couple of days if the Bill was not passed on 8 August. I think I must clarify this, because we have had a legal vacuum all along and we have been talking about this for 10 years since the reunification. And the judgement by the Court of Final Appeal has already proved this ……

CHAIRMAN (in Cantonese): Yours is not a point of order, Ms EU.

MS AUDREY EU (in Cantonese): But Chairman, this related to the date of 8 August……

CHAIRMAN (in Cantonese): I have to respond, and you must give me an opportunity to respond rather than expressing concern for the health of an elderly or talking about what a legal vacuum is……

MS AUDREY EU (in Cantonese): Chairman, I did not say anything about an elderly's health. Not that I do not care; only that I did not say anything to that effect. So, Chairman, I think that this point must be raised here and it is related to the remarks you made, that is, your duty is to ensure the completion of examination before 8 August. This is because I do not wish to see any misunderstanding that if the examination cannot complete on 8 August, it would be a dereliction of duty on our part, or a legal vacuum would be created which is not the question. For this reason, I consider it necessary to clarify.

CHAIRMAN (in Cantonese): Mr Ronny TONG. Had I known this, I would not have made those remarks and wasted Members' time. I have wasted time, I dare not criticize Members any more.

MR RONNY TONG (in Cantonese): I think it is a question of principle. Your duty is to ensure our smooth operation. Your duty is not to accept requests or instructions from the Government to enact the legislation before a certain day. This is a question of principle.

CHAIRMAN (in Cantonese): Well, my duty is to decide when to suspend the meeting, or when to continue it. It is the Chairman's duty. As to how I should discharge it, it is for me, as the Chairman to decide. My earlier remarks were made to Honourable Members, in the hope that you could be prepared psychologically for the course of action that I might take. I also told you that I might not necessarily do so. However, when I consider such action necessary, I will proceed with it. That is it. You may not like my work and style in discharging my duties, which you are perfectly at liberty to do so. This Council allows Members to move a motion at any time on a vote of no confidence in the

Chairman. You need not say you have no such idea, as this is not the point here. I only wish to tell you what course of action I might take. That is all.

MS MARGARET NG (in Cantonese): Chairman, I note from the Rules of Procedure that you certainly have the authority to decide when to suspend. That is absolutely true. But I feel puzzled as to whether or not we have such a rule because in such great haste I cannot find it. Now votes are to be cast on motions. The question is not about whether we have to work overnight. We only have 24 hours in a day. Is there a rule stipulating that a debate must close when it comes to a certain stage and that the Third Reading must proceed? If yes, we can work according to that rule. Chairman, I really do not wish to engage in an argument. I really wish to seek a clarification on how we should proceed as I cannot find such a rule for the moment.

CHAIRMAN (in Cantonese): Ms Emily LAU, you have raised your hand.

MS EMILY LAU (in Cantonese): Chairman, you are discharging your duties. I recall that consultation has always been our way of doing things. You would always listen to the views of the House Committee, particularly with such a significant issue when we have to work for dozens of hours without sleep. Have you consulted Members? I have heard that many Members oppose strongly to such a course of action. I believe you must have followed your past practice of consulting more than 50 Members for their views before making that decision. Chairman, you have not mentioned anything about that earlier. Could you please clarify?

CHAIRMAN (in Cantonese): Mr LEE Wing-tat, you would like to speak. Fine, please speak.

MR LEE WING-TAT (in Cantonese): Chairman, certainly, insofar as the Rules of Procedure are concerned, the Chairman has the final say in the conduct of business in the Chamber. This we all know, and I do respect it. Of course, I trust the Chairman is a considerate Chairman. I mean we drew up a new rule this year on not taking the meeting through the night by all means for two reasons: first, the health of all Members and yours; and second, the need to be clear-headed. It is our job to scrutinize laws and one of the conditions for such

scrutiny is to be clear-headed. So if we are in a state of excessive fatigue, practically, we cannot scrutinize laws in an effective and rational manner. I believe this is not the wish of the Chairman or all Members.

We changed the Rules of Procedure this year as we know that a person's stamina and mental sharpness are limited. Now we are solemnly deliberating a piece of law for an extended period of time — we are not playing electronic games (actually playing electronic games through the night could kill) — I hope the Chairman can note one point, that is, when the House Committee draws up a new rule, I believe each and every one of my Honourable colleague, irrespective of his or her political affiliation, will have one assumption, that is, when every one of us scrutinize a piece of law in a most responsible manner, there is a time limit to work and once that limit is exceeded, we would all feel that it is unhealthy. I hope you can note this point. Thank you, Chairman.

CHAIRMAN (in Cantonese): There are two main questions here. First, is it a must to complete the examination of this Bill before 8 August? Is that target date mandatory? There is no such target in our Rules of Procedure. However, if Members keep making use of our Rules of Procedure to prolong the debate, then the result of this special meeting is that we will not complete the examination of the Bill before 8 August. In that event, irrespective of the passage or otherwise of the Bill, we could not reach that final stage. Therefore, the purpose of holding this special meeting is to give Members an opportunity to debate on the Bill and then make a decision.

However, during the debate in the past one and a half days, points already made in the Bills Committee were frequently repeated by Members and then by others. Of course, Members enjoy the freedom of speech, and this I respect. But the exercise of the freedom of speech has got to be convincing. But this is not for me in the Chair to decide. It should be the decision of the public whose eyes are discerning.

The second point is about closing a meeting at 10.00 pm. Actually, it is due to the bitter lesson in the past when many Members complained to me, after going through a 24-hour meeting, that they hoped to continue the meeting on another day. So all along I have been trying to suspend a meeting at about 10.00 pm and continue on another day. However, I hope very much that Members can conduct the debate in a sensible and reasonable manner instead of prolonging it indefinitely. But you have the right to do so. Honourable

Members, you have this right but the manner in which you exercise this right is accountable to the Hong Kong public. Therefore, precisely out of my respect for Members, I have given you an advance notice on the course of action I would take. It is because I would feel most sorry when on 8 August we find that we cannot complete the examination after holding so many days of meetings, then shall we continue with the examination by then?

The choice is yours as to how you would like to proceed. I cannot make that choice for you. I can only tell you that I would discharge my duties according to the Rules of Procedure. The practice of suspending the meeting at about 10.00 pm every evening is the result of discussions in the House Committee. It is not part of the Rules of Procedure. It may be stipulated in the House Rules, but I need advice from the Clerk.

I hope to stop our exchanges here and proceed with our business on the Agenda.

MS EMILY LAU (in Cantonese): Chairman, I asked you if you had consulted Members. Please give me an answer.

CHAIRMAN (in Cantonese): Sorry, Ms LAU, I forgot about it. I certainly cannot call a House Committee meeting and request Members' attendance to express their views. However, during the break earlier, I did consult some bigger political parties and groupings in the Council. A party categorically voiced its opposition to continuing overnight, while three other parties and groupings told me they supported meeting through the night. There was another view which was not so clear then, but now I reckon from the remarks made just now the party objects to the proposal. If I were requested to put it to the vote, I feel that it may not be necessary. But if you ask about the proportion of support in the House Committee, I can tell you with considerable confidence that though the matter is not yet put to vote, the three political parties and groupings already account for more than half of the votes in this Council.

CHAIRMAN (in Cantonese): Ms Margaret NG and Mr James TO have separately given notice to move an amendment to delete subclause (2) from clause 2, while the Secretary for Security is to move an amendment to that subclause.

As Ms Margaret NG and Mr James TO's amendments are identical, I will only call upon Ms Margaret NG to move her amendment. Mr James TO may not move his amendment irrespective of whether the amendment moved by Ms Margaret NG is passed or not.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendment.

MS MARGARET NG (in Cantonese): Chairman, I move for the deletion of subclause 2 from clause 2. Subclause 2 provides that a person is not regarded as being entitled to a reasonable expectation of privacy when he carries out any activities in a public place. The most important wording is "not regarded". That means whether or not the person has any expectation, he will be regarded as not being entitled to any expectation. Chairman, when we debated on "covert surveillance" earlier, that is, the definition of "covert surveillance" under (a)(i), there is a similar prescription as to what constitutes covert surveillance. First of all, the person should have a reasonable expectation of privacy. It is the subject of our earlier debate. Of course, Chairman, you have not given permission to my relevant amendment. However, during the debate, my criticism against the wording of the provision was that it had made the Bill ambiguous and it would make the law ambiguous. People will not know how to judge when the law-enforcement agencies are conducting covert surveillance. Now subclause 2 serves to further deprive the rights of the person concerned in addition to the ambiguities. In other words, when you are in a public place, you will be regarded as not being entitled to any reasonable expectation, whether or not you actually do have a reasonable expectation. It is not appropriate to undermine people's right in such a way.

Chairman, I know that the Secretary for Security will propose an amendment to delete from the provisions the reference to speeches in public places. However, Chairman, in the proposed provisions, personal rights are exploited through adding yet another uncertain element onto an already uncertain element. Now that we are going to exclude certain items from the rights that will be affected, what useful purposes such a definition will serve to the entire ordinance? I consider that this subclause creates an additional element of uncertainty. The authorities like to refer the statements from the Law Reform Commission (LRC) Report. However, so far as the subject of public places is concerned, the LRC Report has placed the most emphasis on whether people are entitled to a reasonable expectation in a public place. This is the crux of the problem. However, we cannot take that a person will lose all his entitlement to reasonable expectation of privacy once he is in a public place. Even so, his

other privacy rights may continue to exist apart from those words he has said and written. According to subclause 2, however, all privacy rights will be forfeited. In other words, there will in effect be no privacy except those otherwise specifically prescribed. This is not consistent with the Basic Law. Chairman, I therefore propose to delete subclause 2. I wish Members would support my amendment, and object to the Secretary for Security's amendment.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO and the Secretary for Security to speak on the amendment moved by Ms Margaret NG as well as their own amendments respectively. However, they may not move their respective amendments at this stage

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I object to the amendments of Mr James TO and Ms Margaret NG to clause 2(2). The purpose of the Bill is to stipulate a legal procedure that law-enforcement officers should follow when carrying out communication interceptions or covert surveillance operations. One of the main reasons of this procedure is to strike a balance between the protection of privacy and the maintenance of law and order. When considering this issue, the concept of entitlement to a reasonable expectation of privacy is very important. Clause 2(2) purports to clearly prescribe that any person carrying out any activity in a public place will not be entitled to a reasonable expectation of privacy in respect of such an activity, since his activity is carried out in a public place for all to see, he is therefore not entitled to any reasonable expectation of privacy.

Deleting clause 2(2) will create uncertain elements as to whether or not an authorization is required when law-enforcement officers use devices to observe activities in public places, and will lead to disputes. I should however stress that "activity" is different to "saying", "writing" and "reading". Those people are still entitled to a reasonable expectation of privacy when he speaks, writes or reads in a public place.

In response to the proposals of Members I have proposed an amendment to clause 2(2) prescribing that the provision will not affect the relevant person's entitlement of a reasonable expectation of privacy when he speaks, writes and reads in a public place. The authorities object to the amendments of Ms

Margaret NG and Mr James TO. I wish all would support our amendment. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and the amendments thereto.

MR JAMES TO (in Cantonese): Chairman, I once spoke in the relevant Bills Committee that I have suddenly discovered a very interesting phenomenon and that is, when I am in a public place, what privacy will I not be entitled to have a reasonable expectation of, except speaking and reading? I guess it exists when it is there. More or less so. Before that I could not think of any examples. I have one now. Suppose that there is a tent in a public place, in which there are two or three persons sitting in protesting all night. They lock themselves up there, or perhaps the curtain has been pulled. They are there, but nobody knows that they are there. Would they be entitled to a reasonable expectation? It certainly is a technical question. However, in reality, in addition to reading, writing and speech, I cannot think of anything, conceptually, relating to privacy to which we should have a reasonable expectation. From a common law perspective, you can judge that you can reasonably expect that privacy exists when you are in a public place — assuming that you are not in a tent. It makes no difference whether or not it is prescribed in the provision.

MR RONNY TONG (in Cantonese): Chairman, there are three points that I would wish to talk about. There are no such limits to the rights set out in Article 30 of the Basic Law as those which are now proposed by the SAR Government in this Bill. The Basic Law has not prescribed such limits to basic rights as an objective reasonable expectation. Therefore, I do not see why the Government or the Legislative Council would have any power to, through legislation, confine such rights, which are not confined by the Basic Law, and subject them to the passing of a threshold of objective reasonable expectation. This is the first point.

Secondly, Article 30 states that freedom and privacy of communication is protected by the Basic Law. If I do not have any privacy of communication in a public place because of the introduction of an objective consideration of reasonable expectation, I have lost this freedom of communication and it is all in contravention of the Basic Law. If Hong Kong citizens do not have the privacy of communication in public places, their right to free communication has been

regulated. They would think that they cannot go to public places if they wish to talk about private things. In other words, the means of communication available to them has also been limited. This is a violation of the basic rights given under the Basic Law.

Thirdly, I would wish to ask what would be like if we do not have the Bill? Would criminals run wild as suggested by Secretary Ambrose LEE? The answer is in the negative. Why? Because covert surveillance can still be carried out. Please do no forget the meaning of "covert surveillance" as defined by the Bill. It refers to surveillance undertaken with surveillance devices, and such devices do not include video equipment. In other words, the Government may use auxiliary video equipment to survey those things we can see, only that they cannot be audio-recorded or video-taped. However, the SAR Government is proposing an amendment that speech and writing can be exempted. We should ask, as Mr James TO has just raised an obvious point earlier, having exempted these two items, what are those things which would require covert surveillance with surveillance devices? I cannot think of anything at all. I think, therefore, the retention of such a provision is not only a contravention of the Basic Law, it is also unnecessary.

CHAIRMAN (in Cantonese): Mr James TO, speaking for the second time.

MR JAMES TO (in Cantonese): Chairman, I would wish to say something briefly. I wish to remind the Government that there is a loophole here. I thought of it just now. I did not think of it before even after so many hours of hard labour in the Bills Committee. The question is if I am not a dumb person and I can speak, I will speak. A dumb person however will have to use sign language. If we use the term "words spoken", we should specify whether it conceptually includes also sign language. We must remember, however, words can be spoken softly, but what about sign language? Take for an example, do we have to hide ourselves, shielded by our bodies, in order to talk in sign language? If it is kept under surveillance and used within the meaning of this provision, we will probably be contravening discrimination law as well as the spirit of equity. The Secretary must pay attention to this when operations are conducted.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I have nothing to add. However, I wish to say that the concept of reasonable expectation is not invented by the Hong Kong Special Administrative Region Government. We have taken reference of other jurisdictions. These places do have the concept of reasonable expectation with respect to privacy. So does our Law Reform Commission.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): I would wish to respond to the Secretary. He is indeed contradicting himself. If he thinks that there are plenty of legal grounds for reasonable expectation, why would he have said that the main purpose of subclause (2) was to bypass those definitions in that irrespective of whether there is a reasonable expectation, it will not be regarded as a reasonable expectation?

Chairman, perhaps I should mention that, when we discussed about the Code of Practice, we talked about reasonable expectation and suggested that there should at least be two elements. First, the person should have a subjective expectation of privacy; second, objectively, whether society accepts that he should have this reasonable expectation. The Secretary is saying that everything should depend on the law, and there are subjective considerations and objective considerations. And there are so many standards and criteria. Why would he be contradicting himself, bypassing all those factors in subclause (2) to the effect that whenever you are in a public place, you will not be regarded as being entitled to any reasonable expectation of privacy?

It is a contradiction in itself. And the authorities will also wish to exclude certain items from the provision. Chairman, the most important reason that I am objecting is not only that this would create further uncertain factors and would undermine our privacy, it is that there are problems of logic in the Secretary's response. There are contradictions. Chairman, I therefore once again appeal to Members for their support of my amendment.

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendment, I will remind Members that if Ms NG's amendment is agreed, the Secretary for Security may not move his amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, five were in favour of the amendment, 21 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 21 were present, 12 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to subclause (2) of clause 2.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

CHAIRMAN (in Cantonese): The Secretary for Security and Mr James TO have separately given notice to move the addition of subclause (3A) to clause 2.

As their amendments are identical, I will call upon the Secretary for Security to move his amendment since he is the officer-in-charge of the Bill. Mr James TO may not move his amendment irrespective of whether the amendment moved by the Secretary for Security is passed or not.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the addition of subclause (3A) to clause 2, the contents have been set out in the papers circularized to Members.

In the Bills Committee, Members were concerned that whether an application for Type 1 surveillance will suffice when an operation involves both Type 1 and Type 2 surveillance. Furthermore, if a Type 2 surveillance involves particular sensitivity, would it be more appropriate to apply to a panel Judge for a Type 1 authorization. The authorities are proposing to add a clause 2(3A) to facilitate the relevant officer to apply for the issue of or the renewal of a prescribed authorization for Type 2 surveillance as if it were a Type 1 surveillance operation. We will also be prescribing the above circumstances clearly in the Code of Practice that the relevant officers should consider applying for a Type 1 authorization. Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

MR JAMES TO (in Cantonese): Chairman, my amendment is the same as the Secretary's amendment. I do not have to speak. This amendment has been

proposed by me. The Secretary considers it all right after discussion with Members. So he is proposing the amendment.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

CHAIRMAN (in Cantonese): Ms Margaret NG has given notice to move amendments to the definitions of "Type 1 surveillance" and "Type 2 surveillance" in subclause (1) of clause 2. Mr James TO, the Secretary for Security, Mr LEE Wing-tat, Mr Albert HO and Mr CHEUNG Man-kwong have separately given notice to move amendments to the definition of "Type 2 surveillance".

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendment.

MS MARGARET NG (in Cantonese): Chairman, let me first explain briefly the difference between Type 1 and Type 2 surveillance. The authorities consider Type 1 surveillance more intrusive and that it should be authorized by a more

independent person, that is, a panel Judge. They consider Type 2 surveillance less intrusive and that it can be authorized by officers within the department concerned.

My amendment draws the line differently. We agree that for the more intrusive ones, which are actually not only more intrusive but are also exploiting more upon privacy, should be authorized by an independent person. On a more material level..... Therefore, we consider that a simpler way is to look at whether the covert surveillance is carried out by the use of any surveillance or tracking device, or involves entry into any premises without permission, or interferes with the interior of any vehicle without permission. If the surveillance involves any of these three factors, it should be authorized by an independent person. Private premises are protected not only by Article 30 but also Article 29 of the Basic Law. All such circumstances should belong to Type 1 authorization. Any other covert surveillance which does not involve these factors belongs to Type 2 surveillance. They can be authorized from within the department.

Chairman, what is the greatest difference? It lies in the so-called participant surveillance. The Blue Bill proposed by the Government originally prescribes that internal authorization is adequate for any surveillance carried out by a participant which does not involve entry into any private premises or vehicle. However, Chairman, according to my questioning in the Bills Committee, my impression is that — although the Government refused to admit it — if this definition is adopted, a great majority of covert surveillance will fall into the category of internal authorization. According to the current arrangement, only a few dozen of the more than 200 cases will be authorized by independent persons.

Chairman, as a matter of fact, most surveillance operations are carried out by undercover agents. The undercover agent has hidden with him some video or audio recording devices and records what you are saying. Telephone conversations will be recorded at the other end. We knew that some people would say that we certainly should do all we could do to deal with these things. Why should we ..... We are not prohibiting the Government from carrying out covert surveillance. Only that a more stringent authorization is needed when a surveillance operation is required. That is all.

Chairman, what we are disagreeing to is how the authorities will differentiate whether there is an undercover agent? Even if an undercover agent

is involved, if the operation involves a systematic or a large scale wiretapping or taking photographs secretly to the extent that everything in the office is photographed, it would not be appropriate for the Government to say that the operation is less intrusive.

Secondly, the Government's another argument is that if there is a participant involved, you would naturally expect that you can talk with him, and since he has heard what you have said, you cannot guarantee that he will not tell the others. Therefore, you cannot — and the Government again resorts to the point of reasonable expectation — reasonably expect that the person will not tell the others. Chairman, we have read a precedent case given by the Bureau. It is a case in Australia called "*Grollo v Palmer*". The subject matter is a separate thing. In the process, however, on the point that participant surveillance may be less intrusive to privacy to the effect that a person is not entitled to a reasonable expectation, the Judge said that it was absolutely incorrect. When I talk to a person, it is a private conversation. I would certainly know that this person might not be tight-mouthed and he might talk to others about the content of our conversation, but I would never expect him to have hidden with him a tape recorder and would publish the content on a newspaper or send it to others as intelligence, particularly when, according to the definition of covert surveillance, the person is doing his best to do it without my knowledge. It is different from the situation where somebody overhears my conversation with a friend or a colleague and remembers what I have said. Even when he repeats my words, he is not doing that like audio records. I would at least have the chance to explain that maybe he has said it wrongly or that he has remembered it incorrectly, and so on. No matter what, it cannot be compared to systematic recording.

Chairman, we are both Members of the Legislative Council. We (and even government officials) all have this experience: we talked to somebody in confidence and the content of the conversation was published on a later day. How could you say that you did not have a reasonable expectation that what you had said would not be published? If you think that your words will be published by reporters tomorrow, you will be more careful. Chairman, if we talk to a friend or our confidential secretary or assistant and cannot expect that he will not record the conversation and subsequently disclose it to everyone, it will never be accepted in any society. This definition is therefore not acceptable. Therefore, Chairman, I do not consider participant surveillance can be treated with a lower standard. As a matter of fact, since most covert surveillance

operations involve a participating party, it is all the more necessary that they should be authorized by an independent person, in order to safeguard abuse and intrusion upon privacy. Thank you.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO, the Secretary for Security, Mr LEE Wing-tat, Mr Albert HO and Mr CHEUNG Man-kwong to speak on the amendment moved by Ms Margaret NG as well as their own amendments respectively. However, they may not move their respective amendments at this stage. If the Committee has agreed to Ms Margaret NG's amendment, Mr James TO, the Secretary for Security, Mr LEE Wing-tat, Mr Albert HO and Mr CHEUNG Man-kwong may not move their respective amendments.

MR JAMES TO (in Cantonese): Chairman, perhaps let me first speak on my amendment. As a matter of fact, my amendment coincides with Ms Margaret NG's amendment first point in placing participant surveillance under Type 1 surveillance. That is to say, authorization will have to be sought from a Judge. The reason is that for Type 2 surveillance, authorization is to be requested from one not below the rank of Chief Superintendent of police. This is because I do not agree with the distinction made by the Government between a lower level of intrusiveness and a higher level of intrusiveness.

I am not going to repeat my first argument, which has already been covered by Ms Margaret NG. I would like to add one point only. In the recent "Lam Hong Kwok case" of 21 July, the Court of Appeal, composed of three Judges, delivered its majority judgement through Justice CHEUNG by a vote of two to one. Justice CHEUNG specifically pointed out what Ms Margaret NG just mentioned. Citing a case in Canada, he pointed out that if a person told another person something, no matter who the other person was, he was running a risk that the other person might relate it to others (that is to say, in common language, "open his big mouth" and tell everybody like "a bursting fire cracker"). He had to run that risk as it was he himself who told the other person. Correct? Surely, this person also had to consider whether or not he was well-acquainted with the other person or how much trust he had in him, or

how good he was at keeping secrets. But he still had to run a risk. However, still quoting the said case in Canada, Justice CHEUNG went on to point out that running such a risk was different from running another risk if that other person was, in fact, carrying a tape-recorder to tape all his words and to have the contents published, or broadcast or presented to Court in their entirety. This is a totally different kind of privacy expectation.

According to the distinction made by the said judgement, this constitutes a serious infringement on privacy. Precisely for this reason, I am of the view that if we are to have Type 1 and Type 2, it probably ought to come under Type 1 which is a more stringent level. The reason is that for such application, there has got to be authorization from a Judge. The above is to supplement the argument of Ms Margaret NG, and also represents recent development.

It is hoped that the Government can be more prudent. The reason is that if an extreme case crops up concerning the distinction between Type 1 and Type 2, which leads to a lawsuit on the ground that Type 2, not Type 1, has been used. It is then likely for the case to be presented to the Court. The Court might eventually rule it to be of a higher level of intrusiveness, with a view similar to that given by Justice CHEUNG in the Court of Appeal. Eventually if it goes even further, the Court might, for the same reason, find the scheme, that is, the present distinction between Type 1 and Type 2, to be unconstitutional — this is a most extreme case — then we will have to meet again to have a debate on how to set the distinction. So, I have to put this on record, and make a statement in advance as a forewarning.

Now about the second amendment. In the amendment I add something different from the Government's amendment. The first point is about the Government's amendment to paragraph (b), the one on conveyance …… whether or not by electronic interference ……. In other words, to use certain device to obtain in the interior of a conveyance some information, for example, conversation, is sufficient to classify the operation as Type 1. I thank the Government for accepting this amendment, that is, the amendment I have proposed just now.

However, I think there is a similar situation inside premises. This is what Ms Emily LAU said. It is about having the curtains drawn. The situation is one with curtains actually drawn. If I have not drawn the curtains and I get myself seen by others, then it, of course, falls under Type 2, that is, application under Type 2. However, if I have drawn the curtains but he, has a device and is

still able to electronically observe what I do behind the curtains, then in my opinion, this by itself should be a situation as set out in paragraph (b) — the Government has included paragraph (b) in the scope of its amendment — this being also one form of electronic interference, that is, electronically infiltrating an area where one expects a reasonable level of privacy by drawing the curtains. As we all know, nowadays devices are getting more and more sophisticated. Therefore I think it is not impossible for such a situation to come up. However, it has got to be placed under Type 1 application. The reason is that it can be highly intrusive as the other person has already drawn the curtains, but it is still possible to intrude into that person's privacy by means of certain device. This is my amendment.

Then, perhaps let me explain why the several of us, namely, Mr LEE Wing-tat, Mr Albert HO, and Mr CHEUNG Man-kwong, put forward several amendments. In fact, these so-called B, C and D plans of ours are just different levels of amendment. I am going to let them speak.

MR LEE WING-TAT (in Cantonese): Madam Chairman, with regard to the definition of surveillance set out in clause 2(1) of the Interception of Communications and Surveillance Bill, I propose the following amendment on behalf of the Democratic Party. The amendment proposed by me is a combined version incorporating the amendments of Mr Albert HO and Mr CHEUNG Man-kwong. The contents mainly consist of the following two points. Firstly, our proposal is to keep the part on monitoring participatory activities, that is to say, to allow Type 2 surveillance acts, that is, what is set out in paragraph (a), namely "(what is) carried out with the use of a surveillance device for any purpose involving listening to, monitoring or recording words spoken or activity carried out by any person, and the person using the device is one who is the person speaking or carrying out the words or activity". It means to let acts by undercover agents come under the category of Type 2 surveillance. At the same time, we propose to narrow the definition of Type 2 surveillance. In place of the original provision that allows acts of eavesdropping and monitoring carried out with the expressed or implied consent of undercover agents to be treated as Type 2 surveillance, there is to be amendment to the effect that classification as Type 2 surveillance for such purposes is permissible only if there is express written consent from those undercover agents.

Secondly, with regard to paragraph (b)(i), the part on monitoring participatory activities, once it is established that acts by undercover agents, such

as eavesdropping and wiretapping, have become conditions for Type 2 surveillance, there has got to be the stipulation that there can be no entry onto any premises physically or by electronic means without permission if the use of device is involved. It is our hope that by narrowing the definition of Type 2 surveillance, we are to render application to Court necessary in the case of surveillance operations carried out by undercover agents. This is to achieve the purpose of giving the greatest possible protection to people's privacy and freedom without the repudiation of executive authorization. I call upon all Members to support my amendment. Thank you, Madam Chairman.

MR ALBERT HO (in Cantonese): Chairman, this amendment is a very simple technical amendment. As stated by Mr James TO just now, this amendment is already a compromise to a compromise. We all know this, and explanations have already been given by Honourable colleagues. If an undercover policeman or law-enforcement officer brings along some device when attending a meeting in order to listen to or wiretap or record what other people say, and if the participant (that is, the undercover agent) is one given consent, then this will become Type 2 surveillance. There is no need to apply to a Judge. Only internal application will be required. According to the wording in the legislation, the consent can be either expressed or implied. That is to say, implied consent is also all right. There is even no requirement for getting consent in advance. In my opinion, as this is already executive authorization, and there is also such a grey area, that is, it is all right even to imply, then I think it may perhaps give rise to (1) disputes, and (2) the so-called situation of abuse. Of course, that depends on individual cases. I am not saying that it is something going to happen frequently. However, it is likely to have a situation where no prior authorization whatsoever has been obtained and yet colleagues are not quite prepared to give authorization afterwards. However, because of the need for authorization, consent is granted under compulsion. This is a situation we do not want to see. Given the fact that this process of authorization is so simple, why not clearly spell out the explicit stipulation that prior authorization is required before any action can be taken. In this way, all matters will be kept fair and square. Otherwise, please make an application under Type 1, that is to say, to treat it like Type 1 surveillance and make an application to a Judge. I think this is an appropriate approach to take.

MR CHEUNG MAN-KWONG (in Cantonese): Chairman, with regard to the definition of Type 2 surveillance set out in clause 2(1) of the Interception of

Communications and Surveillance Bill, I, on behalf of the Democratic Party, propose an amendment which "even falls short of a compromise to a compromise". We propose to keep the part on monitoring participatory activities, that is to say, to allow Type 2 surveillance acts as set out in paragraph (a), namely "(what is) carried out with the use of a surveillance device for any purpose involving listening to, monitoring or recording words spoken or activity carried out by any person, and the person using the device is one who is the person speaking or carrying out the words or activity". In fact, it means to let undercover acts come under the category of Type 2 surveillance. However, at the same time, we propose to narrow the definition of Type 2 surveillance. With regard to paragraph (b)(i), the part on monitoring participatory activities, once undercover acts, such as eavesdropping and recording, have become conditions for Type 2 surveillance, there is the stipulation that there can be no entry onto any premises physically or by electronic means without permission if the use of device is involved. It is our hope that by narrowing the definition of Type 2 surveillance, we are to render application to the Court necessary in the case of surveillance operations carried out by undercover agents. This is to achieve the purpose of giving the greatest possible protection to people's privacy and freedom without the repudiation of executive authorization. I call upon all Members to support my amendment. Thank you, Chairman.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Bills Committee has gone through very thorough discussions on the definitions of Type 1 and Type 2 surveillance, especially about the circumstances under which the acts should be regarded as less intrusive, and, therefore, applications for authorization should be directed to the executive authorities. In response to the concern expressed by Members, we propose to amend the definition of Type 2 surveillance to state more clearly that this type of surveillance covers two categories of surveillance: first, participant surveillance using listening device or optical surveillance device; and second, in a situation that does not involve entry onto any premises without permission or interference with the interior of any conveyance or object without permission.

Moreover, in response to Mr James TO's suggestion, we also add electronic interference with surveillance device to the part on interference without permission. Covert surveillance other than Type 2 surveillance comes under Type 1 surveillance. We consider the revised definition of Type 2 surveillance clearer.

We have carefully considered the amendments to the Bill proposed by Ms Margaret NG and others. The conclusion is that none of those proposals is practical and workable.

Regarding the new definitions proposed by Ms NG for Type 1 surveillance and Type 2 surveillance, the relevant amendment is likely to greatly broaden the definition of Type 1 surveillance, even incorporating paragraph (a) of the existing definition of Type 2 surveillance, that is, the part on participant surveillance. As I stated at the time of the resumption of the Second Reading debate, Type 2 surveillance under the Bill consists of two major categories: first, surveillance with the use of listening device or optical surveillance device; and second, not involving entry onto premises without permission ..... I have already spoken on this just now. The level of intrusiveness of such surveillance is relatively low. In both the United States and Australia, these can in fact be carried out without any statutory authorization. There are also precedents supporting such a practice. The original provisions in the Bill are already more stringent than those found in these common law jurisdictions, with stipulation designating officers of law-enforcement agencies as authorizing authorities.

Ms NG's proposal will modify Type 2 surveillance to such an extent that it is to be limited to surveillance in public places not involving the use of surveillance device. Such an approach is inappropriate. We therefore disagree with her proposal. The proposal of Mr James TO is very close to that of Ms NG. So, I also disagree with his amendment.

The authorities also disagree with the amendment to clause 2(1) proposed by Mr CHEUNG Man-kwong. The main difference between this amendment and the authorities' proposal is on how to express entry onto premises without permission. In our opinion, what is being expressed in the Bill now, that is, "entry onto any premises without permission", is good enough. This is also the way of expression we commonly use. Mr CHEUNG's amendment is going to have the effect of blurring the expression. I still do not understand under what circumstances the use of optical surveillance device or tracking device can constitute entry onto premises by electronic means.

The authorities disagree with Mr LEE Wing-tat's amendment. The said amendment mainly differs from that proposed by the authorities in that for participant surveillance as set out in (a)(ii) under the definition of Type 2 surveillance, it is going to be absolutely necessary to obtain from the participant

concerned prior written consent. As a matter of fact, sometimes the participants concerned are law-enforcement officers. It is just part of their duties to carry out the operations. We do not find it necessary to stipulate that written consent must be obtained from them before any operations can proceed. Some operations are required to be kept secret so as not to endanger the operations or put the personal safety of the people concerned at risk. A stipulation making written consent mandatory is not necessarily workable. We have stipulated in the Code of Practice that an operation may proceed only after the persons concerned have given their written consent so long as circumstances allow and there is going to be no risk to the operation or the persons concerned.

Madam Chairman, I have finished my speech. I call upon Members to oppose the amendments proposed by Mr Albert HO and Ms Margaret NG, and to support the Government's amendment.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

MR JAMES TO (in Cantonese): Chairman, perhaps let me first reply to the Secretary's words. I am to give explanation first. According to him, he does not understand what Mr CHEUNG Man-kwong said about how to use optical or other devices to make entry onto premises without permission. It is in fact very simple. The reason is that if entry just means a physical one, then, just like what I said earlier on, entry can be made by means of optical device.

Regarding reasonable expectation of privacy, reasonable expectation of privacy has two possible scenarios. Here is the first one. For instance, a person turns off the light, making the whole place pitch-dark. As the entire place is pitch-dark, his expectation is not to be visible to people outside. However, if ultra red beams are being flashed in, there will be rays. That is to make intrusion electronically. Given the fact that the interior of the premises is pitch-dark, his reasonable expectation of privacy at that time ought to be taken

care of. The second scenario is one with curtains drawn. Curtains have been drawn and yet someone finds a way, say, with more powerful ultra red beams, to make images behind the curtains visible. Then there is already intrusion. So, if there is agreement with regard to sub-paragraph (ii) that there should be no interference with any conveyance and no physical or electronic interference should be carried out to acquire information, then, for the same reason, a person inside the premises probably has the feeling that the premises, when compared with the car he travels in, ought to give him a stronger sense of being in his own castle. Is it not right? This is an idiom in the English language, that is, an English idiom. So, for the same reason, there ought to be agreement too.

According to what the Secretary said, under some circumstances, the possibility of giving express prior written consent for one to be wiretapped is questionable. This is, in reality, feasible. There are two possible scenarios. Here is the first one. If the person is an undercover agent from our Police Force, it means that right at the start or shortly after his admission into the police training school or by the time of his graduation, that person has already feigned expulsion from the school — like the story of the movie "Infernal Affairs". Whatever the other circumstances may be, he is an undercover agent right from the start. There is definitely a specific target as well as a special scenario for him right from the outset. He may sign a "self-renouncing deed", whereby he, generally speaking, gives consent for him to be bugged or taped for information in whatever he is to do in the future. I think that under such circumstances it is absolutely possible for the written consent to be signed right from the start.

Now the second one, which concerns people other than law-enforcement officers, namely third parties under control. The scenario is very simple. It is because in certain wiretapping or monitoring cases, you have got to inform him somehow. It is with permission that he goes in to do something. That is to say, he gives permission for you to infringe upon his privacy. Also, you are allowed to tape his conversations with others. It does not matter whether or not he is the family-member of a certain person — or, to use an extreme case, the family-member of an abducted person. He consents to your actions. However, it is necessary for him to sign a document. This is similar to a situation where many family-members agree to install a lot of devices in their premises. In reality, this can proceed only if they agree to sign documents. Why? In the event that the person denies the consent one day, the Government or the police may not have any proof to hold on to. In other words, if the person goes back on his words later on, the consequence can be very serious.

The measure is to forestall this. That is why the Government, on hearing what I pointed out, indicated that the relevant provisions would be spelt out in the Code of Practice as far as possible. It is in fact for the protection of the police and the Government. These are rules for us to follow too.

Finally, I am of the view that, in addition to protecting us, this can also prevent the abuse of power. If it is not so, and only express or implied indication is relied upon, then it is most likely for one, after something is done, to make the claim that there has been some contact with the person. It does not matter whether or not that person is a triad member. The claim is that there has been some contact with him. The claim is that he is regarded as one acting willingly. But please bear this in mind, he only appears (to say it in slang, "surfaces") occasionally to supply some information and to collect some informer fees. However, he may not co-operate with the police all the time. If this practice is not adopted, it may still work to rely solely on implied indication. But sometimes it is necessary to take action first. Very well then, suppose you suspect that a certain meeting is probably related to certain criminal information. So you threaten this informer, "You probably did take part. How about doing this way? This time this is treated as an implied indication, a consent from you. Then I can make use of the information acquired." This will lead to the problem of excessive use or abuse of power. This is a so-called "retrospective supplement". The reason is that the police already got hold of some information. This is not at all uncommon. It is actually an often used method of investigation. However, this is a method of investigation which is somewhat "unorthodox", but effective.

So, why do I think that it is advisable to have prior express written indication? Because I believe that this approach is absolutely feasible and workable in every situation. It can also protect ourselves, and prevent others from accusing the Government of abuse of power.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MIRIAM LAU (in Cantonese): Madam Chairman, the amendment proposed by Ms Margaret NG spells out in detail the definition of Type 1 surveillance, and then claims that those not counted as Type 1 surveillance should come under Type 2 surveillance. Her approach is exactly opposite to

that of the Government. Though the Government's proposal mentions Type 1 surveillance, no details are given. However, for Type 2 surveillance, it is specified what actually constitutes Type 2 surveillance. It is then pointed out that Type 1 surveillance means any surveillance other than Type 2 surveillance.

It appears that Ms Margaret NG's tactic is to take over the approach applied to Type 2. It is also a very simple amendment. However, one look shows that it in fact is to reverse the Government's approach. The Secretary in his reply said that it might broaden the scope of Type 1 surveillance. The way the Secretary put it was very polite. Ms Margaret NG's amendment seeks to place all covert surveillance under Type 1. In other words, if Ms Margaret NG's amendment is passed, then in the future application will have to be made to the Judge for any covert surveillance governed by this Bill.

What is the nature of Type 2 surveillance? Ms NG probably will give us a clear explanation when making her response in due course. With regard to Ms NG's amendment, let me give you some analysis. According to her, Type 1 surveillance is: "Any covert surveillance — (a) carried out with the use of any surveillance or tracking device; or (b) involving entry onto any premises without permission; or (c) interfering with the interior of any conveyance or object without permission." It is then stated that Type 2 surveillance means any surveillance other than Type 1 surveillance. The problem is with (a), that is, the first one, according to it, Type 1 surveillance is "Any covert surveillance — (a) carried out with the use of any surveillance or tracking device". "Covert surveillance" means the use of device. That is to say, all covert surveillance or any covert surveillance based on this Bill comes under Type 1.

There is utterly nothing under Type 2. Also, nothing can possibly fall into Type 2. In the original proposal, there is a part on undercover agent, that is, participant surveillance. Surely, Ms NG's amendment has this part deleted, as a result of which once the use of device is involved in participant surveillance, it is to come under Type 1. Therefore, on the basis of what I understand, Ms NG's amendment seeks to place all covert surveillance under Type 1. As for Type 2, I have thought it over and over but I just cannot figure out what should be counted as Type 2 according to Ms NG. Of course, this amendment is not bad, with all issues to be handled by Judges. As I mentioned earlier on, if the threshold is to be raised, then there will be more restrictions. As a result, there will be less flexibility for law-enforcement agencies as authorization from the Judges will have to be sought in all matters.

We in fact know a lot about undercover agents. Even if it is not so, a lot of information, such as that on "sting operations", can be gathered from sources like movies and newspapers. Nowadays it is common to hear of sting operations carried out to catch gangsters selling bogus medicines, or running prostitution syndicates. There are even undercover agents posing as hawkers in order to keep tab on the activities of triad societies. The police and law-enforcement agencies are engaged in a lot of these operations. Are we saying that in the future all such undercover operations cannot proceed unless authorization has been sought from Judges first?

I also would like to point out this. As undercover agents or informers, they have got to keep their identity secret. As a matter of fact, the fewer people know, the better. Otherwise, their life will be at stake. Moreover, these undercover agents, require a lot of flexibility while in operation. Once there are situational changes, they must cope by flexibly resorting to some other tactics. If all is placed under Type 1 surveillance, and if all matters are required to be authorized by the Judges first, and are not allowed to be swiftly or flexibly authorized by the departments concerned for switching over to another set of surveillance method, then such an approach is bound to put law-enforcement agencies under a lot of restrictions.

I would like to say something about Type 2 surveillance as proposed by the Government, that is, participant surveillance, as compared to foreign countries. Are we very lenient and liberal? As I mentioned in the resumption of the Second Reading debate, the system that we use is in fact more stringent than those of foreign countries. Here are some examples. I know that in both Australia and the United States, undercover operations do not require statutory authorization. Take the United States as example, the FBI only has the Attorney General's Guidelines on FBI Undercover Operations as their regulations. They do not have a set of rules, and need no authorization to carry out their work. The proposal in Hong Kong now even requires executive authorization for participant surveillance. We do have governing laws. Any non-compliance is likely to give rise to a series of consequences. All these have been written into the Bill.

Therefore, I would like to point out this. If Ms NG's amendment gets passed, in the first place, lots and lots of limitation will be brought in affecting the flexibility of law-enforcement agencies, then the effectiveness of law enforcement. In the second place, as far as the situation of undercover agents is

concerned, her proposal is not necessarily practical and workable. Also, it might lead to the collapse of the entire undercover system.

Turning now to Mr James TO's amendment. Mr TO is in fact very concerned about intrusion by electronic means. The Secretary, therefore, proposes amendment to clause 2(1)(b) of the Bill. The amendment to (b)(ii) is actually the one put forward by Mr TO to the Bills Committee and considered to be practical and workable for adoption by the Government. Now, however, the proposals from Mr James TO and Mr CHEUNG Man-kwong are clearly on entry onto any premises (physical entry or by electronic means). We do not know what it is about. What is meant by entry onto premises by electronic means? In fact we do not quite understand that definition now, and, therefore, we have reservation on that amendment. Therefore, the Government has only adopted part of Mr TO's amendment. Because it is possible for us to visualize the possibility to effect electronic interference by means of, say, computer or some other objects. However, with regard to the concept of making entry onto premises by electronic means, we have yet to learn more before we can understand more. We will be more receptive if Mr James TO makes his proposal then. However, for the time being, please do excuse us for having reservation on the amendment. The reason is that we do not know what it is. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Is there any Member who has not spoken yet wishes to speak?

MS MARGARET NG (in Cantonese): Chairman, first, I would like to reply to what the Secretary has just said. In making reference to Ms Miriam LAU, the Secretary was in fact just trying to speak a little longer. He said that in other places there was no need for authorization by Judges; in some places, there was even no need for authorization. Why are we so bothersome? Chairman, why do we work out amendments for the entire Bill? This is for the sake of public confidence. It is for the confidence of the general public — what hinges on public confidence? I will say more in the next stage when it is time to talk about panel Judges. The most important thing is that the authorities, in order to assure the people, say that these operations of eavesdropping are required to be authorized by Judges. We trust Judges. Since there is authorization from Judges, they must be proper acts. The Government is trying to gain public confidence by holding out the brand name of Judges.

The Government should not try to gain confidence by making use of the brand name of Judges and then request that there should not be too many cases for authorization by Judges and that the rest be allowed to be authorized by the departments. Ms LAU even went on to say that there is just no need for executive authorization if authorization by Judges is required under the three conditions. However, do the people find executive authorization, that is, departmental authorization, very important? It is absolutely not so. On the contrary, the people very much distrust it. Let us take a look at the circumstances under which authorization by Judges is required. Nowadays, a lot of devices are in use. They are very powerful. Perhaps, it is necessary to make entry into a house. Chairman, at present, in order to get into a house to conduct a search to collect evidence, a warrant is already required. Why should not these two not be authorized by Judges? In reality, the only point of contention is here. Must there be authorization by Judges whenever the use of device is contemplated? The use of device is very intrusive. Why should authorization not be sought from Judges for such intrusive matters? So, we think that in order to really inspire the people with confidence, it is advisable to do like this.

Just now Ms Miriam LAU queried Mr James TO's amendment. Regarding devices, Mr James TO knows this better than I do. She asked how to make entry into a house with the use of devices. In fact, if you stand outside a house using a device, is it equivalent to making entry into the house? Even ignorant people like us know that it is possible to do so. With regard to the idea as to whether or not there is entry into a house, it is necessary to make adjustment as technology progresses. If no device is involved, then the entry into the house is for a search for evidence. Now covert surveillance is also about getting evidence, right? The Government is just going after evidence and intelligence. In order to get into a house, it is still necessary to apply for search warrant. Furthermore, if device is used, then making no entry onto the premises is, in fact, equivalent to making entry onto the premises. Many devices are capable of doing that. Perhaps Mr James TO can brief us on this later on. Given this, I wonder if it is still necessary to apply to the Judges for authorization.

In fact, Chairman, I need not argue too much. It is because the onus is not with the people. It is with the Government. Are the people going to have confidence if such a monitoring mechanism is approved? Ms Miriam LAU is most concerned about convenience for law-enforcement officers. However, for us to pass a piece of legislation, it is necessary for the people to have confidence

in that piece of legislation. It especially has got to be so when executive authorities are infringing upon our basic rights. So, Chairman, we think this is a very reasonable amendment. I call upon Members to support my amendment. Thank you.

MS MIRIAM LAU (in Cantonese): Chairman, I would like to make it clear that the Government's proposal consists of Type 1 surveillance and Type 2 surveillance. It is clear enough. What does Type 2 surveillance mean? Firstly, it means participant surveillance. Second, it means less intrusive surveillance involving the use of optical or tracking device and making neither entry onto premises nor interference with others' objects. These come under Type 2 surveillance. All those not covered by Type 2 which I have mentioned come under Type 1. In the case of Type 1 surveillance, applications will have to be made to the Judges. Therefore, I would like to correct what Ms Margaret NG has just said. It is because it seems that she has been a little bit misleading. This is the first point.

Secondly, according to Ms Margaret NG, my sole concern is the convenience for law-enforcement officers. We certainly have to see to the flexibility that they should have when enforcing the law. Otherwise, I just wonder how they are to arrest criminals when they themselves are "tied up" while confronting them. However, it is also important to have checks and balances. I must stress that we have done a thorough examination and found a lot of checks and balances in this Bill. I must reiterate that many tests set out in clause 3 (which is also the soul of the Bill) already specify a lot of checks and balances, such as the need for authorization and the need for review. Also included is the Commissioner. So, I think it has achieved a balance.

Thirdly, one that I omitted in the speech I just delivered. I would like to speak on Mr LEE Wing-tat's amendment. He made mention of participant surveillance. That is to say, both Mr LEE Wing-tat and Mr Albert HO accept the existence of participant surveillance. However, as he pointed out, there should be express prior written consent, not the express or implied consent as proposed by the Government originally. I would like to point out that such an idea has in fact been adopted in the Code of Practice. Rule 66 in the Code of Practice clearly stipulates that the relevant participant's written consent must be obtained under reasonable circumstances. It is otherwise in the case of law-enforcement officers as they can see to it themselves. If it is surveillance by a participant other than a law-enforcement officer, then there has got to be

prior written consent. There is, however, one more condition, namely, not to endanger that person's safety. This is of considerable importance too. In fact, this point is being set out clearly under rule 66 in the Code of Practice. Given this, I think there is no need to make amendment to the legislation. Thank you.

CHAIRMAN (in Cantonese): Mr James TO to speak for the third time.

MR JAMES TO (in Cantonese): Chairman, let me say briefly. My wish is for everyone to consider clearly the difference between a high level of intrusion and a low level of intrusion. Let us go back to the Government's original so-called participant surveillance, that is, what is mentioned in paragraph (a). In fact that refers to an undercover agent going into a residence with a device. The concept is like that. In the case of paragraph (b), there is no entry into residence. Broadly speaking, that is the difference. However, we can visualize that the point "without permission" in paragraph (b) also includes "disguising". So, going into a residence by "disguising" to effect intrusion is also forbidden. There must be an application made to the Judge. However, it is not so in the case of paragraph (a). Although it refers to undercover agent, yet undercover agent does not necessarily mean getting consent for entry into a residence. Instead, he can make entry into a residence by "disguising" while carrying a device for the purpose of setting it up. So long as you are present at the scene and give consent, then taping may go ahead.

I once raised a question about paragraph (b)(i). Does the point "without permission" to a certain extent cover making entry into a residence by "disguising"? According to the reply at that time, it is not permissible as that is an act by false pretence. "Disguising" is false permission, not genuine permission. However, please bear in mind that to a certain extent to be an undercover agent is also a breach of trust. It in fact breaks the trust. It is also "disguising".

It follows that as far as paragraph (a) is concerned, it is entry into a residence by "disguising". The reason is that trust is first gained by posing as someone, and then one can enter the residence with a device. The meaning of "without permission" as contained in paragraph (b) of the same provision is that not even posing as a fitting-out worker or as one repairing the electricity meter is allowed. In fact, these two provisions are not consistent. But the sole

argument of the Secretary is that "other countries" are doing this and that. However, they are really not consistent in both concept and logic.

My reply is very simple. Every country has its own Courts. Courts have made their own decisions on the practicability of certain matters. However, even if you ask me about those matters now, it is in fact still possible to challenge those matters again. Why? The reason is that if we go back to some old cases (including the recent case of LEUNG Kwok-hung), according to the Telecommunications Ordinance, originally it was permissible for the Chief Executive to grant permission for the interception of communications on grounds of public interests. The purport of the Executive Order issued by the Chief Executive last year is that all that we are now talking about was permissible. However, the Judge said that if it was so, then no matter how meticulous the Executive Order was, there was no law in the end. We have the law now. But the questions are how meticulous that piece of law must be, and what differentiation must be made in order to satisfy the Judges. It is really necessary to exercise great care here. Otherwise, it is still going to mean "nothing" even if we have the law. The reason is that there will still be problems if the law is too lax and the Judges may say that it fails the stringency test.

MS MARGARET NG (in Cantonese): Chairman, I am indeed sorry as I have to make a brief response to what Ms Miriam LAU has said. According to Ms Miriam LAU, the Government's amendment is simpler because if it is not Type 2, then it is Type 1. It is very clear. So is mine. If it is not Type 1, then it is Type 2. It is equally clear. However, under the guidance of Ms Miriam LAU, I carefully examined the Government's original proposal one more time. On the part involving devices, the authorities appear to be saying in paragraph (b) that if it is necessary to make entry into a house, the level of intrusiveness is going to be higher and that if certain devices are to be used, the effect is no different from an entry into a house. That is to say, you may, with the use of devices, turn something that needs an entry into a house into an entry into a house. This is my first point.

Second point, if there is permission for an undercover agent, that is, a participant, what can you do? The participant may get into the house while carrying device. Definitely there is permission. When the person gets into the house, he has got a permission. However, the use of device is involved. As

the use of device by itself does not constitute Type 1, therefore, it comes under Type 2. That is to say, these two sub-groups are used to off-set each other. With paragraph (a) and paragraph (b), then all sorts of things can be done.

Secondly, there is one point which I find very peculiar. How come life can be at stake if it is necessary for law-enforcement officers to apply to the Judges? He asks for flexibility, so it is very flexible to go back to his own department to apply. Not just flexibility, there are even talks about life being at stake. In fact, several Judges will be there waiting for applications. There are even emergency procedures in the case of emergencies. Why is it not flexible enough? As a matter of fact, the most flexible approach is to do away with authorization from Judges and the need to apply to the Judges. Simply not to make any application is the most flexible. So, in order to gain people's confidence, it is necessary to get those devices involved. With those devices, one can do it, no matter there is entry into the house or not. Given this, it is necessary to apply to the Judges. This is very much on the side of reason. Thank you, Chairman.

MS MIRIAM LAU (in Cantonese): Chairman, it is in fact very simple. Under the Government's amendment, there are Type 1 and Type 2. It is very simple. Whatever is not Type 2 comes under Type 1. Under Ms NG's amendment, whatever is not Type 1 comes under Type 2. The difference is that the Government's amendment has got both Type 1 and Type 2. In the case of Ms NG's amendment, on the face of it, there are Type 1 and Type 2. However, in reality, Type 2 exists in name only. There is only Type 1. Thank you.

MR JAMES TO (in Cantonese): Chairman, I would like to remind the Government about one point and hope that it will be careful because we are now discussing paragraph (b)(i) and the Government's amendment is "entry onto any premises without permission".

The Bureau pointed out that it would not do to "wear all sorts of disguises" to enter into a house either. Concerning paragraph (b)(ii), the Government's wording is "interference with the interior of..... object without permission", meaning that if one enters a premises and damages other people's wardrobe or vase would be considered without permission. However, there is something known as a Trojan horse. For example, when an article is delivered to a certain person, something is already inside the article but the recipient is not aware of

this when receiving the article. In fact, this has been done many times in the past.

I hope the Bureau will be more careful. "Without permission" is clearly stated in the Code of Practice of the Bureau. If it is phrased in this way, it means that when an article, such as some fixture or some decorative or ornamental object is delivered to someone's premises, enters his premises and he takes delivery of the article, the article can end up audio-recording or video-recording in his premises for years. This kind of article is very intrusive to some extent, however, it seems that the Secretary for Security has not included such articles in the present arrangement.

It was just a few minutes ago that this point occurred to me. Therefore, we can see how a fine product can result from meticulous care and patience. On this principle, I have thought of this point just now. If I had raised it earlier with the Secretary, he might have been willing to make amendments, however, the Bill has gone through the resumption of Second Reading and it has already entered the Committee stage. Nevertheless, the Secretary can take notice of this point, particularly because when this Bill was scrutinized, Mr YING was not willing to concede in the slightest way. I also hope that his colleagues such as Madam CHEUNG and the Deputy Secretary will also take notice of this point, so that even though the legislation is incomplete, at least this principle can be made consistent in a future review.

MS EMILY LAU (in Cantonese): Chairman, I speak in support of Ms Margaret NG's amendment. Ms Miriam LAU said that Ms Margaret NG's amendment put all the particulars under Type 1, so Type 2 would no longer exist, as it would be completely empty. In fact, if it is empty, then so be it. Both the Basic Law and the Bill of Rights state clearly that the privacy of the public must be protected. They do not say that it will be protected only under certain conditions and not under other conditions. Now, the authorities want to give exemptions because the intrusiveness is lower under some conditions but higher under those conditions.

Also, Ms Miriam LAU is very concerned about the efficiency of law-enforcement officers. There is not the slightest problem on this score either. However, we want to strike a balance. Members of the public do not just want to strike a balance, the most important thing of all is the rights of

members of the public. The next amendment has to do with whether all rights are to be included in it. Members of the public are entitled to such rights but some moves that will infringe upon them are being taken. If one really has to do this, then one should seek authorization from a Judge. What is so difficult about this? One minute, people are talking about verbal authorization and everything can be authorized. I do not have the impression that this will be very difficult at all. The Permanent Secretary told me that it could be done very quickly and it would just take a phone call to have it done, so what is so difficult about it? Most ridiculous of all, she said that if undercover agents were required to apply for authorization, this would lead to the collapse of the entire system. I have never heard that a mere request would lead to the collapse of an entire system. I believe there is no need to make this issue so scary. All of us want to work out a system in which the most important thing of all is to protect the privacy of the public. In this way, law-enforcement agencies will be able to operate but protecting the privacy of the public will still be of foremost importance. Therefore, I very much agree that if any devices or other items are to be used, they should be included in this category.

At present, Ms NG's wording is the clearest of all. If one says that if everything is put under Type 1, then there will be nothing in Type 2, I will say that if it is empty, then so be it. It is best if applications must be made for all covert surveillance. Let us suppose that Ms Miriam LAU and I go out to the streets to stop 20 passers-by for an interview and ask them if they are to be placed under covert surveillance of the Government in the future, special authorization should be obtained in the first place, Chairman, the response will surely be in the affirmative.

We are now examining this amendment. She must grasp the situation, keep tabs on the public and understand how worried members of the public are. Therefore, it does not mean that the actions are not allowed but that there must be supervision in the process of taking action. In view of this, I support this amendment.

CHAIRMAN (in Cantonese): Ms Margaret NG, could you wait until all Members have spoken before you speak?

MS MARGARET NG (in Cantonese): Yes.

CHAIRMAN (in Cantonese): We will let those Members who have proposed amendments give a summary reply first.

Does any other Member who has not yet spoken wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): In fact, when the Chief Executive issued the Executive Order back then, it was already known in Hong Kong that some surveillance had always existed, only that no one knew what to do about it. Today, in enacting this piece of legislation, we are actually putting Article 30 of the Basic Law into practice. The greatest significance in doing so is that the freedom and privacy of communication of the Hong Kong public are protected by law. The amendment proposed by Ms Margaret NG amounts to a demand for protection, that is to say, law-enforcement agencies must go through certain procedures. In fact, no matter extent of intrusiveness is, so long as someone's freedom and privacy of communication are infringed by the authorities, the authorities must be required to prove that doing so is indispensable in a democratic society. In fact, this is stated clearly in the two human rights covenants that we have entered into. However, when we talk about this matter here, we seldom bear this principle in mind.

Many Honourable colleagues said that if things were made too complicated, it would be inconvenient to law-enforcement departments and hinder the prevention and detection of crimes as well as the protection of public security. In fact, such a logic is wrong because we said throughout our discussions that as the purpose of Article 30 of the Basic Law is to protect the communication and privacy of Hong Kong residents, the executive authorities ……

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, are you now talking about "Type 1 surveillance" or "Type 2 surveillance"? Please speak to the question of "Type 1 surveillance" or "Type 2 surveillance" and not to dwell on Article 30 anymore. You have been talking about Article 30 since yesterday.

MR LEUNG KWOK-HUNG (in Cantonese): Understood. Understood. The best thing is to group these several types into one type, that is, any restriction of or infringement on the freedom and privacy of communication should all be dealt

with by the Court. In fact, in such a dire situation, Ms Margaret NG knows well enough that there is little hope, so she made the amendment in such a way. We have all along insisted on giving all the say to the Judges. Furthermore, if the scopes of these several categories are expanded, it would mean that they will all require approval from a Judge. In my mind, I think this will be great and we do not have to argue any more.

Therefore, when our Honourable colleagues said that Ms Margaret NG's amendment was not worth their support, it is actually turning things over the other way. Article 30 of the Basic Law has been given a wrong interpretation and law-enforcement agencies can get at the back door what it cannot get at the front door by devising different categories, substituting concepts and classifying things under types 1, 2 and 3. This is in fact improper and at odds with the legislative intent today. Chairman, although you have reminded me a number of times that Article 30 of the Basic Law has been discussed, I would also like to remind you that the legislation to be enacted today is based on Article 30 of the Basic Law, with a view to protecting the privacy and freedom of communication of the public. Therefore, there is only one yardstick, which is the legislation concerned……

CHAIRMAN (in Cantonese): If you want to discuss Article 30 of the Basic Law, you should have given your speech at the resumption of Second Reading debate. Now, we are discussing the amendments, so please speak on the amendments. Some of your remarks have got it right, so please speak to the question and comment on the appropriate matters, alright?

MR LEUNG KWOK-HUNG (in Cantonese): A speech must have a premise. How can one go on with one's speech if it has no premise?

CHAIRMAN (in Cantonese): However, your premise is longer than the rest of your speech.

MR LEUNG KWOK-HUNG (in Cantonese): I now announce that the premise in all my speeches is Article 30 of the Basic Law and this should be understood by Members. Please bear this in mind and do not say that my comments are illogical.

Therefore, the purpose is here. Why have I supported Ms Margaret NG throughout? I think she is very consistent. She is just trying to survive in a very hostile situation. The Government has already got many votes and it is not willing to accept her amendments, so she can only try to do things as best as she can. Although she is trying to do a service kind-heartedly, still, not one of her amendments is passed. I find it really perplexing and she is even criticized by many Members as crazy. To be frank, ever since I know her, I find that she is just not crazy enough, otherwise, things would not have come to this. If she is crazy enough, she will express the proposals she conceives in even more incisive and thorough ways, instead of rattling on here with nobody understanding her. She should resort to more different ways to express her views.

Therefore, in conclusion, concerning this debate, in my view, in fact, the three categories can be reduced to just one and that is, all law-enforcement agencies must be responsible to the Hong Kong public. Be it covert surveillance, surveillance, the interception of communications and the like, they should all fall under one category. Therefore, I implore Honourable colleagues to support Ms Margaret NG's amendment. Thank you, Chairman.

CHAIRMAN (in Cantonese): Which Member who has not spoken wishes to speak now?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If no Member wishes to speak, I will first ask Mr LEE Wing-tat if he wishes to speak again.

(Mr LEE Wing-tat indicated that he did not wish to speak again)

CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak again?

MR ALBERT HO (in Cantonese): I just want to say a few words and I will be brief. Just now, Ms Miriam LAU said that in fact, my amendment has been more or less set down in the Code of Practice. I do not think that this is adequate. It should be made even clearer. I think that if this is a legislative principle, it should be written into the legislation instead of the Code of Practice. This is the first point.

The second point is that she said that if an application in writing had to be made in advance, it would sometimes cause danger. However, I think that making an application will not lead to any danger. Be it to a Judge or an executive authority, there cannot possibly be any danger for them. The most dangerous thing of all is to actually bring a device into a premises. This is the most dangerous thing of all. Often, in order to protect himself, an undercover agent will not bring with him any device into a premises and will just observe with his own eyes and listen with his own ears. It will be very dangerous if a device is found. If no device is brought in, this is beyond the scope of the legislation. Therefore, I think that such an amendment is absolutely necessary.

MS MARGARET NG (in Cantonese): Chairman, sorry but I am just not crazy enough. I can only be rational and comment on the provisions. Chairman, just now, Ms Miriam LAU queried whether there would still be anything left in Type 2 surveillance if my amendment was adopted. According to what she said, it seems that my amendment is very unreasonable, or at least illogical, though naturally, I will of course be pleased to have the support of other Members.

In fact, Members might have forgotten — and Ms Miriam LAU might have forgotten that earlier on, concerning the definition of "covert surveillance", I said that even without using any device, an undercover operation can also be considered as a type of covert surveillance. Ms Miriam LAU can take a look at Type 1 surveillance. It is very clear that there is no other type of covert surveillance apart from Type 1 surveillance. What she meant was that for all covert surveillance in which no device was used, that would amount to entering onto other people's premises or vehicles without permission. Why has such a situation occurred? This is attributable to the definition. Our Government has limited the definition of "covert surveillance" to these two conditions, that is, it is allowed only if a device is brought along. However, ordinary people do not think that covert surveillance involves entry onto other people's premises together with devices and without permission. Therefore, this is in fact logical. Chairman, it is not that I have suddenly got crazy in the middle of the night and made up something that has no substance in it.

Chairman, since my amendment on the definition of "covert surveillance" has already been negatived, there is now no need to apply for any approval whatsoever for undercover operations which do not involve the use of any device. The people concerned should now be very pleased, so why do they still want to attack me? Thank you, Chairman.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Chairman, I have nothing to add.

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendment to the definition of "Type 1 surveillance" and "Type 2 surveillance", I will remind Members that if that amendment is agreed, Mr James TO, the Secretary for Security, Mr LEE Wing-tat, Mr Albert HO and Mr CHEUNG Man-kwong may not move their amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your amendment.

MR JAMES TO (in Cantonese): Chairman, I move that the definition of "Type 2 surveillance" be amended.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that the definition of "Type 2 surveillance", as set out in the paper circularized to Members, be amended.

Madam Chairman, I urge Members to support the passage of the authorities' amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing,

Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Albert CHENG, Mr Frederick FUNG, Mr LEE Wing-tat, Dr Joseph LEE, Mr LEUNG Kwok-hung and Dr KWOK Ka-ki voted against the amendment.

Ms Margaret NG, Ms Audrey EU, Mr Alan LEONG, Dr Fernando CHEUNG and Miss TAM Heung-man abstained.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 48 Members present, 30 were in favour of the amendment, 12 against it and five abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

CHAIRMAN (in Cantonese): Now Mr James TO will move the deletion of subclause (4) from clause 2.

MR JAMES TO (in Cantonese): Yes, page 31 of the script. Chairman, I move the deletion of subclause (4) from clause 2.

Chairman, I am looking for the relevant document. *(Laughter)*

Chairman, I am sorry, I have to find the relevant document because there are really too many documents. Chairman, the concept of subclause (4) is that if a communication is transmitted via a system and when the recipient has received the message, the communication is considered to have been completed. This concept is in fact about the email system that we have discussed earlier on. If an electronic mail is sent and in a very short time (perhaps in a second), it reaches a server, the mail can no longer be considered to be in the course of

transmission, so it does not fall within the scope of interception of communications. In this case, the communication will go down one level in the hierarchy and fall within the scope of covert surveillance. Therefore, we suggest that this subclause be deleted, that is to say, when the recipient has received an email, has not yet opened it and it is still in the server, and if the authorities want to get the communication from the server, it should be regarded as an interception of communications. In other words, it has to comply with more stringent requirements, such as the need to obtain approval from a Judge and the offence must be punishable by more than seven years of imprisonment.

We believe that the subclause is drawn up with a view to solving a technical problem, namely, whether the transmission of a communication should be regarded as the completion of communication. This has a direct bearing on whether it should fall within the scope of the interception of communications or within the scope of other actions such as covert surveillance. I believe that if my amendment is passed, it can give protection to emails that have already been received as intercepting such emails would still be considered the interception of communications. Moreover, since the present distinction is too fine, this will give rise to instances of taking a misstep that will make a great difference. Therefore, we should not adopt a lower standard because of technical considerations.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities oppose Mr James TO's amendment to delete subclause (4) from clause 2. This clause explains the concept of transmission and it is closely tied to the sort of behaviour which constitutes an "intercepting act". If this subclause is deleted, the sort of behaviour that will constitute

"telecommunications interception" and "postal interception" will become very ambiguous. Therefore, we oppose this amendment. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): Chairman, doing so will not result in ambiguity. Why? Although we call electronic mail a kind of "postal article", actually it is not. The transmission of what we call electronic mail is carried out within a very short span of time, whereas postal articles involve physical transmission. For example, a postman puts a letter into a physical letterbox and this is a kind of transmission. In these circumstances, the interception of communication is possible because physically, that is a letter. However, an electronic mail is different from a physical postal article because when an electronic mail is still kept in a server for electronic mail, from this perspective, the electronic mail is still considered to be intercepted in the course of transmission. Therefore, in modern life and society, doing so should also be regarded as an interception of communications and not other less intrusive acts because its intrusiveness remains very high.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr James TO rose to claim a division.

CHAIRMAN (in Cantonese): Mr James TO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, six were in favour of the amendment and 20

against it; while among the Members returned by geographical constituencies through direct elections, 21 were present, 11 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): The Secretary for Security, Ms Margaret NG and Mr James TO have separately given notice to move the deletion of subclause (7) from clause 2.

As their amendments are identical, I will call upon the Secretary for Security to move his amendment, as he is the officer-in-charge of the Bill. Mr James TO and Ms Margaret NG may not move their amendments irrespective of whether the amendment moved by the Secretary for Security is passed or not.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the deletion of subclause (7) from clause 2, as set out in the paper circularized to Members. The amendment is moved in response to the proposal made by the Bills Committee with a view to dispelling any doubt on whether any acting appointment can be made for a panel Judge.

Ms Margaret NG and Mr James TO have proposed their respective amendments to delete clause 2(7). Since the authorities have proposed a similar amendment, the amendments proposed by Ms Margaret NG and Mr James TO are not necessary.

Thank you, Madam Chairman.

Proposed amendment

Clause 2 (see Annex)

CHAIRMAN (in Cantonese): Ms Margaret NG, do you need to speak?

MS MARGARET NG (in Cantonese): Chairman, I do not need to speak.

CHAIRMAN (in Cantonese): Mr James TO, do you need to speak?

MR JAMES TO (in Cantonese): No.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

CLERK (in Cantonese): Clause 3.

CHAIRMAN (in Cantonese): Ms Margaret NG, the Secretary for Security and Mr James TO have separately given notice to move amendments to clause 3.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendment.

MS MARGARET NG (in Cantonese): Chairman, clause 3 is really the crux of the entire Bill. In describing it as the crux, it is actually like a pivot and all previous……

MR ALBERT HO (in Cantonese): Ms Margaret NG has forgotten to move her amendment. She should move her amendment before speaking.

MS MARGARET NG (in Cantonese): Sorry. Chairman, I move my amendment to clause 3. Thanks for reminding me, Mr Albert HO.

Chairman, clause 3 is really the most crucial point in the entire Bill, that is, it can be described as the pivot and all the definitions are set down for the sake of this clause, so it is of utmost importance. In future, matters such as how to apply for authorization, the procedure that should be followed in granting authorization, what sort of affidavit should be made and what should be spelt out, what protection or safeguards will be provided, or what the Commissioner will examine and so on, all hinge entirely on this clause. Therefore, Chairman, I implore Members to look at this clause closely.

Chairman, in fact, after two of my amendments have been negatived, one can say that the two wings of the overall spirit have been clipped because the most important first step has to do with the purpose. This provision mainly stipulates the conditions that must be satisfied if one wants to apply for authorization to carry out wiretapping. The first condition is the purpose. The purpose states that this can be done only for the purpose of detecting or preventing serious crime or protecting the public security of Hong Kong from any threat. Concerning serious crimes and public security, the scope is already very broad and vague and there is a lack of definitions, so the protection given to us is already very limited. What ingredients am I adding to such a purpose? The first thing is to make it more specific and regulated and that means one cannot merely say that an application is made for the sake of crime prevention. If it is claimed that the purpose is to detect a crime, one can at least maintain that the crime has already occurred. However, if it is said that the purpose is to prevent a crime, then nearly all general activities can be described as having crime prevention as their purpose. This being so, adding this requirement of a "purpose" is meaningless. Therefore, my first amendment seeks to specify that a particular and specified crime must be stated in the purpose. For example, it must be specified that the purpose has to do with a bank robbery or drug

trafficking case that occurred in a certain year, a certain month, on a certain day, in a certain period of time or at a certain location. It must be known what sort of matter or crime is involved. If the purpose has to do with public security, it must also be specified what sort of threat, that is, for example, if the authorities believe that the Korean farmers pose a threat to public security, it cannot describe them in such a way that it becomes a general threat. True enough, Korean farmers will pose a threat, however, it must be stated what sort of threatening incident the Government expects will occur. Why? This is because the materials and information obtained must all be geared towards this purpose and cannot be used for purposes outside this scope. Therefore, it is very important to specify the purpose.

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Secondly, our purpose in adding this paragraph is not just to require what the incident or threat must be specified but to specify how the person whose communications the Government wants to intercept is related to the incident that the Government is concerned about or to the crime that it wants to detect, as well as what credible evidence there is to prove that the person whose communications the Government intends to intercept or on whom it wants to conduct surveillance is related to a certain crime. Why do we want to lay down such a requirement? We will see later that this sort of restrictions will prevent the Government from using certain excuses to intercept communications or carry out wiretapping, instead, there must be hard evidence. The main reason for adding these two factors is to require the Government to prepare an affidavit when making an application. That is to say, if it wants to apply for authorization from a panel Judge, it has to prepare an affidavit and in it, the Government has to provide the basis for the matters that I have mentioned, state the facts that the Government believes in and on what grounds it thinks that those facts have already occurred.

Deputy Chairman, why do we seek to do this? We will explain this point later. Even if the Government applies to a panel Judge for authorization, will a panel Judge be definitely very impartial and independent just because he is a Judge? We consider that a person will not definitely be very impartial just because he is a Judge or on account of his profession as a Judge, rather, it is necessary to provide a basis to him to enable him to know on what basis he can decide whether the Government's claim is founded. Later on, we will see that

he has to assess the proportionality and necessity and the Government must also inform him of some specific facts so that he can decide impartially and independently whether to grant an authorization to the Government. This is the first point.

Secondly, if the Government has obtained an authorization based on certain facts but subsequently, it is found that these facts are totally unfounded and wrong, then the authorization will then become invalid.

Later on, we will see that in Schedule 3, the facts that the Government must state are spelt out and what is stated must be facts. The Government cannot say that its intelligence indicates such and such a thing, as it proposed to us during the scrutiny of the Bill. Therefore, we request that this point be added. In paragraph (b), we are dealing with how an assessment should be made. If something is done in response to a certain crime, what factors must the Government take into consideration for the action to be considered proportionate? In addition to those factors, we held that consideration must be given to the freedom and privacy of communication that the public is entitled to under Article 30 of the Basic Law. In addition, it is also necessary to consider other human rights and freedoms. If these factors are not included, a panel Judge or an authorizing officer in considering the purpose, will only assess the immediacy of the matter which the Government worries will occur or the matter it wants to detect. If it will not occur for a long time to come, there is no need to consider the application. Secondly, it also depends on the relative intrusiveness of the action. Deputy Chairman, in fact, at such a stage, the intrusiveness of covert surveillance is quite high. Next, it will also be necessary to state what the information obtained through wiretapping will be.

Deputy Chairman, it will be possible to know the scope of the purpose clearly only after making these amendments of ours. This is because the materials to be obtained in wiretapping will be geared to such a purpose in future and the protection given to the materials depends on what the purpose is. If the scope of the purpose is exceeded, then the Government will not be allowed to use the materials. Since the provision of the original clause 3 is written in a very general and loose way, we find it necessary to make it more specific, so that in the process of making a decision, be it an authorizing officer or a panel Judge, they can all have very clear guidelines and know what factors must be considered. Meanwhile, law-enforcement officers can also look at these conditions in advance and when they know that the conditions cannot be met, they should not apply for authorization.

However, Deputy Chairman, having said all these, I am well aware that this move will not help very much, the main reason being that we cannot lay down any specific provisions concerning public security and serious crime. The only thing we can do is to enable the panel Judge to have some reference if he wants to, so we have set down more provisions for him here, so that he knows in what circumstances he should approve of an application and in what circumstances he should not. Thank you, Deputy Chairman.

Proposed amendment

Clause 3 (see Annex)

DEPUTY CHAIRMAN (in Cantonese): I now call upon the Secretary for Security and Mr James TO to speak on the amendments moved by Ms Margaret NG as well as their own amendments respectively. However, they may not move their respective amendments at this stage. If the Committee agrees to Ms Margaret NG's amendment, the Secretary for Security and Mr James TO may not move their respective amendments.

MR JAMES TO (in Cantonese): Deputy Chairman, I agree with the comments made by Ms Margaret NG in her speech. We in the pan-democratic camp regard her amendment as the first choice and my amendment can only be regarded as menu B or the second choice. Of course, the Secretary will probably mention the immediacy and gravity of the relevant factors, however, I believe that if the words "imminent threat" are added to "a threat to public security", the balance between privacy in communication and law enforcement can be even better reflected.

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, as Ms Margaret NG has said, the provisions concerning the conditions for issue, renewal or continuance of prescribed authorization in clause 3 can be considered the crux of the entire authorization mechanism and they are very important. Therefore, the Bills Committee had very thorough deliberations on this provision and the proposed amendments to this provision by the authorities were made after carefully considering the discussions in the Bills Committee and striking an appropriate balance of various factors.

Clause 3 now specifies that the action concerned must serve the purpose of preventing or detecting serious crime or protecting public security and it must be proportionate. The relevant elements are also specified. Having considered the suggestions of the Bills Committee, we now propose amendments to clause 3. Firstly, there is an amendment which specifies clearly that there must be the element of reasonable suspicion with regard to the relevant serious crime or threat to public security. Secondly, the requirement of necessity is added. Also, considerations of other matters are added besides the original requirement of proportionality. As I said in the resumption of the Second Reading, this is done in response to Members' concerns that the authorizing authority should be able to consider other relevant factors, including human rights considerations.

To avoid any doubt, the phrase "the particular" has also been added to the reference to serious crimes in the amendments.

I wish to take this opportunity to express the views of the authorities to the amendments proposed by Ms Margaret NG and Mr James TO.

The Government does not agree to the amendments proposed by Ms Margaret NG to the provisions concerning the conditions for issue, renewal or continuance of prescribed authorization in clause 3.

The present Bill has already taken into account the element of immediacy of the relevant crime or threat. Clause 3 already provides that in adopting the test of proportionality, the immediacy and gravity of the serious crime or of the threat to public security, as well as the possibility of using other less intrusive means must be considered. This is a reasonable approach that has struck a balance between various factors. For example, for threats which will have serious consequences if appears, even though the relevant threat is not immediate, the authorities still have the responsibility to carry out monitoring as long as they fulfil the tests of proportionality and necessity, so as to protect the security of the Hong Kong public. This is an arrangement that has the flexibility to cope with different situations and we think that it is even more preferable than the arrangement proposed by Ms Margaret NG.

Ms NG also proposes that a new provision be added to clause 3(1) to require that there must be "credible evidence" indicating reasonable suspicion and proving that the subject of surveillance is involved in the relevant crime or undertaking an activity which constitutes the threat to public security. Since the purpose of intercepting communications or carrying out surveillance is probably to obtain reliable evidence or intelligence so as to achieve the purpose of

detecting serious crimes or protecting public security, it is perhaps putting the cart before the horse to require that "credible evidence" supporting the relevant suspicion must be obtained before making an application for taking the relevant actions.

Of course, law-enforcement agencies will not suspect people for no reason. The officer applying for authorization must provide information to satisfy the authorizing authority that the operation is necessary and proportionate with the purpose before authorization will be granted. If the authorizing authority has queries about the information submitted by the applicant, we would expect it to ask the applicant for further information. If it is still not satisfied that the relevant information meets the stringent prerequisites for granting authorization, then no authorization will be granted.

Ms NG also proposes that a new provision be added to clause 3(1) to require that the relevant serious crime or threat to public security must be specified. On this point, the authorities have clearly shown their acceptance of such a procedural requirement in the amendments to the requirements prescribed in Schedule 3 on the affidavit or statement that must be submitted when applying for authorization. Meanwhile, since clause 3 specifies the conditions for issue, renewal or continuance of prescribed authorization, we do not consider it appropriate to add this information and procedural requirement to clause 3.

In addition, Ms NG proposes that a new provision be added to clause 3(2) to include the rights protected by the Basic Law and the International Covenant on Civil and Political Rights in the "relevant factors" that must be considered. As I have pointed out earlier on, it is of course a must for the authorities to comply with the Basic Law and the international covenants on human rights mentioned in the Basic Law when exercising all its powers. In view of this, we believe that such a reference is unnecessary.

The Government opposes the amendments proposed by Mr James TO.

Mr TO's proposed new provision to clause 3(1) is generally speaking similar to the one we have proposed, however, it provides that the threat to public security must be an "imminent threat". As I have said, it may be necessary for the authorities to carry out surveillance on the threat concerned before it has reached the extent of being "imminent", as long as such action conforms to the test of proportionality, otherwise, the public security of Hong Kong cannot be effectively safeguarded.

Mr TO made references to the Basic Law and the covenants on human rights in his proposed clause 3(1)(b), which are similar to the above amendments made by Ms NG to clause 3(2). On the grounds that I have given just now, the authorities oppose the relevant amendments.

Deputy Chairman, based on the reasons that I have given, we believe that the criteria embodied in Ms NG and Mr TO's amendments will prevent the entire mechanism from functioning effectively. Here, I call on Members to oppose the amendments proposed by the two of them and pass the amendments moved by the Government. Thank you, Deputy Chairman.

DEPUTY CHAIRMAN (in Cantonese): Members may now jointly debate the original provisions and the amendments thereto.

MR RONNY TONG (in Cantonese): Deputy Chairman, just now, Ms Margaret NG described the wings of the overall spirit of this amendment as having been clipped. Ms NG has been studying philosophy, so what she says tends to be quite philosophical. I myself am a down-to-earth person, so if I am to give a description, I will say that this amendment is where the core of the entire piece of legislation lies.

Article 30 of the Basic Law stipulates that the freedom and privacy of communication of the residents of Hong Kong shall be protected by law. Before formulating this piece of legislation, the SAR Government has all along viewed its responsibility in this regard with contempt and refused to enact legislation to protect this freedom. Now, having looked at all the provisions in this piece of legislation introduced to this Council, we found that none of them has affirmed the fundamental freedom protected by the constitutional instruments that I have mentioned.

At present, this piece of legislation, either without or even with the amendments, will probably only give greater weighting to convenience and the all-importance of power, and the enactment of the law will serve to legalize the violation of the rights protected by the Basic Law. Therefore, the starting point has put the cart before the horse and the weighting is placed completely on the wrong side.

The Secretary said just now that if we supported Ms Margaret NG's amendment, this would lead to the total disintegration of or pose obstacles to

operations. It is utterly beyond me as to why the Secretary made such comments. Quite the contrary, we believe that if we support an amendment to matters of principle, this will by no means affect operational efficiency. In comparison, people who oppose this amendment are expressing their opposition to the provisions and spirit of the Basic Law. Therefore, I just cannot understand why the SAR Government has adopted such an attitude.

The second point is that there is a practical need to make this amendment because according to the amendment moved by the Secretary, the authorizing agency (that is, a Judge or an inspector within a department) is only required to consider the proportionality, however, we believe that such a starting point is wrong in its weighting because it is at variance with the weighting in the Basic Law. Just now, I have said that Article 30 of the Basic Law stipulates that the freedoms shall be protected and the onus of proof is on the Government. The Government must prove that it is absolutely necessary to violate these fundamental rights. Therefore, the weighting is tilted in favour of the freedom and privacy of communication. If the authorities merely prepare some very simple guidelines which say that basic human rights have to be weighed against the gravity of a crime, this is in fact no better than saying nothing.

We can look at this matter from two perspectives. If an application is to be decided by a Judge, this is correct because a Judge is a lawyer who may have a fairly good grasp of the importance of the Basic Law and he may also take the same view as we do, believing that the respect for the Basic Law must be far greater than that which is manifested in the present provisions. However, we must understand that in giving his ruling on a case, a Judge must follow the law and different Judges take different approaches in dealing with cases. Some Judges may be more robust or more abiding to the principles of the rule of the law. They may spend time on taking into account other viewpoints outside the scope of the legislation when dealing with cases. However, Judges usually dare not do so and will just follow the law when making a ruling. In other words, if the importance of Article 30 of the Basic Law or the covenants on fundamental human rights is not spelt out in the provisions, it is possible that some Judges will just follow the legal provisions when dealing with cases. However, when it comes to the situation of internal authorization, the concerns voiced by us will increase infinitely because the people responsible for internal authorization are not lawyers and their starting points in handling applications will completely follow what is stated in the provisions. As I have said, if the weights of the present provisions are all placed on the other side, the mechanism of internal authorization will provide no protection whatsoever to the freedom and privacy of communication that the public is entitled to.

In the final analysis, this comes back to a very fundamental issue. Why does the Secretary oppose even this amendment concerning matters of principle? Does he disapprove of the fundamental rights accorded the Hong Kong public by the Basic Law? If he approves of them, why did he voice his opposition? The Secretary said just now that the amendment was "not necessary" but he did not say that it was wrong. I do not believe he has the guts to say that it is wrong, so he only dares say that it is not necessary. If it is said that the rights protected by constitution is "not necessary", I believe hardly anyone will agree with this, even if one is not a lawyer. The rights protected by constitution are not "not necessary" but "necessary", therefore, even if the Secretary considers it "not necessary", he should still support this amendment.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MARGARET NG: Madam Deputy, I feel I have to speak in English, because I feel very handicapped speaking in Cantonese where this particular provision is concerned. One of the very important reasons why I feel I have to amend this provision is that it is incomprehensible in its original drafting. But even after the amendment itself, the particularity of the conditions is still unclear.

Madam Deputy, what we want to say is before you come to apply for an authorization for interception or surveillance, you have got to be able to say that a certain crime has been committed, or that it is about to be committed, and you are asking for permission in relation to these events. This is not achieved by the Government's drafting. Moreover, we want to say that you not only have to say that this event is about to happen or has already happened, but you also have to be able to say that there is credible evidence linking this particular person to the crime or the threat to security which you have in mind.

The Secretary for Security claims that he has already done so in subsection (1) of his amendment, but if you listen to it, he obviously has not done it. Subsection (1) is supposed to deal with the purpose, and it says: "the purpose sought to be furthered by carrying out the interception or covert surveillance concerned is that of preventing or detecting serious crime; or protecting public security." So far, it has not named a single event, and the only courtesy to particularity is by adding (aa), "there is reasonable suspicion that any person has been, is, or is likely to be, involved", after a lot of language, in the "serious crime to be prevented or detected", or with a threat to security. Here, you are talking about general protection or prevention of crime, general protection of

public security, and general suspicion that somebody is connected with it. What has it done to particularity?

Whereas in the amendment which I propose, we have to say that the purpose is that of preventing or detecting "a serious crime which the applicant reasonably believes is about to take place or has taken place as the case may be". So, particularity is not only there, but you also have to say that the applicant believes it is there. Later on, you have to say why you believe, and what the reasons for your belief are. So, if it is protecting public security, you have to say against a threat which the applicant reasonably believes to be imminent, and so later on, in supporting your belief, you have to name the facts and the events which you rely on. That is why we are able to say that there is credible evidence to show a reasonable suspicion that the subject of interception or covert surveillance has been or is likely to be involved in committing the serious crime, or undertaking the activity which constitutes or would constitute a threat to public security.

Then, we add that that particular crime or threat has to be identified. If you compare the two drafts, it is sufficiently clear to anyone who can read English that one is much more particular than the other, and my amendment incorporates the idea of the requirement of reasonable belief which the applicant is going to have to back up.

That is why in our amendment to Schedule 3 we mentioned two things. First, you have to identify the serious crime or the threat to public security, and you have to set out all the facts and matters in support of the reasonable suspicion, so that when you are before the panel Judge or the authorizing officer, he can question the applicant on these matters. Whereas under the Government's drafting, it leaves everything in a most general level. This is unconscionable and really quite dishonourable.

Then, the second part of it has to do with what you have to do to show necessity and balance proportionality. As far as necessity is concerned, there is in the original only a very unsatisfactory provision, namely, it says that you must consider whether the purpose sought can be reasonably done by a less intrusive means. So, it is a thought exercise, whether you think you can achieve it by less intrusive means. Whereas in many jurisdictions, the requirement has to be that you have tried less intrusive means, or, in the nature of things, it is unlikely that the less intrusive means would enable you to get the evidence, or do the detection or prevention, or whatever it is.

As far as proportionality is concerned, as the Bill is drafted, even with the Government's amendment, what do you balance? You balance on the one hand the intrusiveness of the action, and on the other, against relevant factors. What are the relevant factors which you name? It is only the immediacy and gravity of the crime or the threat, and also the value of the evidence to you. Whereas in my amendment, what you have to balance is, first of all, the right and freedom and privacy protected by Article 30 and other rights. So, you have to look at how intrusive it is; you have to look at the right which is involved; you have to look at the value of the evidence; you have to look at whether or not you can get the evidence by any other means. So, that is a complete and reasonable weighing of proportionality.

We must remember that when the authorizing officer or the panel Judge looks at an application, he is going to look at condition 3 to see what it has to satisfy himself with, before he grants an authorization. And now, with your draft and with your amendment, he is all at sea. It becomes an even more arbitrary, personal and subjective matter. Whereas in my amendment, I try not only to make things particular, but I also try to make things complete, as well as concrete and based on objective facts. So, you are going to look at whether the claim you make about reasonable belief is backed up by the Schedule, by your affirmation or affidavit in the Schedule.

So, Madam Deputy, that is why I feel that it is not just a matter of referring to things which are included or not included, but the law has to be clear. One of our biggest concerns is that this law is opaque, and that is why it has to be rewritten, and I do not see why the way I have written it is making it unworkable. In fact, if I may say so, the Secretary's version is precisely what is unworkable, unless what you want to do is to give the biggest leeway and uncertainty to the whole process. Thank you.

DEPUTY CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR LEUNG KWOK-HUNG (in Cantonese): Although Mrs FAN asked us not to raise matters that were discussed in the Bills Committee again, some matters were discussed many times in the absence of Secretary Ambrose LEE, so one cannot say that it is wrong even if they are raised now. I have listened to Ms Margaret NG speak for a long time and she spent all 15 minutes. Everyone has heard a story when they were young. After YUE Fei was captured, he was

taken to the Da Li Temple, where HAN Shizhong asked what crime YUE Fei had committed. QIN Gui said that whether any crime had been committed was irrelevant. In fact, this is precisely the explanation — any reason is irrelevant.

Actually, Ms Margaret NG said that it would not suffice to just copy the original text such as public security, the public security of Hong Kong and the prevention or detection of serious crime once again. In fact, this has always been the practice on the Mainland, where the offences are copied but there is an absence of details, yet people can still be successfully prosecuted. However, this is Hong Kong and although it can be argued that the procedure is not designed to determine if someone is guilty but to apply for authorization to intercept communications or conduct covert surveillance, and although the people concerned are not being sentenced to jail, he will be deprived of a lot of things — including his freedom of movement, his privacy and the privacy of his friends. All of these will be lost because of the actions taken by law-enforcement agencies.

Now, Ms Margaret NG has said that it would be better if the authorities could specify clearly what "the public security of Hong Kong" is and what public security is. When will serious crimes occur? When are they likely to occur? Why is a person suspected of being in connection with a certain crime?

In fact, all these are the fundamental basis of thinking in all people. KANT also pointed out why we have the concept of time, space and location — this is a pair of spectacles and there is no need to ask about it as this will occur to us instantly — at what time and place and who. However, we can see that this is not case with the Government's amendment. No time, place or person is specified. All in all, it is only necessary to tell the officer empowered to consider applications that I expect someone will do this or that and there is no need for solid proof or authentication. Even though a Judge or a future panel Judge may consider such a request to have gone too far, there is nothing else he can do because his hands are also tied. He can only give his authorization or refuse to do so according to the legislation, since the legislation specifies that there is no need and he will be doing more than required if he makes such a request. However, he will be wrong if he refuses to grant an authorization because the legislation provides that only those words need to be said.

Therefore, if we look from this viewpoint, should Ms Margaret NG's amendment be passed, the Judge responsible for considering the application will ask, "No, the law is written this way, when did 'Long Hair' use violence?

What likely was it? On which day did this happen?" He will of course ask such things. However, this will not be the case under the present amendment. It will only be necessary to say that "Long Hair" often stages protests and there is a likelihood that he will use violence. There is even no need to specify the time and in this way, surveillance can be conducted for extended periods of time, so it can be seen that there is a huge difference between the two.

I believe that if Members vote in favour of the Secretary's amendment today, we are in fact selling our own freedom and our own privacy. In future, if the amendment moved by the Secretary is passed, the situation will become like that of biting off whatever one can chew. Why do I say that it will be like biting off whatever one can chew? Now, if it is only necessary to submit names in making an application, perhaps let me also apply to conduct surveillance on the Secretary. I will at least apply to conduct surveillance on the 60 Members of the Legislative Council first. Doing so will not incur any cost and there is no need to say why it is necessary to track Ms Margaret NG. There is no need to say so and this is how things will be like. This is a very important cause leading to the abuse of power. The entrance fee is very low and the threshold is also very low. The authorizing officers have nothing to go by, moreover, it is as though the authorizing officers were in the dark as no one would tell them anything. For example, if they are considering an application for an order to conduct surveillance on me, I will not know about it. I will have nothing to say. I cannot say, "No, Secretary LEE is talking nonsense. This is not true." I will have nothing to say.

Therefore, in fact, without any formal legal procedure, it is all the more necessary to make the applicants abide strictly by some rules and follow a procedure strictly, so that he cannot obtain any authorization without following them. Just as Mr Howard YOUNG said one day, if he filled out a form using the computer, he could not submit it without filling it out completely. Such problems have occurred even to him. Why can we not make reality our starting point and provide that only two claims that cannot be dispensed with in democratic societies can be used as the special grounds for making applications: the first being to protect the public security of Hong Kong and the second, to prevent serious crimes?

We have put it heavily under locks here, however, having imposed restrictions in one area, we have allowed greater leeway in another by making it unnecessary for applicants to cite anything else other than these two grounds.

We are just doing something perfunctorily and pretend to comply. Let me remind you, this method of having only to say the right thing is just like the story "Ali Baba and the Forty Thieves", in which the door would open to any person knocking on the door who would say "open sesame". That is a password and there is no need to resort to other methods. What if someone really cannot remember the two words "open sesame"? In fact, he can still get inside every time. If fact, to put it in a mean way, if no one proposes any amendment to such a piece of legislation, the Government can maintain self-righteously that this bunch of people are all low in intelligence since no one has proposed any amendment, however, now that other people have proposed amendments, it opposes other people and pays no heed to their advice that doing things this way will not work.

In the stage of scrutiny, I sympathize with Members because they were working very hard, so I did not say much and just let people say whatever they wanted. However, now that we are here, some people have lectured us not to say too much. If they were bankers, that would be very fine since everything can be saved. However, no, what is being discussed now is not money, not wealth, but a kind of indispensable freedom.

Members, all that Ms Margaret NG has been doing is in fact just to point out a very simple rationale. One can compare this to making the Secretary prove a geometric question and he cannot just recite the axioms but has to prove the question with positive quantity. He cannot simply recite that the sum of the inner angles of a triangle is equal to 180 degrees. He has to identify the question and prove it with positive quantity. With such a premise, he has to go on proving because there are already some known conditions. If they were the examiners, it would only be necessary to recite the axioms and there would not be any need to prove the equations.

Therefore, I believe that in speaking here today, I am giving others a very good lesson and it should all be recorded to see how a person should look at things. There is the major premise but not the minor premise, so how can one make the deduction?

Now, Ms Margaret NG says, hey, man, I just do not bother to argue with you. I have been cornered by you bit by bit and I am only asking the Secretary to specify the particulars, to put down the actual particulars. We have accepted the "public security of Hong Kong" (it was accepted because we were forced to)

and we have also accepted "serious crime" as it is now. We are just asking that you inform people of the particulars. However, you are not even willing to do this and you refuse to tell people about them. In that case, do you want to have your way all the time? Are you feeling very impatient?

I think that on this issue, it is as though we were already close to sunset. The "sunset clause" has already come into effect and it seems that everyone is very sluggish. Some people have already left. Even the gatekeeper, that is, the government players leading the football team is no longer here, so how can this not be a "sunset" Bill? In fact, let me tell you, I have spoken here, Ms Margaret NG has spoken here and sometimes, Mr LAU Kong-wah also speaks here from time to time. In fact, all of us just want the legislative process to be characterized by greater rationality, instead of just letting the Government proceed after going through the formalities.

Today, I have listened for a long time and in fact, I do not really have any desire to listen to this sort of meetings. Frankly speaking, I am obliged to listen only because I believe what Ms Margaret NG said is right. All she did was just to raise one point, however, no one has given her any response. Everyone hopes that this matter will finish as quickly as possible. However, let me tell you, I will not let it end quickly.

In fact, I believe the pan-democratic camp should take stronger measures to express their anger. We have been speaking here day after day but no one has given us any response. I just do not know how to describe how this situation is like — it is as though a group of fools are speaking to a wall and I really cannot stand such agony.

DEPUTY CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I know that you may be in great agony, however, can you go back to the amendments to clause 3 proposed by Ms Margaret NG, Mr James TO and the Secretary for Security?

MR LEUNG KWOK-HUNG (in Cantonese): Yes, OK, I know how to get some pleasure from my agony. In fact, I wish to reiterate here that although Ms Margaret NG's speech was very long, she hoped that the Secretary would respond to each point she raised. If the Secretary shows her amendment to people issuing the orders, can he tell us in what way they think the amendment

will hinder their work? How will it leave the public security of Hong Kong unprotected? How will it impede his work on preventing serious crimes? He will not be able to answer all these.

We can see that if the Bureau does not follow the arrangement proposed by Ms Margaret NG, there is a great likelihood that information infringing on our freedom and privacy of communication will be obtained and this is the difference. Therefore, I hope that our Honourable colleagues will not support the amendment proposed by Secretary Ambrose LEE but support Ms Margaret NG's amendment instead.

I also hope that all royalist Members will go out to have a cup of tea and will not come back for voting. In this way, one outcome will arise and that is, truth will be manifested. In fact, doing so is not difficult. It only calls for the use of a little wisdom and making an act of silent protest. I hope my wish will really come true and this will at least indirectly show that this legislature has not become a conference hall where one person has all the say and other are the rubber stamps of the Secretary.

I will make an appeal once again. All Members who have received Donald TSANG's letter should just treat it as though they have not received it and go out to have tea, so that the amendment with the crucial point, as Ms Margaret NG pointed out, will be passed and a little remaining protection will be given to our rule of law and the rights given to us by Article 30. I will say it again: Members should go and have tea and should not stay here, as we are going to vote soon.

DEPUTY CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): Deputy Chairman, I left out something when speaking for the first time, since it was rather confusing and the so-called notes on the amendments also made it clear that due to limited time, the notes may not be complete. In fact, they are really incomplete. Later on, I went over them again and fortunately, I now have a chance to speak for the second time.

I wish to amend subclause (1)(b) of clause 3 and the aim is to introduce some human right elements to it. The Government, after listening to the

deliberations of the Bills Committee, added item (iii), so as to take into account other factors. What are the differences between the other factors and the human right elements in my amendment? There are some differences. Mr Jasper TSANG, who attended the meeting on that occasion, is very astute and he can tell after just having a look. Why? This is because if we take a look at items (i), (ii) and (iii) of subclause (b), it seems that item (i) has to do with the relevant factors and intrusiveness and item (ii) has to do with what is less intrusive. Therefore, it seems both items (i) and (ii) have to do with factors relevant to human rights.

However, if the Government adds other factors to be considered in item (iii), a question will arise. Of course, there is one possible explanation, that is, what is called other factors to be considered means considering other human right factors or other negative factors relating to the refusal to authorize the interception of communications or the conduct of surveillance. However, since the present wording is quite neutral, therefore, in taking into consideration negative factors, that is, not approving an application it is only one of the possibilities, so this is not clear enough. However, since what we discussed at that time were human right factors, therefore, although the Government was willing to put things down in writing, it was not willing to put down words such as human right factors no matter what. Even Mr Jasper TSANG could spot such differences and it is possible that this factor will serve to make the authorities consider other factors that will be conducive to giving authorization, however, factors conducive to obtaining authorization have been clearly specified in the relevant factors, that is, clause 3(2).

(THE CHAIRMAN resumed the Chair)

Therefore, if it is not specified clearly that they are human right factors, when it is necessary to make interpretations, the meaning may not be the one stated by the Bills Committee and in the response given by the Government. Other factors surely refer to human right factors. Regarding this rationale, I hope other Members can understand, particularly the Liberal Party. Why? This is because Ms Miriam LAU is the Chairman of the Bills Committee and she should know this well enough. Mr Jasper TSANG is not present now but I hope he and his fellow party members can consider this idea carefully because it was proposed by him. Since he sees the problem, he should support my amendment.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

(The Secretary for Security indicated that he did not wish to speak)

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

(Mr Alan LEONG indicated that he wished to speak)

CHAIRMAN (in Cantonese): Perhaps I will let Mr Alan LEONG speak first.

MR ALAN LEONG (in Cantonese): Chairman, please allow me to comment on clause 3(1)(a) first. In the amendment proposed by the Security for Security, the test of "reasonable suspicion" is added to require that law-enforcement officers must have reasonable suspicion that any person has been, is, or is likely to be, involved in the serious crimes specified in the provision, or any activity which constitutes a particular threat to public security, before they can apply for authorization to conduct covert surveillance.

The amendment moved by Ms Margaret NG raised the threshold of reasonable suspicion to that of "reasonably believes" or "credible evidence to show a reasonable suspicion".

The amendment proposed by Mr James TO echoes his own definition on "public security" in clause 2(1) by narrowing down the scope to a particular imminent threat to public security.

Chairman, I wish to focus my discussion on the differences between concepts such as "reasonable suspicion" and "reasonable belief". On the face of it, the differences between these terms are not great, however, the underlying thinking and their meanings are worlds apart. The differences between these terms in law are demonstrated the best of all in the Police Force Ordinance (Cap. 232) (the Ordinance), in which requirements are laid down in respect of the power of police officers. Section 50 of the Ordinance gives a police officer the power to apprehend any person whom he reasonably believes of being guilty of an offence; and section 54 gives a police officer the power to stop and search any person whom he reasonably suspects of having committed any offence.

In the Ordinance, that is, in sections 50 and 54, I have just found the different expressions "reasonably believes" and "reasonably suspects". In fact, judging from the apparent meaning of these terms, we should have little difficulty in understanding that the requirements for "reasonable belief" are stricter than those for "reasonable suspicion". In *Hussien v Chong Fook Kam*, Lord DEVLIN of the Privy Council pointed out that "reasonable suspicion is only a state of conjecture or surmise where proof is lacking". In contrast, with regard to "reasonable belief", one may not have reached the state of getting hold of proof either. However, it is at least necessary to conduct initial investigation to get hold of information linking the subject to the crime, so as to prove that the initial conjecture is reasonable and hence, elevate the conjecture to a more well-founded belief. Therefore, "reasonable suspicion" and "reasonable belief" are two different concepts involving two different levels.

Chairman, this escalation in the degree of stringency is in fact directly proportional to the damage that the relevant action will cause to the rights of members of the public. We can just imagine, in a situation of stop and search, that is, in a situation involving section 54 I have cited, a member of the public who is searched will usually be subjected to restrictions on his personal freedom only for a very short period of time. When a police officer confirms that the suspicion is a mistaken one, he must let the person concerned go. However, in a situation of apprehension in pursuance of section 50, even though it may eventually be proven that the suspect has not committed any crime, the police can still legally detain him for 48 hours and the detention may also have an effect on the reputation of the arrested person. Therefore, we can see that the legal requirements for them are also different, one being suspicion and the other belief.

If the disagreements between the Secretary for Security and Ms Margaret NG are summed up as one point, it would be at which level the criteria according to which law-enforcement agencies can take action should be established? If covert surveillance is compared with both a stop-and-search action and making an arrest, I can by no means subscribe to the Government's proposal of requiring law-enforcement agencies to have a reasonable suspicion only, since the consequences arising from covert surveillance are definitely much more serious than those of a stop-and-search action on the street.

Chairman, assuming that it is necessary for the police to conduct a body search and if upon that search, the police really finds articles that convince one that someone has indeed committed a crime, then the suspicion of the police will

be elevated to belief and an arrest will then be made. However, if nothing is found upon search and nothing can be achieved, the police will have to release the person concerned and the matter will come to a close. The person who is searched is fully aware of what is happening throughout whole process, however, in a situation of covert surveillance, the person subjected to surveillance is totally unaware of it and even when a law-enforcement agency decides not to prosecute the person subjected to surveillance, it is possible that it is entitled to continue to retain the information obtained by surveillance. Therefore, the damage done to the rights of members of the public will definitely be far greater than in a stop-and-search action.

In the same vein, this sort of damage may even be greater than that done to innocent people who are detained for 48 hours. May I ask how we can put the seriousness of actions such as wiretapping and secret filming on a par with simple things such as stopping a member of the public on the street to carry out a body search? Should we allow law-enforcement agencies to carry out covert surveillance purely based on their conjecture or surmise, even in the absence of information indicating that the subject of investigation is linked to any offence? Obviously, this does not conform to the principle I stated at the resumption of Second Reading yesterday that for legislating on covert surveillance, we must be on the strict side and government power must be curtailed and reduced to the lowest necessary level.

Chairman, raising the requirement on law-enforcement agencies to the level of reasonable belief or having credible evidence to support a reasonable suspicion will, on the one hand, avoid rendering it impossible for law-enforcement agencies to conduct covert surveillance due to the absence of evidence that can be produced in Court; on the other hand, it can also be guaranteed that any authorization to conduct covert surveillance will be backed by and based on facts and that such actions cannot be based purely on conjecture and surmise.

Chairman, having commented on clause 3(1)(a), allow me to comment on the two provisions of clause 3(1)(b) and 3(2). The difference in the amendments to this part mainly lies in the fact that in the amendment proposed by the Secretary for Security, the test of necessity is added to the conditions for authorization, whereas Ms Margaret NG has moved an amendment to delete the original provision that the conduct of surveillance is proportionate to the purpose sought to be furthered by carrying it out. As regards Mr James TO's amendment, it adds human rights considerations, including the Basic Law and

the contents of other international covenants on human rights, to the amendment proposed by the Secretary for Security.

Chairman, the principle manifested by the expression that the conduct of surveillance "is proportionate to the purpose sought to be furthered by carrying it out" is certainly not as reasonable and scientific as it sounds. In order to enable the conditions for authorizing surveillance to serve the purpose of preventing the Government from abusing power, the wording of the law must be certain and clear and allow members of the public to fully understand their own rights and law-enforcement officers to clearly understand the criteria that should be kept in view when taking actions. The original text of clause 3(1)(b)(ii) clearly requires that consideration must be given to whether the required information can be obtained by adopting less intrusive means. This is an example of a clearer requirement. In contrast, the principle of the action being proportionate to the purpose sought to be furthered by carrying it out appears to be very abstract and vague.

Just now, when speaking on the definition of "serious crime", Members holding different views have all related a situation in their comments, that is, at the stage of investigating a crime, law-enforcement officers often may not have grasped fully the seriousness and extent of the offence which the subject of investigation is involved in, as a result, the outcome of investigation may not tally with the original goal of investigation. It is not uncommon to see such failure to tally. If a law-enforcement agency intends to abuse power, another scenario may arise, that is, an applicant applying for authorization may intentionally exaggerate the seriousness of a matter to be investigated to mislead the authorizing officer into believing that covert surveillance is justified and authorization is hence granted.

If the legislation specifies the aim of surveillance vaguely as a consideration in granting authorizations, this will provide an inducement to law-enforcement agencies so that officers will deliberately exaggerate the nature of a matter as one that falls within the scope of acts for which authorization will be granted. Even though it is found at a later stage that a matter does not turn out in the way described by law-enforcement agencies, the authorization for lawful covert surveillance has been granted and the Government can obtain the results of surveillance. So people on whom surveillance should not have been conducted will become the subjects of surveillance for no good reason. Even if the consideration of necessity has been added to the Government's amendment, the evils of determining the use of such means by the end cannot be avoided.

Just as the term "proportionate", the term "necessary" is also one that gives the Government a great deal of room to manoeuvre. Not matter how many terms of a similar nature are added to this provision, as long as the aim is one of the factors to be considered in authorizing applications, a great deal of room for manoeuvre will be left to government departments, which can obtain authorization by manipulating the end.

Chairman, Ms Margaret NG proposes the deletion of the entire sentence, whereas Mr James TO proposes the addition of a provision to the teleology by requiring the consideration of human rights factors, so as to counter the side-effects of teleology. If specific factors protecting human rights are added, apart from the aim of surveillance cited by the Government *ex parte*, an authorizing officer must consider whether the rights which a subject of surveillance is entitled to under the Basic Law and human rights covenants will be infringed upon without good reason. Ms Margaret NG has also proposed amendments similar to that of Mr James TO's in clause 3(2), which add in human rights considerations to avoid excessive infringement of the right to privacy of communication that members of the public enjoy under constitutional protection.

Chairman, in view of the above analysis of the factors, I oppose the Secretary for Security's amendment and support the amendments of Ms Margaret NG and Mr James TO. Thank you, Chairman.

CHAIRMAN (in Cantonese): Secretary for Security, I trust you do not have to speak again. Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, since Mr Alan LEONG has already given a detailed account of what I wanted to say, there is no need for me to go over the same things in detail again. However, the only thing that I have to add is that it is not all about operations — I am sorry, Chairman……

CHAIRMAN (in Cantonese): That is all right.

MS MARGARET NG (in Cantonese): Chairman, the only point I have to add has to do with discontinuation of operations. This is because the authorities will

seek authorization on the basis of some specific conditions in order to conduct covert surveillance. However, if subsequently, there are changes to the conditions, the authorization should cease to be in force. Therefore, if such specific requirements are not stipulated in the authorization, the time when an authorization should be terminated will become a very arbitrary matter. Chairman, it is all about the standard adopted in enacting legislation. The stringency of our rule of law is reflected in whether or not our requirements on enacting legislation are stringent.

Thank you, Chairman. I hope Members will support my amendment.

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendment, I will remind Members that if that amendment is agreed, the Secretary for Security and Mr James TO may not move their amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Ms LI Fung-ying, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, six were in favour of the amendment and 18 against it; while among the Members returned by geographical constituencies through direct elections, 23 were present, 14 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 3.

Proposed amendment

Clause 3 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Martin LEE rose to claim a division.

CHAIRMAN (in Cantonese): Mr Martin LEE has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Miss CHAN Yuen-han, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Ms LI Fung-ying, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 47 Members present, 26 were in favour of the amendment and 20 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Mr James TO may not move his amendment to clause 3, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 3 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the clause 3 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): Clauses 4 and 5.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move amendments to subclauses (1) of clauses 4 and 5 relating to carrying out interception or covert surveillance indirectly, as set out in the paper circularized to Members. The authorities' amendment to clauses 4 and 5 is proposed to address Mr James TO's concern by pointing out specifically that apart from through any other person, public officers are also prohibited from carrying out any interception of communications or covert surveillance by any other indirect means. Thank you, Chairman.

Proposed amendments

Clause 4 (see Annex)

Clause 5 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MS MARGARET NG (in Cantonese): Chairman, sorry, but can I have a little time to..... OK, I understand. I understand.

CHAIRMAN (in Cantonese): The Committee should now discuss the amendments moved by the Secretary for Security and we will deal with your amendment and Mr James TO's amendment afterwards. When your amendments are to be dealt with, Members may have different views, though.

MS MARGARET NG (in Cantonese): All right.

MR JAMES TO (in Cantonese): I wish to comment on this matter.

CHAIRMAN (in Cantonese): Yes, please go ahead.

MR JAMES TO (in Cantonese): This is because there are subclauses (1), (2) and (3) in clause 4. As the Chairman considers that some amendments have

exceeded the scope of the Bill, so they could not be included. Therefore, I wish to express my views in this regard since this is the only opportunity available.

I think that in fact, the public officer mentioned therein lacks — why did we want to propose an amendment to include the Chief Executive and the Directors of Bureaux under the accountability system? Members will have an even clearer idea after looking at the Secretary's amendment because it is written therein that "Subject to subsection (2), no public officer shall, directly or through any other person, carry out any interception." Subcluase (2) has to do with authorization matters. In other words, public officers cannot carry out interception of communications through other people, so we think that the Chief Executive should also be prohibited from doing so himself or through any other person.

The Secretary mentioned the Government's response in his speech on Second Reading and the reasons given are limited to these points. Firstly, he said that the Chief Executive has no one under his command, so how possibly can he carry out any interception of communications by himself? He has to find some public officers to do it for him. However, this is not the reality. Why is it necessary to add "through any other person"? In other words, it is also possible for the police to do so by contracting out the task, although this has now been prohibited and this is an improvement. If the Chief Executive is not considered a public officer, that means he is above the law and he can do this sort of things through a private detective company and this is not prohibited. As regards whether there will be any criminal or civil liabilities after he has done this sort of things, we will debate this later in the next part. However, if the concept of prohibiting such actions already exists in the law, at least, the Chief Executive cannot be above the law. In the Second Reading, Mr LEE Wing-tat quoted the proverb that "for any crime committed, both the king and the people shall be punished alike without discrimination". The concept involved is in fact the same, that is, the Chief Executive cannot be above the law.

The second point that I wish to say is that this is the first legislative exercise after 1997 in which the Chief Executive has been deliberately excluded from the prohibitions of the law. The Prevention of Bribery Ordinance came into existence before 1997 and in the context of the adaptation of this piece of legislation, it would have originally been possible to include the Chief Executive in it, however, the Government said that he could not be included. It was only after seven to eight years of discussions that the Government finally agreed to make changes. It is a pity that before the changes are made, the election of the

Chief Executive will take place very soon. In fact, this is already an inadequacy, however, at least in principle, it is accepted that the Chief Executive should be subject to the regulation of the Prevention of Bribery Ordinance. However, on this occasion, this is the first legislative exercise after 1997 in which the Chief Executive is deliberately excluded from the scope of this law, even though we already know that the Chief Executive is not included in the definitions. I believe this will set a very bad precedent. If this can be done here, why can this not be done elsewhere?

Moreover, the third point in the Government's arguments is that since the Chief Executive himself has to abide by the Basic Law, if the Chief Executive makes any mistake, there is a possibility that he will be impeached and that is really the ultimate punishment. If this is so, this can become the reason for the Chief Executive to remain above the law in future legislative exercises. No matter what happens, we only have to refer to the Basic Law and impeach him should anything happen. I think this is not what should be done. Be it civil or criminal matters, except when an authorization has been granted, what people in general are prohibited from doing should also apply to the Chief Executive.

Furthermore, one very important point is that in fact, many members of the public are still very apprehensive of certain public officers. They are not the public officers of Hong Kong but public officers from the Mainland or other countries and all these people excluded. If officers from other countries take such actions as wiretapping, moreover, if such acts involve Article 23 of the Basic Law, then it is possible to provide for offences such as espionage, sabotage or theft of state secrets in the legislation on Article 23 in future, so that it is possible to prohibit something or make someone answer in accordance with the legislation. However, the offence of espionage in our law will not cover state security officers or public security officials and they will not be accused of espionage because it is not appropriate to do so. Since they cannot be covered by offences of this nature, the only thing that can be done is either to include them here or to tailor-make a piece of legislation for them in future.

In this case, since they have the system, organization and resources, and, there is a likelihood that such actions will be taken on a large scale, if the protection given to the public by the Basic Law has also to be respected by public officers from other countries, the most appropriate thing to do is in fact to include them in this piece of legislation now, rather than enacting another piece of legislation. Therefore, on the omission of the Chief Executive here, if this is done deliberately, I think the Government should be condemned for this.

Chairman, one more thing that I wish to say is that if the Chief Executive himself knows that this piece of law has deliberately excluded him but he agrees to it nonetheless, then he should be condemned all the more.

CHAIRMAN (in Cantonese): Ms Margaret NG, you have proposed an amendment that is the same but I have ruled against it. Perhaps you would also like to speak too?

MS MARGARET NG (in Cantonese): Yes, Chairman. I am also aware that Chairman is dealing with matters according to the Rules of Procedure. Why do we have such respect for the power and functions of the Chairman? This is because the Chairman is dealing with matters according to rules and not her personal wish. Chairman, I strongly agree with the comments made by Mr James TO just now, so I am not going to repeat them either. I just want to raise one point, that is, in the discussions during the stage of scrutiny by the Bills Committee, we also raised the question of why the Chief Executive was deliberately excluded from this legislation? At that time, the answer was that this was an important matter and the Chief Executive had to comply with the Basic Law, if not, he would be impeached.

On this matter, why are we sitting here in this Chamber today? This is precisely because the Chief Executive has failed to comply with the Basic Law. However, did we take any impeachment proceedings against him? No, we did not and we even have to "work overtime". Chairman, even as we are in despair, the Chairman has told us just now that it is likely that we will not be allowed to sleep, is that right? When the Chief Executive has violated the constitution, it is the Legislative Council which will get the punishment. What does it mean by impeaching the Chief Executive? He will not be impeached in any way at all.

Chairman, not only did the Court help him, we really have to look even more clearly — I hope I will be able to elaborate this point clearly — although the decision of the Court of Final Appeal points out that that is a judicial declaration and the declaration has been suspended from coming into operation for the time being, it also means that since it has the power to make such a judicial declaration, of course, it also has the power to decide when to let it come into operation. That is to say, the difference between allowing it to come into

operation and not doing so only lies in charging the Chief Executive with the offence of contempt of court if he still does something unconstitutional after the declaration has come into operation. However, a law-abiding Government will act according to the true interpretations of the law. If it knows right at this moment that the Court has ruled that it has violated the law and it is unconstitutional, it should stop its actions of its own accord because it has to abide by the law.

Have we seen the Chief Executive abide by Article 30 of the Basic Law of his own will? No. He just said that he had a host of reasons to continue with what he had been doing and to continue to be unconstitutional. Not only has he continued to be unconstitutional, he is pleased after obtaining information by unconstitutional means because the Court may not necessarily reject such information submitted to it. Therefore, how can we say that since the Chief Executive will definitely comply with the Basic Law and it will be a serious matter if he does not, therefore, it is not necessary to include the Chief Executive within the scope of this legislation? Chairman, if we do not comply with the Basic Law, it will be a serious matter, however, if the Chief Executive does not respect the Basic Law, it will also be a serious matter for us. *(Laughter)* Thank you.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, in what circumstances did Richard NIXON have to step down? If Richard NIXON had lived in Hong Kong, it would have been great because he would not have become a President who was impeached, since we would say, "Forget it, he does not have to assume any responsibility.". In fact, BUSH is now very bothered. Although he has intercepted the communications of tens of millions of people under the excuse of anti-terrorism, he is now waiting to see if anyone will take legal action against him and whether he will be found guilty. Therefore, when we say that we want to free the Chief Executive from all liabilities, that means he does not have to assume any responsibility for being unconstitutional in intercepting communications and conducting covert surveillance. This is unfair. This only reminds us of Napoleon in ORWELL's novel, who said that all animals were equal, but some were more equal than others.

Of course, we understand that if people take legal actions against the Chief Executive all the time, he will be very busy, so much so that he will not have time for his work. If someone accuses the Chief Executive of indecent assault and keeps taking legal actions against him, so that he has to appear in Court

frequently, that would not do. However, the point is, we are now discussing whether constitutionally speaking, the Chief Executive have the right not to abide by the constitution and order that actions infringing on the freedom and privacy of communication of the Hong Kong people be taken. I am not talking about his committing any ordinary offence. In fact, he has to be held accountable in accordance with the legislation. The legislation provides clearly that "no department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents". What does the following line say? It says, "the relevant authorities may inspect communications in accordance with legal procedures.".

Today, in this legislature, we are empowering law-enforcement agencies or the executive authorities to grant exemption on two grounds, that is, to intercept communications to protect the public security of Hong Kong and to detect or prevent serious crime. Given that the requirements are so clear, why does the Chief Executive still want to be exempted from such a responsibility? I really cannot see the reason. If the Chief Executive can be exempted from this responsibility, then he will be able to do one thing, or to put it in a nice-sounding way, he can exercise flexibility and order some people to do some things unconstitutional or unlawful. After knowing about it, we can only sigh helplessly but cannot sanction him in any way.

Members have to understand one point. To Members of the Legislative Council, if the Chief Executive intercepts my communications, that is, those of "Long Hair", I will lobby other Members to impeach him and as long as I can secure 40 votes as required, the Chief Executive can then go home and take a break. However, for ordinary members of the public, they cannot do so. How can they ask Members of the Legislative Council to impeach the Chief Executive for them? They can only seek redress from the Court, however, if there is no legal provision in this regard, the Judge will say, "I am sorry, you have all my sympathy but I cannot help you because at a certain time on a certain date, the Legislative Council passed a piece of legislation and under it, the Chief Executive does not have to assume any responsibility.".

Who will benefit from such an arrangement? Will this sort of arrangement be conducive to the protection of our privacy? I do not find this to be the case. Therefore, under the order of the Chief Executive, a lot of things can happen. Of course, we understand that the Chief Executive will not do so very often, but when he does, we will be totally helpless. This is the crux of the matter.

Therefore, I hope Members will understand one point, that is, we must not always say that we do not have time and in the event that the Chief Executive does not follow the rules, we will just impeach him. In reality, it is very difficult to impeach him because the impeachment must be agreed by two thirds of the Members of the Legislative Council. Furthermore, some stringent requirements are stipulated in the Basic Law. I think the law-enforcement departments and officers of the Department of Justice cannot make such a claim, that is, they cannot say that he has to assume constitutional responsibility with regard to everything and that Members can impeach him. This is to deceive Hong Kong people.

May I ask the government officials here how an ordinary member of the public can impeach the Chief Executive? Is there any law in Hong Kong providing that as long as 500 000 signatures of members of the Hong Kong public are collected, he can then be impeached? If there were, they could stick to their position. In reality, there is none and only the Legislative Council can impeach him. Therefore, I think this is clearly a black-and-white issue. By including the Chief Executive, the spirit of all people being equal before the law can be manifested even more clearly in the legislation, that is, everyone is equal before the law. If he is not included, there will be a loophole, some people do not have to abide by the law and some people do not have to shoulder any responsibility if they violate the law. In fact, the Chief Executive has violated the law before and Ms Margaret NG has already pointed it out, so I am not going to talk about this again.

I know that four Members did not cast their votes, so I hope that even more people will go and have tea and refrain from voting, so as to make Mr Donald TSANG and other future Chief Executives equal like other people before the law. Thank you, Chairman.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I do not agree with the comments made by Ms Margaret NG and Mr James TO that the Chief Executive is above the law. The Chief Executive has always abided by the law of Hong Kong.

MS EMILY LAU (in Cantonese): Yes, Chairman. I also agree with the comments made by several Members just now. It is regrettable that on this occasion when drawing up a new piece of legislation, the Chief Executive has not been included in the Bill and be required to abide by this piece of legislation.

I remember that when discussing the Prevention of Bribery Ordinance several years ago, we asked why the Chief Executive was not included. At that time, Mr TUNG Chee-hwa came out at the earliest opportunity to say that he accepted being bound by the law. I thought then that it would do only if he really make good on his pledge to be bound by the law. However, even though he has left now, the Chief Executive has still not yet been subjected to any regulation. Still, I have not seen Mr Donald TSANG come out to say that he accepts being regulated, be it by the Prevention of Bribery Ordinance or this Bill which we are going to pass or negative soon. I really find this highly regrettable.

In addition, Honourable colleagues are right in saying that if this Bill can be passed today, with regard to a lot of Bills that will follow in the future, will the authorities set down in each and every Bill that the Chief Executive is above the law? Each time, it will be maintained that Article 73(9) of the Basic Law can be invoked, so will it be necessary to deal with each instance by resorting to this method like dropping an atomic bomb?

Chairman, if things are really like this, we can actually invoke the Article and we can indeed do so. If Members do not quite remember what Article 73(9) stipulates, they can take a look at it. It says, "If a motion initiated jointly by one-fourth of all the members of the Legislative Council charges the Chief Executive with serious breach of law or dereliction of duty and if he or she refuses to resign, the Council may, after passing a motion for investigation, give a mandate to the Chief Justice of the Court of Final Appeal to form and chair an independent investigation committee. The committee shall be responsible for carrying out the investigation and reporting its findings to the Council. If the committee considers the evidence sufficient to substantiate such charges, the Council may pass a motion of impeachment by a two-thirds majority of all its members and report it to the Central People's Government for decision.". The threshold is that a motion can be initiated jointly by one fourth of all the Members of the Legislative Council.

Chairman, I hope that the SAR Government will not challenge the Legislative Council like this and refuse to do what is formally prescribed in the law. Moreover, Members all know that the former Chief Executive and the

incumbent Chief Executive both deliberately refrained from enacting any legislation, thus making the covert surveillance and interception of communications by law-enforcement agencies unconstitutional. If Members ask if the Chief Executives are being unconstitutional and whether or not they have failed to abide by the Basic Law, I believe the answer is very clear.

If the Secretary continues to maintain that there is no need to set this down in local legislation and it will do just to invoke Article 73(9), Chairman, then we probably have to go along with this. I believe this Article in the Basic Law can be invoked, however, if something should be specified in local legislation, why do we not do so? In future, when another piece of legislation is tabled, one can also say that this aspect does not have to be specified because it is not specified in the legislation on the interception of communications. Since Members have not taken any action, the Government can continue to act unconstitutionally and the Basic Law will just remain untouched and collect dust and in that event, Members will become an object of ridicule.

Chairman, the Basic Law is here and we have the power and probably the ability to invoke it, although there is no knowing if there will be enough votes in the end. However, I believe that it will not be very beneficial to all of us to activate an atomic bomb. Nevertheless, if the executive authorities want to provoke us in this way by refusing to do what they should have done and to include the Chief Executive in the Bill, thus compelling us — this is to force us, Chairman, because they said there was no need to include him and it would do to invoke the Basic Law. If something is really well-founded and Members still do not invoke it, then that would really get highly interesting.

Therefore, I really hope that a precedent will not be set. If the Chief Executive is not included in the legislation this time, next time, when another Secretary comes — be it Secretary MA, Secretary LAM or whoever else — it will also be said that there is no need to include him because he has only to remember that on the other occasion, it was also possible for Secretary Ambrose LEE not to include him, that it only took a few sleepless nights to get the job done. I really think that this is no laughing matter. Since we say that we have to respect the rule of law and everyone is equal before the law, I hope it will not be necessary to fall back on this atomic bomb called the Basic Law to prove that some people have to abide by the law.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, I now call upon the Secretary for Security to speak again.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I have nothing to add.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendments passed.

CHAIRMAN (in Cantonese): The Committee now deals with those amendments of Ms Margaret NG and Mr James TO to clauses 4 and 5 relating to penalty provision for persons who carry out interception or covert surveillance in contravention of the enacted Bill.

CHAIRMAN (in Cantonese): Ms Margaret NG proposes to amend respective subclauses (1) of clauses 4 and 5 while Mr James TO proposes to add subclause (1A) to clauses 4 and 5 respectively.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her further amendments to respective subclauses (1) of clauses 4 and 5 relating to penalty provision.

MS MARGARET NG (in Cantonese): Chairman, I move further amendments to respective subclauses (1) of clauses 4 and 5 relating to the proposed penalty provision.

Chairman, the aim of this Bill is to protect the freedom and privacy of communication of the Hong Kong people. However, regarding law-enforcement officers, what if they deliberately carry out interception or covert surveillance in contravention of the legislation? It seems the only thing that can be said is that disciplinary action can be taken on them at many levels of the echelon. Many people think that this cannot adequately reflect the intention of this legislation to protect the privacy of communication. Therefore, we all think that a penalty should be prescribed and its threshold should be set higher. In fact, my amendments also reflect the view of the legal profession. Meanwhile, I also notice that although my amendments and that of Mr James TO are different in form, they do share the same goal.

Therefore, Chairman, I urge Members to support my amendments. Thank you.

Proposed amendments

Clause 4 (see Annex)

Clause 5 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO to speak on the amendments moved by Ms Margaret NG as well as his own amendments. However, he may not move his respective amendments at this stage.

MR JAMES TO (in Cantonese): Chairman, I am not going to repeat what Ms Margaret NG has said. I mainly want to target a comment made by the Secretary in the Second Reading debate on why public officers should not be liable to criminal penalties.

The reasons he cited consisted of only a few points and he had already mentioned them in past documents. Firstly, our public officers should be just like other members of the public. Since the Law Reform Commission has not yet recommended a new offence, why should such an offence be prescribed specifically for our public officers, so that they will be regulated?

My answer is very simple. Why do we want to tackle the easier part first in this legislative exercise and deal with the more difficult part later? That is to

say, we are now dealing with the part concerning public officers first before dealing with that concerning private individuals. What are the considerations? When the Government consulted me, it asked me if it could tackle this part first and I agreed. The reason is that I believe public officers have the resources, they are in an organized framework with a very good system and they are well-organized under such a system, so they have the system, organization and resources to carry out this kind of interception or covert surveillance, which may be related to law enforcement.

For this reason, this part has to be dealt with first. If the Government is now saying, "No, why not wait until we have prescribed criminal offences applicable to other people before we include such act done by public officers in the criminal offences?" This will run counter to the Government's remark on dealing with public officers first. The reason for dealing with public officers first is that we want to tackle the easier part first before dealing with the more difficult part, as regulating public officers will be less significant, less disruptive to society and less controversial. Therefore, along with the provisions on prohibition, there has to be a penalty clause in order to reflect the need for such a complementary measure. This is my reply to the first question, that is, why one cannot wait till all other people, including the press or the paparazzi, are covered by such a criminal offence before this provision is proposed together.

Secondly, the Government often thinks that there are probably other punishments for public officers. Frankly speaking, no matter how it draws up the provisions, it has also mentioned internal disciplinary actions in its documents and that it is only in very specific and extreme circumstances that there is the possibility of committing offences such as what are called perverting the course of justice or dereliction of duty. This falls far short of the merit of having a provision that carries consequences. Of course, the Government has given some examples in its documents, pointing out that not every piece of legislation contains a provision on the consequences of non-compliance. However, as these are important provisions that will affect the rights of the public, including the privacy of communication as stipulated by Article 30 of the Basic Law, if there is no consequence whatsoever for violating these important values and the rights that should be protected, I think the deterrent effect is inadequate.

I hope Members can give their support, so that we can really have a piece of legislation which, as it gives public officers greater power, also correspondingly imposes greater punishment on them if they acted unlawfully.

Even if we do not propose this amendment, those Members who support the government amendment have also claimed that they are very concerned about whether there will be any dereliction of duty or abuse of power on the part of public officers, however, they want us to believe them and give them even greater power. This is what they have said. If the Government is truly just as concerned about the issue of power abuse as it professes, then even if I had not proposed this amendment, other Honourable colleagues should have proposed it. However, now that it has been proposed, there should be a complementary measure, so that the greater the power, the greater the punishment will be. However, this is not the case at all in reality. In that event, has this piece of legislation struck an appropriate balance?

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MS EMILY LAU (in Cantonese): Chairman, I speak in support of the two Members' amendments.

All people who have attended the meetings know that during the scrutiny of the Bill, I was very concerned about this matter. I find that the power conferred is very great and the infringement on privacy, be it that under Type 1, Type 2 or Type 3, is very serious. Should this power be abused, I believe the intrusion on members of the public will be very serious.

Moreover, as said earlier, the "product" is obtained without correct and proper authorization — I find the description "product" very ridiculous, Chairman, since a product is already what is obtained successfully, however, it turns out that it can still be used as intelligence, to be kept by the Government all the time. Therefore, I think that public officers must get the message that any non-compliance with the legislation — it is actually already very lenient — will result in serious consequences.

However, the authorities tell us that there is no need to be afraid because in future, disciplinary action may be taken against them. However, I will not be able to know in what circumstances those instances happen and I will not be

able to know if there really will be any action. In the past, we have asked about other matters, however, very often, no disciplinary action was taken. They dared not tell people who did what and at what time. The information submitted was only classified as highly confidential.

Chairman, this is only the first step. If other pieces of legislation are enacted to regulate other people in future, will it be the case that these people do not have to face any consequence either? Does it mean that no one will have to face any consequence? Then everyone will say that there is no need to heed this piece of legislation because there will not be any consequence for non-compliance with the requirements. Or people will say, no, there will be consequences for private individuals who do not comply with the legislation but not for civil servants. Are we saying that disciplinary action can also be taken against private organizations? How can that be done?

The legislation drawn up now is only the first step. However, it is necessary for us to be logical and principled. This can actually be done. If such serious infringement of privacy is just like other criminal offences — Chairman, as the Government often claims that civil servants are also law-abiding and have to abide by the laws on other criminal offences, which is only right, I think it can be included under the same category. That means as in other types of serious criminal offences, there will be consequences for non-compliance instead of merely talking about disciplinary action, which will take I know not how many years. I find this unacceptable.

Furthermore, regarding how the private sector can be regulated in the future, no one knows what will be done. People will then say that if private organizations will be subject to disciplinary action but a different kind of treatment is given to civil servants, will the public not be even angrier? There is already no need for the Chief Executive to abide by the law and if it turns out that civil servants will also be treated as another class, what will members of the public become? I really do not know how to put it. Perhaps, I will not be here anymore and I will no longer be around. However, so long as I am still around, I have to raise this point. Chairman, I find this very unfair — Chairman, I do not mean that you are being unfair — I mean the authorities are being very unfair.

MR LEUNG KWOK-HUNG (in Cantonese): After all, there should be some sort of logic. If the Government thinks that the Chief Executive should be

exempted from any liability, the logic is that public officers should not assume criminal liabilities even for any mistakes made or dereliction of duty.

I do not know how the Government will take disciplinary action either. What does it mean by that? In fact, in ancient China, there was a kind of people called *ya nei* (profligate sons of the rich or officials), and GAO Qiu was one of them, right? For those who have read the Chinese classical novel *Water Margin*, they know that these people did not care about killing people or teasing decent women. What was the reason for that? It is because they were *ya nei* and we are now encouraging this sort of people and acts.

It is actually for their own good that we keep curtailing their power. Power and responsibility are commensurate. With less power, there will naturally be less liability for the mistakes made. However, this is not what the Government wants; it wants all the power but not any liability.

Moreover, in this legislative exercise, the Government has taken upon itself to give the stamp of approval itself, so that the officers concerned know about this. What sort of education is this? I want to tell Members that as everyone is saying that there should be patriotic education, so let me ask Members now if they know what the Three Main Rules of Discipline and the Eight Points for Attention are. I believe most people do not know about them. Such patriotic education is really pathetic. I wonder if Secretary Ambrose LEE knows about these? If he does, please tell us later. When no one trusted the Red Army of the Communist Party, they laid down the Three Main Rules of Discipline and the Eight Points for Attention. Even though someone belonged to the Red Army, if he took anything from the people, be it just a single needle or a piece of thread from the masses, he would immediately be disciplined. Only in this way could they win the trust of the people. However, in reality, they were attacking local tyrants and distributing land and they were in fact the ones who were stealing needles and thread.

Members, the Government now asks us to legislate pursuant to Article 30 of the Basic Law to protect the freedom and privacy of communication of the Hong Kong people, except when the Government is to safeguard the public security of Hong Kong and to prevent or detect serious crimes. If things are not done this way, then there will be serious trouble. Since all the above elements have already been included in it, that means any abuse of power will infringe on the privacy of Hong Kong people. Another point is: what if the information is sold? What about selling it to a weekly magazine? What are the liabilities? None. This will only be dealt with through disciplinary action. Disciplinary

action is no big deal and one can continue to work. One does not have to be afraid even when one is dismissed. If a job will offer a lot of benefits, why should one be afraid? Therefore, it is only right that the person concerned should assume criminal liability.

Furthermore, as a defendant, he can defend himself and he will be punished only when he fails to get an acquittal. Given that there are so many tiers in the mechanism, the Government still thinks that this is not necessary. I really find this perplexing. Some Honourable colleagues claim that we have no confidence in the Government, therefore, our logic is totally wrong. Of course, I do not have confidence in the Government and I do not even have much confidence in myself, right? Therefore, the legislation must be put in place and there should be explicit provisions for the purpose of regulation, so that people will see that this is not a rule by individuals. Quite simply, disciplinary action means that one will be punished by the head but one may have been ordered to do the job by the head, so how would one be punished? Such matters should be referred to the Court. The Judge is not related to him in any way. If there is any irregularity, just like goods in the market, such matters should be referred to the Court for the Judge to make a decision.

If one is to monitor or sanction oneself like this, it will be the onset of corruption. I only have to be suspected of having committed a serious crime at a certain date to be investigated or followed. However, such irregularities on the part of the Government will not result in any responsibility. Is this fair? If the Government deliberately ignores this point in legislation and when other Members request for an amendment, it pays no heed to them; and when Members propose amendments, it opposes them, then it is being truly stubborn, making one mistake after another to the very end.

In fact, since day one of the discussion, I have been in a mental struggle that involves two logics. It is really a struggle. Since the Government possesses public power, should it regulate itself with its own public power? Or, should a third party, that is, the judicial system, act as the middleman? This is not just a problem for the Legislative Council. It does not matter if we are bullied by the Government today, since members of the public will fare the worst. Can they scold the Government here? Of course not. On this issue, I think that things have come to a point of no return, the reason being that the Government has all along refused to listen to our views. In the end, even the request for the Government to lay down a "sunset clause" is not accepted, so how can I possibly support the Government?

Therefore, I hope that Members, that is, Members who have given their speeches earlier on and who said that the Government should be given more powers and that they trust the Government, will act according to what they profess, so that there is proportionality between power and responsibility and a balance between the two can be achieved — since they love to talk about this matter so much. If the power is great, the liability should be full. If full liability is to be assumed, it should involve the necessary sanctions. I think that this point is essential to the rule of law. Otherwise, the rule of law is only a joke and it will mean that laws are used to govern people but not making all people equal before the law and enjoy equal rights. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, we oppose Mr James TO's amendments to subclauses (1A) of clauses 4 and 5 and Ms Margaret NG's amendments to subclauses (1A) of clauses 4 and 5 relating to the consequences for contravention of the enacted Bill. These amendments will make any act of carrying out interception or covert surveillance in contravention of clauses 4 and 5 of the enacted Bill a criminal offence.

Just as the authorities have repeatedly explained to the Panel of Security and the Bills Committee, that the authorities have consulted the views of those concerned about this topic and proposed that the current Bill be limited to public officers only. This means that interception and covert surveillance carried out by non-public officers will not be subject to the Bill. It would create an anomaly, if for the same conduct, law-enforcement officers but not others would have criminal liability. Under our proposal, a breach under the proposed legislation on the part of public officers would be subject to disciplinary action, and this would be stipulated in the Code of Practice.

In addition, any non-compliance would be subject to the scrutiny of the Commissioner, who may report such cases of irregularity to the Chief Executive, the Secretary for Justice or the panel Judges. The Commissioner can also make

recommendation to the heads of department on measures to be adopted so as to put into practice the aim of the legislation or the provisions in the Code of Practice. The Commissioner also has to handle and scrutinize any application from the applicant who is suspected to be the subject of the interception or covert surveillance carried out by the department. Furthermore, statistics on cases of violation would also be provided to the Chief Executive in the Commissioner's annual report, which would also be tabled to the Legislative Council.

The above are powerful measures to ensure that law-enforcement agencies and their officers will comply with the law and the applicable procedures. Based on the above reasons and the fact that the Bill has provided an appropriate check and balance on the actions concerned, we are of the opinion that at this stage, no new criminal offences should be introduced against public officers. At the next stage, when considering regulatory measures applicable to everyone, we will consider this point. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): What the Secretary has said just now is really somewhat perplexing. Why? In fact, both police officers and law-enforcement officers are already used to being subjected to restrictions when taking actions. For example, when exercising the power of arrest, if such power is exercised in an improper or unlawful manner, it may result in the other party suing the police for unlawful arrest or false imprisonment. When the police lawfully use force to arrest or restrain someone, it is exercising its power lawfully. However, if this limit is exceeded, charges may be brought against the officer concerned for assault occasioning actual bodily harm. These are the two aspects of power.

What I have said just now is that in a situation of direct confrontation, since it is possible for the other party to see clearly whether law-enforcement officers have acted beyond their powers, he can take actions against the authorities. If an arrest made by the authorities is unlawful, it will then become false imprisonment, will it not?

Conversely, in the present situation, the authorities are hiding in the dark. The authorities can carry out wiretapping for half a year or a year, depending on the authorization, or it is possible that no authorization have ever been granted, yet there will be not any penalty. Thanks to the discussions on certain issues

that we have had over the last few days, we now have a fuller picture. Yesterday, we discussed why information obtained unlawfully would not be destroyed and could be used for other purposes. Now, it is said that unlawful interception of communication will not be made a criminal offence, instead, a civil claim can be made. I think that all these issues are related, that is, this kind of operation is designed to indirectly encourage actions of unlawful obtainment. In the Government, unlawful obtainment is one of those things that — although the Government may not want to encourage it, it does not mind such actions and it does not want its subordinates to be subjected to any punishment for such actions. The Government is happy to see that the result or product so obtained can be retained, or at least it will turn a blind eye to this. It does not want to exclude or reduce the possibility of such unlawful obtainment. The issues are all related, are they not? They all have the same logic and are consistent.

Is it the Government's intention to have something else beside a lawful channel, since a lawful channel will require authorization from a Judge and it is also necessary to meet some criteria and the test of proportionality? In some cases, a matter may be very troublesome or it is inconvenient to leave it to some Judges, even though these Judges are already trusted politically. However, will there be situations in which it is really necessary to do something through a third party, yet it is not reasonable to let this third party face criminal charges, as this will really be unfair to him?

Of course, the Secretary will think that I am suggesting a conspiracy theory and thinking that the sky may fall down. However, the entire existing arrangement is very interesting. When the law is violated, all the people concerned will not get into any trouble. Of course, since the Government has hinted that once a person is asked to do a job, he will have to be treated well. His superior will be happy to see what he has done. If something is lawful, it can be carried out within the prescribed confines. However, if it is unlawful, his superior may still want him to do it but it will not be reported no matter what and the superior will not punish him for obtaining the information. This grey area in the middle is designed to make subordinates feel at ease, knowing that even when something is done *ultra vires*, the act will still not be a criminal offence.

Conversely, is there really the chance that one will be subjected to disciplinary action? This point is very complicated. Assuming that the product he obtains is by unlawful means but it seems that there is a chance that a case will be cracked, then he is only being too aggressive and he can still make

amends for his wrongdoing by doing a meritorious service. Therefore, when considering the punishment, one will say that this subordinate is in fact diligent and efficient in his work and although he has done something wrong, giving him a slap on the wrist will do. Of course, he will get a bad record but it does not matter. We have seen many past cases in which despite the fact that some officers of the ICAC were repeatedly ruled by the Judge to have acted unlawfully and *ultra vires* in carrying out wiretapping, they were still promoted very quickly. In the eyes of law-enforcement departments, cracking a case might be considered the most important thing. Doing something unlawful does not matter. So long as there is no penalty clause, one will be happy to see such things done. I think that if there is not any penalty clause, a lot of such possibilities will arise in actual implementation. I dare not say such things will surely happen but at least, this will cast doubts on the present system.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, Mr James TO has raised many points just now and I find them very acceptable, so I do not think it necessary to repeat them. I just want to respond to a remark made by the Secretary. He said that it is not fair to prescribe penalties intended for government law-enforcement officers because at present, there is also no law regulating any intrusion into privacy by people not belonging to governmental law-enforcement agencies, however, he will consider this matter at the next stage.

Chairman, this is really inconceivable. I do not know when, but at least for the next three years, the Government will not propose another piece of legislation. As a result, for all this time, public law-enforcement officers will not be subject to any criminal liability, and then, a few years later, criminal liability will be imposed on them all of a sudden. Is this justifiable? No, this is not. Rather, it should be specified in the present legislation that together with the power comes criminal liability.

In fact, it is stipulated in the Basic Law that no one can infringe on other people's privacy. However, there are some special procedures to empower the relevant agencies to conduct checks on communications according to the legal procedures. That is to say, the relevant agencies will have such a power only in the future. This is what we already know today. When exercising this kind of power, one is also subject to criminal liability. In this way, we all know that

officers of the disciplined forces and law-enforcement officers will not violate the law, so we can set our mind at ease. If there are criminal liability and responsibility, all will be very clear. When someone has to be punished or penalties are to be drawn up in the future, everything will be very clear and all will be very reasonable as everyone will be faced with criminal liability for infringing on other people's privacy.

However, if the legislation has been implemented for many years and all this while, they are not subject to any criminal liability and the same applies to outsiders and the Government is powerless in sanctioning them, then how can the Government tell law-enforcement officers that it is necessary for them to be subject to criminal liabilities? This is really unjustifiable. Chairman, I find many of the things said by the Secretary today are unconvincing, moreover, just as Mr James TO said, his line of reasoning is perplexing. I think this should be pointed out. Thank you, Chairman.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, four were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 11 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your amendments.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to add subclause (1A) to clauses 4 and 5 relating to the proposed penalty provision.

Proposed amendments

Clause 4 (see Annex)

Clause 5 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is not agreed by a majority respectively of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendment negatived.

MS MARGARET NG (in Cantonese): Chairman, I move the amendments to subclauses (2) and (3) of clause 4.

Chairman, these two items are technical amendments. Words deleted in paragraph (2)(b)2b are mainly in accordance with the amendments of the definition of communications I proposed at the earliest stage. The deletion of paragraph (2)(c) is due to the fact that we consider it unnecessary. We are of the opinion that these words should not be added. As these two parts have been deleted, subclause (3) has become unnecessary. Chairman, all these are technical amendments.

Thank you, Chairman.

Proposed amendments

Clause 4 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Ms Margaret NG's amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): We oppose the amendments proposed by Ms Margaret NG.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, that is not necessary.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is not agreed by a majority respectively of each of the two groups of Members, that is, those returned by

functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendments negatived.

CLERK (in Cantonese): Clauses 4 and 5 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clauses 4 and 5 as amended stand part of the Bill. Will those in favour please raise their hands?

(Member raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CLERK (in Cantonese): Clause 7.

CHAIRMAN (in Cantonese): Mr Albert HO is not in the Chamber now. Members, I have to suspend the meeting to allow Mr Albert HO be fetched back to the Chamber.

(Mr Albert HO hurried back to the Chamber)

CHAIRMAN (in Cantonese): Meeting now continues.

MR ALBERT HO (in Cantonese): I am sorry, Chairman.

Chairman, I move the amendments to clause 7. Clause 7 mainly refers to the head of a department may designate any officer not below a rank equivalent

to that of Senior Superintendent of police to be an authorizing officer for the purposes of this Ordinance.

I only wish to add one point in my amendments. And that is, in the event of making an application, even if it is made in the same department, it should not be made from the same formation. In other words, if it is made by the Organized Crime and Triad Bureau, which is charged with the specific responsibility of handling the triad societies or organized crime, the application should not be made to a Chief Superintendent of police of the same formation. Instead, it should be made to a Police Superintendent of another formation. I consider that there should not be a case where the relevant officer submits an application for approval to a superior of the same formation. I believe this is consistent with the views expressed by the Government to us in the meetings of the Bills Committee. I only wish that this will be explicitly provided in the Ordinance.

Thank you.

Proposed amendments

Clause 7 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Mr Albert HO's amendment therero.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, the Democratic Party has proposed to amend clause 7. This is because an application in the scope of interception of communications will be authorized by a Judge. Meanwhile, application for Type 1 covert surveillance will also be authorized by a Judge. As for application for Type 2 covert surveillance, that is, surveillance of less intrusiveness, it will be authorized by a Senior Superintendent of police or above as stipulated in clause 7.

The relevant arrangement has been stipulated by the Administration in the Code of Practice that a Chief Superintendent of police is of half a rank higher than that of a Senior Superintendent, whereas a Chief Superintendent of police or

above is one rank higher than that of a Senior Superintendent of police. It is true that a Chief Superintendent of police is of a very high rank. But when it is stipulated that the authorizing officer should be a Chief Superintendent of police or above, we expect that the approving officer should not come from the same formation as that of the applicant, who, according to the current proposal of the Administration, should be a Police Inspector. However, the Government is only prepared to explicitly express in the Code of Practice that if an applicant is conducting the investigation of the relevant case, for instance, a case of sensitive nature, it will be best for the Chief Superintendent not to approve an application from an officer working under him. The reason is that, on the one hand, the Chief Superintendent holds meetings with the relevant Inspector, while on the other, he instructs the Inspector to submit the application to him. This arrangement is not satisfactory, and should therefore be avoided.

Moreover, as the approving officer has to take into account the massive information and tests of the whole legislation, we hope that there is a certain distance between the approving officer and the applicant, that is, the team submitting the application. Why is such a distance so important? Let me illustrate with a simple example. The heads of the Organized Crime and Triad Bureau — the Bureau mentioned by Mr Albert HO just now — and the Narcotics Bureau are all of the rank of Chief Superintendent. When there is a direct relationship in giving approval to an application from his inferior and interests of gaining merits and achieving success, will the Chief Superintendent view the situation from a distant angle and take into consideration the need to abide by law which requires him to maintain a balance, including the protection of rights and freedom? Frankly speaking, I think this arrangement is inappropriate for the Superintendent. It also puts him in a very difficult position.

On the contrary, when an officer from the Narcotics Bureau charged with the responsibility of taking actions submits his application to a Chief Superintendent (Criminal) of another formation of the headquarters, the Chief Superintendent, who does not have a direct responsibility for the operations of the Narcotics Bureau (I believe in taking into consideration that he is the approving authority, he will have some misgivings about giving a rash approval or indicating an inclination of approval, which can be found out by the Commissioner or through other channels later). He will then take into account the role of the approving authority to abide by law so as to prevent any problems from occurring. This will be his prime consideration.

However, if he is from the same formation, that is, he is the head of the formation of the applicant, we can imagine that he will assess whether the risk is

worth taking and consider many other factors as well. For instance, firstly, he will be more concerned since the applicant is a "subordinate" from his own formation. Secondly, probably he will be more sympathetic and enthusiastic. We have to remember, being enthusiastic is not necessarily a bad thing. But when we require him to play the role of a distant, independent and neutral approving authority, it will lead to another possible consideration. As the public does not know whether he has the same trend of thought, and when everything is not conducted openly, it will be a further cause for worries. Therefore, I consider this inappropriate.

Our approach is to provide it in the legislation. The approach of the Government is to provide as much as possible, a larger part of it in the Code of Practice. As a matter of fact, the difference between the two lies in the part of the Chief Superintendent. There will be a question of interests if the Chief Superintendent comes from the same formation, even though he is not directly responsible. If the authorities will include this point in the Code of Practice, our thoughts will be much closer. What remains will simply be a matter of legal aspects. If it is not included in the Code of Practice, there will be differences in both the legal aspects and the scope. With the significance of infringement of communications and privacy, even if the operation is approved by means of internal approval, it should be approved by an officer who is absolutely — not absolutely — but relatively independent, distant and with less vested interests. This will be better in terms of the internal monitoring of the Police Force and in gaining the trust of the public in the system.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR RONNY TONG (in Cantonese): Chairman, I would like to make a supplementary comment. At present, we are considering *ex parte* applications. In view of the fact that within the framework of the Ordinance, there is absolutely no opportunity for anyone outside the formation to have any knowledge of these *ex parte* applications, apparent conflict of interests is of utmost importance under the circumstances of an *ex parte* application. Under the law, we have a basic principle called "apparent bias". I believe the Government clearly understands that "apparent bias" can render all decisions illegal. That is why I absolutely support this amendment proposed by Mr James TO. I think the Government does not have any grounds for opposing the amendment.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR MARTIN LEE (in Cantonese): I do not wish to be repetitive. But I really do not know why the Government opposes this. Therefore, I would like to hear from the Government the argument for opposing the amendment. This amendment is very reasonable. The existing identification procedure (that is, identification of suspects) is also like this. The procedure is monitored by officers of other departments.

MR HOWARD YOUNG (in Cantonese): Chairman, I remember when we were discussing the Code of Practice, we had mentioned this point. I understand the argument of Mr James TO. The only worry I have is that we are talking about different formations. The establishment of the Police Force is of a larger scale. It is easier for them to act accordingly. I wonder whether it will be difficult for other disciplined forces with a smaller establishment to abide by it since they may find it difficult to identify different formations. I have no idea if the Government has considered the difficulties encountered in this aspect. We certainly hope that there is a distance between the approving authority and the applicant. This will be fairer. But I do not wish to see that this requirement will have any adverse impact on operational efficiency. It will also be unsatisfactory.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, we oppose to the amendment proposed by Mr Albert HO. We consider that since this amendment is involved with the operational details of a department, it should not be regulated in the legislation. As a matter of fact, there are alternative views in the Bills Committee. It is considered that due to the confidentiality of operations, information exchanges among different formations should be avoided as much as possible. This view is consistent with our policy of restricting the

disclosure of information to circumstances under which there is a need to know. Who should take the role of the authorizing authority in a case? The decision should be made by the law-enforcement authorities in accordance with their individual operational needs. Nevertheless, we will set out in the Code of Practice that the authorizing officer should not be directly involved with the decision of making an application. Thank you, Madam Chairman.

MR MARTIN LEE (in Cantonese): Madam Chairman, now I clearly understand. The words that "your own people" do not trust "your own people" speak it all. If that is the case, you should not ask us to trust you, because even "your own people" do not trust "your own people". Then how can we trust you?

MR LEUNG KWOK-HUNG (in Cantonese): I think the Secretary is speaking nonsense. Even if the relevant officer is afraid that his action will be known to other people, he still has to submit his application to the original superior. If the original superior has received money from others, he will reveal the information secretly. On the contrary, officers do not know anyone from another department. It will be more difficult for officers to collude with those from different formations. If the officer is dishonest, whatever he does is dishonest. In fact, the argument given by the Secretary does not make any sense. He said that if an officer from Department A submitted an application to Department B, details of information would be disclosed. But when an officer of Department A notifies his superior of the information, details of information are also disclosed. There is not a difference between the two. However, there is a difference under some other circumstances. It is natural for the "head" of Department A to support the actions of those working under him in Department A. It is as simple as that.

I really do not understand the argument of the Secretary. This is the typical style of language used by you all. You only speak with abstract principles but without any real substance. Quoting from the Code of Practice, the Secretary said that according to normal practice, information would not be disclosed to "unrelated" persons. This is true. However, in legislating, we are now trying to specify a "related" person to whom an officer can submit his application in the future. Though this is only a minor amendment, the Secretary still has to obstruct the passing of this amendment. The term "the ever opposing party" used by Donald TSANG is best reflected in the attitude of the

Secretary. Despite the fact that the Secretary is not the person who governs, he is excellent in playing the role of "the ever opposing party". The Secretary is unable to express clearly his views.

I repeat once more. If information is to leak, no matter to whom you are notifying, the information will be leaked. Is the Secretary telling me that confidential information will not be leaked by someone in the same department? As a matter of fact, information is often leaked by officers in the same department. If the Government is being unreasonable, it is like "a scholar arguing with a soldier, the rationale cannot come across". It will only be a waste of efforts. I believe we really need more aggressive actions. I can tell you, if things are to go on like this, discussion on the last day will certainly be very aggressive.

CHAIRMAN (in Cantonese): Does any other Member……many Members have just raised their hands. Would those Members who wish to speak raise their hands again? I could not see clearly at one glance.

(Dr LUI Ming-wah raised his hand to indicate his wish to speak)

CHAIRMAN (in Cantonese): All right, Dr LUI Ming-wah has not spoken before.

DR LUI MING-WAH (in Cantonese): Thank you, Chairman. This is the first time I speak. Originally I have not wanted to speak. Actually I have seldom spoken on this aspect. However, as the current topic under discussion is about management, I would like to share with you some knowledge about management.

Large companies, especially companies dealing with technology, all of them will act according to the principle of "a need basis". We can only obtain certain knowledge when there is a need for it. When staff members are assigned to handle the same project, even though they are in the same department, tasks may be assigned in great detail and each staff member may not know what the others are doing. This is practised in all companies. It is my belief that the Government is also operating in high confidentiality in terms of the current operations of interceptions. Take a company as an example.

Members may query the reasons for the management to employ staff members if they do not trust them. Nevertheless, this is the fact. This is the general practice in large and small companies alike. I therefore believe that, for the highly confidential operations of the Government, it is not a cautious practice if information of a certain department is to be shared with other departments. I have trust in and agree with the practice of the Government in allowing the same department to be responsible for the job based on the reasons that they know what they are doing. Of course, you may query whether this practice will lead to other problems. But this is a problem in management and can be solved from the management perspective. We cannot blame the Government and say that their own people do not trust each other. This is impractical, and spoken from a lack of knowledge in management.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak?

MS MARGARET NG (in Cantonese): Yes, Chairman.

CHAIRMAN (in Cantonese): You have not spoken. I will let you speak first.

MS MARGARET NG (in Cantonese): I would like to respond briefly to the speech of Mr LEUNG Kwok-hung. I am glad that this debate has made Mr LEUNG Kwok-hung understand our good intention and our reasons for doing something rational like studying the amendments in detail. He is also committed to doing this rational thing with us, which, I think, is very much against his character. However, we may find that consequently we cannot convince him to discuss the amendments in a rational manner. Instead, we will be convinced by him to take more aggressive actions. Chairman, if even this amendment proposed by Mr Albert HO is not passed, I will find the speech of Mr LEUNG Kwok-hung very attractive indeed. Thank you, Chairman.

MR MARTIN LEE (in Cantonese): Chairman, we are not talking about companies, but the members of the whole Police Force and disciplined forces. We are now talking about the rank of Chief Superintendent of police. If the Administration is worried that even Chief Superintendents will leak information,

it means that of the many Chief Superintendents in the whole Police Force, there is not even one who can be trusted. It is not the case, is it? Has the Secretary ever thought of what these Chief Superintendents would feel if they have heard of this?

MR JAMES TO (in Cantonese): Chairman, according to my understanding, this is not wholly a question of trust, while the concept of "need to know" is completely defined by the authorities.

I have thought about if I were in the position of the authorities, what kind of design would be the best. Let me illustrate with an example. I will take the Narcotics Bureau located at the Headquarters as an example. If this team suddenly submits an application to the teams of the West Kowloon Police Region, I would consider the scope of "need to know" too far. It is possible for the authorities to design a concept covering several formations to enable inter-formation applications. Furthermore, there is already a rank of CSP (Chief Superintendent of police) in the Headquarters of the Police Force. As a matter of fact, this can be considered by the authorities. The Chief Superintendent of the Headquarters comes from the crime formation — no, it should be the criminal formation — but he is not directly under the formation that conducts investigation. Neither is he accountable to nor performance-related to the relevant formation. Owing to the fact that I sincerely do not wish there is such a situation, if more than 20 formations are put in place (the figure provided by the Government indicates there are only some 20 formations, in fact this can be done), then the Government can act according to the principle of "need to know". When there is a need to know, he will be informed. In this way, maintaining confidentiality can also be taken into account of.

There is another aspect to it. We have to do this because we have to take up a statutory responsibility. This is a different matter. As it is a statutory responsibility, it will be different from our usual responsibilities, such as managerial, executive and disciplinary responsibilities in a sectional framework mentioned by Dr LUI Ming-wah. This is statutory responsibility which is totally different from other responsibilities.

To take up the statutory responsibility, we have to select a batch of officers, and conduct an assessment on confidentiality. As for the scope of

need, it can be restricted to the formations that handle highly confidential missions. Inter-formation approval will be given by these formations and not by the "regional" formation from which the application is submitted. In terms of operation and administration, this practice is not in conflict with the principles of the so-called sectional framework, such as the principle of "need to know", that is, the principle of being informed when needed, and the principle of maintaining confidentiality when needed. This can be designed. As a matter of fact, it will be a substantial improvement.

Furthermore, I would like to respond to Mr Howard YOUNG's question of how a force of a smaller scale should handle the procedure. Actually I have thought about it as well. Take the Customs Drug Investigation Bureau of the Customs and Excise Department as an example. In fact, they have in place several officers of the equivalent rank who can take up this responsibility. It is acceptable as long as the superior of the same formation is not responsible for authorizing the approval. There is also an implication in Dr LUI's speech, and that is, whether the relevant officer knows how to give an approval. This is the key question. Let us consider this. A similar operation of Type 1 surveillance will have to be authorized by a Judge. We can similarly query whether a Judge knows anything about the operations of the Police Force and the Independent Commission Against Corruption. We can query whether a Judge knows how to give an approval.

However, the concept is not based on this. The concept is based on the fact that he is familiar with law. Under the prescribed guidance and Code of Practice, this trustworthy, experienced person of a relatively high rank, after reading the relevant information, affidavits, faxed materials, and after assessing whether the reasonable questions raised can be answered, will make an objective approval on the basis of all information. In fact, it is also provided in the legislation that he has to assess whether he is convinced by the written content. A Judge may not know whether the person is a villain who has heaps of criminal records. A Judge is not supposed to have this information. He is supposed to base on the affidavit or available information to make an approval. The responsible person in question should not be an officer who also comes from the Organized Crime and Triad Bureau and who obviously knows this person under investigation has heaps of criminal records. He simply knows even if he is not informed.

Otherwise, the "head" responsible will read the affidavit in a relatively casual manner. This is because he already knows the relevant information.

Since he has been assigned to different formations such as the criminal formation, he is generally familiar with the information. This is just the scenario we are trying to avoid. The approving authority should simply base on the Bill, the law, the available statement and the content of the application to assess whether he can be convinced by the available information. He should not allow some familiar information in his memory, or even previous cases he has handled and still remembers to be supplementary background information. It should not be like this. The legislation has expressly provided that the officer should base on the information of the application for assessment when he makes an approval. Whether he has a general knowledge of criminal matters is absolutely irrelevant.

CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak again?

MR ALBERT HO (in Cantonese): Chairman, I would only like to conclude with three points. Firstly, considering from the point of principle, there should be a relatively independent monitoring even in the case of executive approval. If the head of the team responsible for investigation is vested with the responsibility of approving, the purpose of imposing a relatively independent check and balance will be defeated. Mr Ronny TONG has already spoken on this clearly just now. There is a situation of potential conflict of interests. We should avoid bias. At least we should avoid giving others an impression of being biased. This is the first point.

If there is a need to know, that is, he has a need to know, the second question of how to deal with this will arise. If it is said that the departments cannot deal with this, the most logical way of handling this is to hand it back to the Judges. The amendment proposed by Ms Margaret NG this morning attempted to achieve the effect of handing all the authority to a Judge. This is because if the departments fail to do this — if Superintendents of police are not trustworthy — then Judges who have undergone in-depth integrity check should be trustworthy. Nevertheless, the Government does not wish to hand the authority back to the Judges, instead it is ready to hand it over to some Senior Superintendents of police. Meanwhile, the authorities have indicated that there is no need for the Senior Superintendents to know. It is risky if they have the knowledge. The argument of the Government really makes me worried. As Mr Martin LEE has just pointed out, the authorities are worried that allowing the Senior Superintendents to know will be insecure. If the Government has doubts

about these officers who are of such high ranks in enforcing the law, then I am really worried. At present, it is those who are in power who have constant doubts about others. I would like to ask the Government, are the persons in power qualified to have doubts about others? When the authorities are exercising their powers, is it possible for others to query whether the authorities' actions are just and lawful? This is the question.

The last point, which is the only solution to the problem? If the Government considers that these Senior Superintendents are not trustworthy — the Government may not mean this — but if it is really worried about this, I would ask the Government to conduct integrity checks at a more in-depth level. The problem will no longer exist when all Senior Superintendents responsible for giving approval have undergone such checks. When all Senior Superintendents have undergone in-depth integrity checks, they will fully satisfy the requirements of the Government. It will also meet our purpose of the need to maintain a relatively independent monitoring. Thus, it is my hope that Members will support this amendment.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(Mr Ronny TONG indicated his wish to speak)

CHAIRMAN (in Cantonese): Mr Ronny TONG.

MR RONNY TONG (in Cantonese): I had raised my hand before, but you did not see me.

I have to respond to the earlier speech of Dr LUI Ming-wah. I have been a lawyer for several decades. This is the first time I have heard that basic legal principles can be ignored on the grounds of "operational convenience of a company". I can only hope that the audience watching the television broadcast just now has not heard that part of the speech.

MR ALBERT HO (in Cantonese): I now officially move the amendments to clause 7.

CHAIRMAN (in Cantonese): Committee will now vote on the amendment moved by Mr Albert HO. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert HO rose to claim a division.

CHAIRMAN (in Cantonese): Mr Albert HO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Frederick FUNG, Ms Audrey EU, Mr LEE

Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Mr Albert HO, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 24 were present, four were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 24 were present, 13 were in favour of the amendment and 10 against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 7 stand part of the Bill.

CHAIRMAN (in Cantonese): Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): The Committee now deals with clauses and Schedules relating to "oral applications".

CLERK (in Cantonese): Clauses 11, 17, 20, 21, division heading and cross-heading before clause 25, clauses 25 to 28 and 57.

MS MARGARET NG (in Cantonese): Chairman, may I seek your consent to move under Rule 91 of the Rules of Procedure that Rule 58(7) of the Rules of Procedure be suspended in order that this Committee may consider Schedules 2 and 3 ahead of other clauses and new clauses of the Bill.

CHAIRMAN (in Cantonese): As only the President may give consent for a motion to be moved to suspend the Rules of Procedure, I order that Council do now resume.

Council then resumed.

PRESIDENT (in Cantonese): Ms Margaret NG, you have my consent.

MS MARGARET NG (in Cantonese): President, I move that Rule 58(7) of the Rules of Procedure be suspended to enable the Committee of the whole Council to consider the Schedules ahead of other clauses and new clauses of the Bill.

PRESIDENT (in Cantonese): I now propose the question to you and that is: That Rule 58(7) of the Rules of Procedure be suspended to enable the Committee of the whole Council to consider Schedules 2 and 3 ahead of other clauses and new clauses of the Bill.

PRESIDENT (in Cantonese): I now put the question to you as stated. Will those in favour please raise their hands?

(Members raised their hands)

PRESIDENT (in Cantonese): Those against please raise their hands?

(No hands raised)

PRESIDENT (in Cantonese): I think the question is agreed by a majority respectively of each of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the motion passed.

Council went into Committee.

Committee Stage

CHAIRMAN (in Cantonese): Council is now in Committee.

CLERK (in Cantonese): Schedules 2 and 3.

CHAIRMAN (in Cantonese): Ms Margaret NG and Mr James TO have separately given notice to move the amendments to clauses 2 and 20, and deletion of clauses 25 to 28 from the Bill in relation to oral applications. The Secretary for Security has also given notice to move amendments to subclause (6) of clause 2, and clauses 26 and 27.

Since Mr James TO's amendments to these clauses have the same effect as those proposed by Ms Margaret NG, I will only call upon Ms Margaret NG to move her amendments. Mr James TO may not move his amendments irrespective of whether the amendments moved by Ms Margaret NG are passed or not.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendments.

MS MARGARET NG (in Cantonese): Chairman, the simplest explanation is that, first of all, everything starts with clause 25. The following clauses 25, 26, 27 and 28 are all related to oral applications. The authorities seem to indicate that all general applications, whether they are submitted to panel Judges, internal superiors or through other channels, must be applications in writing. However, starting from clause 25, almost all applications can be submitted in the form of oral application.

I think oral application is of course not as stringent as application made in writing, particularly when schedules are involved. We have to know the exact information of the application submitted by the applicant, together with specific details, rationale, criminal offences or acts that threaten security. All information has to be clear, detailed and specific because it may affect whether the application will be renewed in the future or has to be terminated afterwards. Besides, ancillary powers such as approval of the applicant to conduct wiretapping of certain persons at certain addresses may be involved. All these requests have to be clearly, specifically and accurately listed and recorded. Under such circumstances, it is absolutely not appropriate to submit an application orally. The only exception is emergency application (we will examine provisions regarding emergency application later). Otherwise, oral application should not be submitted. Thus, I suggest deleting all provisions concerning oral application, especially the ones adding oral application in the provisions on application for emergency authorization.

Chairman, with your permission, I would like to invite Members to examine clause 25 regarding the methods of submitting oral applications. Clause 26 is about confirmation upon submitting an oral application. Since provisions regarding oral application are deleted, provisions setting out application for confirmation are not necessary. Clause 27 sets out how an application for confirmation of prescribed authorization is to be determined. Similarly, as oral application is not permitted, all these provisions should be deleted. Clause 28 regarding the submission of oral application under emergency circumstances is exceptional. Since we have added appropriate provisions in the part on emergency applications, we also suggest deleting clause 28.

Chairman, pursuant to the deletion of these provisions in the main body, provisions in respect of other definitions should also be deleted. Chairman, regarding the definition of oral application, I may need to give an explanation. I refuse to accept insolent methods such as making a telephone call as a form of submitting emergency applications. Due to the fact that there is a reference to clause 25(1) in the definition of oral application, and pursuant to my suggestion of deleting clause 25(1), I suggest the definition be deleted as well.

As for clause 2(6), it is a provision which explains what oral application is and what constitutes an oral application. Detailed wordings are used with the only purpose of providing that oral application delivered by telephone, made in

person, and through speech are all counted as submitting oral application. Accordingly, these provisions are completely unnecessary.

Originally, there is a reference to emergency application in clause 20(2). But emergency application has already been provided in clause 2 — Chairman, I will explain in detail when I make a speech on emergency application — as the clause also mentions oral application, the provision should also be deleted.

Likewise, oral application is also mentioned in clause 21(2). It should also be deleted altogether.

Chairman, put simply, it is because I do not wish to have generalized oral application, I propose to delete clauses 25 to 28. Pursuant to this, other definitions or provisions with references to oral application should be deleted altogether. Thank you, Chairman.

Proposed amendments

Clause 2 (see Annex)

Clause 11 (see Annex)

Clause 20 (see Annex)

Clause 21 (see Annex)

Clause 25 (see Annex)

Clause 26 (see Annex)

Clause 27 (see Annex)

Clause 28 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO and the Secretary for Security to speak on the amendments moved by Ms Margaret NG as well as their own amendments respectively. However, the Secretary for Security may not move his amendments at this stage. If the Committee agrees to Ms Margaret NG's amendments, the Secretary for Security may not move his amendments.

CHAIRMAN (in Cantonese): Mr James TO.

MR JAMES TO (in Cantonese): There is no need for me to speak.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities have proposed amendments to clauses 2(6), 26 and 27. With respect to clause 2(6), during the discussions of the Bills Committee, Ms Margaret NG was of the view that the description of "oral application" should not only set out certain examples, but should include all methods of submitting oral application. Thus, application "made orally in person" should also be set out. In view of this, the authorities have proposed an amendment to clause 2(6), adding the reference to "made orally in person" so that the scope covered by the definition will be clearer.

As for clauses 26 and 27, there are three amendments proposed by the authorities:

- The proposal of Ms NG in amending clause 26(1) is accepted, and it has clearly been set out that application for the confirmation of authorization shall be made within 48 hours of making an emergency or oral application.

- As for proposed amendments to clauses 26(3)(b) and 27(3)(b), these are made with the purpose of reflecting the proposals of the Bills Committee, and in particular, Mr James TO's proposals. If no application for confirmation of emergency or oral authorization is made within 48 hours, or if confirmation of authorization application is refused, the head of the relevant department shall destroy any information obtained from the operation.

Adding clause 26(4A) is a consequential amendment pursuant to the deletion of clause 2(7) so as to expressly provide for the arrangement after the original relevant authorizing authority no longer performs the functions of its role.

The Government opposes to the amendments proposed by Ms Margaret NG and Mr James TO, because they have the effect of cancelling out the

arrangement of "oral application" under the new mechanism in which only emergency authorization can be made in the form of oral application.

We consider that while oral application and emergency authorization are two mechanisms of different categories and levels, they are both necessary. According to the Bill, oral application is a form of application, applicable to all prescribed authorization, including Judge's authorization, executive authorization, and emergency authorization. Only under circumstances when it is not reasonably practicable for the submission of written application can an application be made orally. For instance, the applicant only has sufficient time to meet the panel Judge, but does not have enough time for the preparation of a formal application in writing and all the affidavits required.

On the other hand, emergency authorization is only applicable to cases that originally require Judge's authorization, that is, interception of communications or Type 1 surveillance. Under the Bill, application under emergency authorization requires an officer of a department to apply to the head of the department concerned. The head of the department shall only issue the authorization sought under the circumstances that he considers as emergency circumstances referred to in the Bill, and that having regard to all the circumstances of the relevant case, he considers it is not reasonably practicable to apply for a Judge's authorization.

The relevant arrangement will ensure that under possible circumstances, all applications are submitted to appropriate authorizing authority. In respect of Judge's authorization, application to the head of department for authorization shall be considered when it is not reasonably practicable to submit an application in writing or orally to a panel Judge. This will avoid any circumstances of overriding the panel Judges in authorization.

Application for authorization is not applicable to circumstances that do not meet the definition of emergency authorization, such as those that do not involve death or injury but are still urgent in nature.

As a matter of fact, since the relevant authorization issued or renewal granted in response to oral application has to be confirmed within 48 hours beginning with the time of the issuance of the relevant authorization or the granting of the renewal, and all the documents relating to the application in writing have to be submitted, law-enforcing authorities will be unable to use oral application as a "short cut". However, if the procedure of oral application is

not in place, certain operations which should be carried out will not be implemented.

Deleting the mechanism of oral authorization is not beneficial to protecting the public and providing checks and balances. Thus, we oppose to the amendments of Ms Margaret NG and Mr James TO.

Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR JAMES TO (in Cantonese): I would like to say just one sentence. I request the Secretary to quote an example of having to make an oral application under a situation that is not considered as an emergency. We will need to examine it in detail.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MS MARGARET NG (in Cantonese): Chairman, I think the Secretary is unable to quote any example. In fact, the main concern of the Secretary is to preserve all the convenience for the law-enforcement officers.

I only want to make an explanation. The Secretary has just said that some of the amendments are made in response to amendments proposed by me and Mr James TO in the Bills Committee. We do not intend to oppose even after he has made some amendments. It is only that those amendments are necessary. With respect to this provision, we consider that the amendments made not sufficient. Since his amendments and our amendments are contradicting, we have to propose other amendments. His amendments are based on the practice of allowing all kinds of oral application to be made, whereas our amendments are based on the practice that except for emergency application and emergency authorization, there should not be any oral application.

Chairman, I only want to raise one point. Why are we so adamant in respect of oral application? It is because this application can illustrate that the structure of the whole Bill is stringent at the beginning, but lenient afterwards. It sounds very stringent, and many procedures mentioned are also very stringent. But at the end, it is lenient. The reason is that the requirement for oral application is very low to the extent that oral application can be made under what are considered reasonably practicable circumstances. If this is the practice, there are basically no stringent procedures. Therefore, Chairman, I call upon Members to support my amendment, and oppose the amendments made by the Secretary.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

(The Secretary for Security shook his head to indicate he did not wish to speak again)

MR JAMES TO (in Cantonese): I am trying to give a second chance to the Secretary. Can he give us an example which is not an emergency but requires an oral application? If he cannot give us even one example, I wonder whether we have ever thought about any possible room for manoeuvring during the drafting stage. We do not even know what this room for manoeuvring is.

CHAIRMAN (in Cantonese): Secretary, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the subject has been debated in the Bills Committee many times. As I have said just now, oral applications and emergency authorizations belong to two different types at different levels. I do not wish to confuse one with the other.

MS MARGARET NG (in Cantonese): I wish only to add one word. When examining the Bill, we had first dealt with oral applications under clause 25. We therefore did not have the opportunity to discuss the provisions preceding it, that is, the provisions relating to applications for authorization. I would like to point out but briefly that if we take a look at clauses 8, 9, 10 and 11, we will see that they involve two aspects, that is, applications to the panel Judge for renewal, and applications to the administrative departments for renewal. It is prescribed that all applications should be made in writing (that is, submitted in written form). Therefore if we look at it from the beginning up to before clause 25, we should be very satisfied with it, because everything is set out in a strict and tidy manner. Everything is to be done according to specified rules and procedures. Turning round and round, the Bureau has not been able to give us a reason. If the purpose of the provision is to let people understand clearly that there are actually two categories of application, one of which being in writing, the other being orally under certain circumstances, the Bureau should say it outright at the beginning, instead of specifying there that applications must be made in writing until it comes to clause 25: all applications can in fact be made orally. Chairman, this is not an honest way to enact legislation. Please, please do not do this any more.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I am very surprised that the Secretary is not willing to give us any examples. We would usually say that examples are numerous and uncountable, but the Secretary can give us none. Members have repeatedly asked for examples. He just cannot oblige. How could he convince us that there exists such a necessity and that the two categories are distinct from one another? In the time of Three Kingdoms in Ancient China ZHUGE Liang was very clever and smart, but luring ZHUGE Liang to come out to assist him, LIU Bi had only to visit his thatched cottage three times. Now we have three Members asking the Secretary three times to cast some light on us. All are rejected. Would it appear not reasonable?

Ms Margaret NG has put it very accurately: this is "fighting the tiger at the front door, but letting in the wolf at the back". You work very hard in battling with the tiger at the front but then the wolf sneak in from the back. Is it not bad enough? We have all along been kept in the dark. Your attention is drawn here and there on the one hand, and your will is numbed on the other. At one time they are dealing with this thing here and suddenly you have to look over there at another subject. It is not appropriate, right? There has to be logic and continuity in legal matters.

The Secretary has specified everywhere that a written application is required. All the while the thinking is that application in writing is a must when no emergency is involved. Now a new concept arises suddenly that an oral application will suffice because there is something wanting. This is a proviso. The proviso which appears suddenly is fooling people. I really think the Secretary should respond to Members' query. I remember that Mr James TO raised this question at the Bills Committee. I do not quite remember at which point he raised the question but if he did raise it Mr YING should remember it. Mr YING should stand up to answer. Probably Mr YING knows how to answer but dares not speak up now. We must understand that the proceedings are now televised live and people are watching. They will probably feel disgusted when they witness unreasonable things like this.

James TO and I have together requested three times the Secretary to let us have some examples. I hope the Secretary can give us some examples or else the legislation work is superfluous. There is nothing that we can hold on to if there is a proviso in the legislation process. Your saying is unreasonable, Chairman. Let me tell you why: in case of urgency when the lead time is inadequate, action can first be taken and a covering approval afterwards will suffice. Are we not doing this all the time? Why is it necessary to legislate to allow oral applications? I consider this very unhealthy. In future there may be a large number of oral notifications made and covering approvals given later. It would be extremely difficult to rectify the situation.

Therefore, I do hope Mr LEE the Secretary will stand up to the challenge, show his skills to the full and explain why he needs to do this. Secretary, please accede to our request. Please let us know!

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendments, I will remind Members that if the amendments are agreed, the Secretary for Security may not move his related amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, five were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 12 were in favour of the amendment and nine against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): As the amendments moved by Ms Margaret NG have been negatived, Mr James TO may not move the deletion of the definition of "oral application" in subclause (1) of clause 2 and para (a)(ii) of Part 4 of Schedule 3 and the heading before clause 26, and subclause (1)(c) and (f)(ii) of clause 57, and those amendments to subclause (2)(b)(ii) of clauses 17, subclause (1)(b)(i) and (ii) of clause 57, subclause (6) of section 3 of Schedule 2 and paragraph (a)(ii) of Part 4 of Schedule 3 which relate to "oral application".

Mr James TO may not revise the terms of the proposed subclause (1A) of clause 40 by deleting the reference to clause 26, the deletion of which has been negatived, as the amendment so revised will be the same as those to be moved by the Secretary for Security.

Ms Margaret NG also has my permission to revise the terms of her amendments to subclause (2) of clause 23 by removing the reference to the proposed subclause (4) of clause 20.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That Division heading and cross-heading before clause 25 as well as clauses 25 and 28 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendments to subclause (6) of clause 2 as well as to clauses 26 and 27. The contents of the amendments have been set out in the papers circularized to Members.

Proposed amendments

Clause 2 (see Annex)

Clause 26 (see Annex)

Clause 27 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, I would like to raise this for comparison: Clause 26 relates to the confirmation of oral application, meaning that if the oral application is not confirmed, all the information — the term used here is "information" — given thereof will be destroyed. It is a very special situation, because once destroyed …… Of course, we may further refer to the Code of Practice for the meaning of destruction of information referred to here. The meaning is very clear: such information before its destruction cannot be taken out and put into the intelligence system. However, such destruction of information is rather conceptual because information, theoretically speaking, is formless. What are destroyed should actually be audio tapes and video tapes. They can be destroyed. However, the information that I saw just now a few minutes ago is formless. What is, then, the destruction of information?

Having read some information, Honourable colleague may be able to remember it clearly and write it down afterwards on a piece of paper. The

information however is memorized, and cannot be erased. He can disclose what he has memorized and input it into the intelligence system through other means. There is an inadequacy in this provision. It is a pity that after more than 100 hours of examining this, I did not see it until now. I have to confess here, because I cannot make myself any smarter. Nevertheless, I discovered it just now. I would wish to remind the Government: while there may be a slight problem in the concept, if the concept of the policy is indeed so, we must at least specify clearly in the Code of Practice that the Secretary may issue an instruction to the effect that all information that should be destroyed according to the concept of the policy must not be dictated from memory and input to the intelligence system, even if such information is memorized, for example information that frontline staff came across during their surveillance operations, such as a vehicle registration number or other information. Currently there is no law prohibiting this behaviour theoretically or conceptually.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): I do not have any supplementary comments to make. As Mr TO has said, this subject has been talked about many times in the Bills Committee.

MR JAMES TO (in Cantonese): Chairman, the Secretary has never been present in the Bill Committee meetings. Would the Secretary be honest about it? Would he please ask Mr YING? I thought of the problem just a few seconds ago and the Secretary commented that it had been discussed many times. There is nothing that I can say. Ms Miriam LAU may be able to do some justice: how could one say that this point of view has been raised many times? This is a point of technicality, a very tricky one, and I have been examining the subject for a long time but the problem has just popped up in my mind. Would we all agree that an examination like this is inadequate? To me, it really is

inadequate. Honestly speaking, had I thought of this point much earlier, I would think the Government would be willing to accept an amendment, as long as there is no major difference on a policy level. Or, the problem could be resolved through various forms and means. The question is: the problem will really arise, if the law remains the way it is.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

CLERK (in Cantonese): Clauses 26 and 27 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clauses 26 and 27 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): The Committee now deals with clauses and Schedules relating to "judicial authorization".

CLERK (in Cantonese): Division heading for Division 2 of Part 3, cross-headings immediately before clauses 8 and 11, clauses 6, 8, 9, 10, 12, 13, 22, 23, 32, 34, 46, 50 and 59.

CHAIRMAN (in Cantonese): The Secretary for Security has given notice to move amendments to various clauses and Schedule 3 in relation to renaming the authorization made by panel Judges as "judge's authorization". Mr James TO has given notice to move amendments to various clauses and Schedules so that such authorizations will be made by Judges of the Court of First Instance, instead of by panel Judges. Ms Margaret NG has also given notice to amend clause 8(1).

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon the Secretary for Security to move his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendments to replace the definition of "judicial authorization", amend the definitions of "prescribed authorization" and "relevant authority" in subclause (1) of clause 2, the Division heading for Division 2 of Part 3, the cross-headings immediately before clauses 8 and 11, clauses 8 to 13, 20 and 22 as well as Parts 1, 2 and 4 of Schedule 3. The contents of the amendments have been set out in the papers circularized to Members.

The Bills Committee has had very detailed discussions on how an authorization of a panel Judge should be described. In response to the views of the Bills Committee, that of Mr Albert HO in particular, the authorities propose an amendment to amend all the terms of "judicial authorization" in the Bill to "judge's authorization"

We object to Mr James TO's amendment to replace panel Judges with Judges of the Court of First Instance.

The Judiciary has pointed out in the paper issued to the Bills Committee and the Panel on Security that a panel Judge shall not handle any cases for which he has issued authorization during any law-enforcement agency's investigation process. Furthermore, to avoid any possible problem and to ensure that justice is seen to be done, all panel Judges will not be hearing cases which have been issued with Judges' authorization during the investigation process. Mr TO's proposal will render implementation of the Judiciary's concept difficult. It will also create great difficulties in the arrangements made to the cases.

In view of the above, coupled with the need to ensure sustained confidentiality of operational information, it is essential to establish a self-sufficient authorization system. The proposed system will not affect the panel Judges' consideration regarding the applications. It will also not create a situation whereby the Judges are "selected" by the law-enforcement agencies, since the assignment of an application to individual panel Judges is completely controlled by the Judiciary.

The proposed system of panel Judges has been fully debated in the Security Panel and the Bills Committee. I would not repeat in detail their related points of view. However, I would like to quote a relevant provision from the Law Reform Commission's report on "Privacy: The Regulation of Covert Surveillance" published in March this year. It points out that, and I quote:

> "A limited number of judges should be appointed by the Chief Executive on the recommendation of the Chief Justice for a fixed term to deal with applications for warrants. Having a limited number of judges would be conducive to developing expertise and broad consistency of approach. Further, this arrangement is necessary since the judges dealing with applications for warrants would not be able to hear cases arising out of the applications or the investigations for which they were made." (End of quote)

The Bill has been drafted based on a similar analysis. Mr TO's amendment however has not taken consideration of those factors considered by the Law Reform Commission. When the Second Reading debate was resumed I had already explained the necessity for extended checking. I would therefore like to stress here that checking is a method that has long been used. It is not a new thing. And there is no question of political vetting.

The authorities also object to Ms Margaret NG's proposed amendment to delete from the Bill the reference to "judicial". We consider that, after the amendment, since all references to "judicial authorization" have been changed to "judge's authorization", the nature of the authorization will be clearly reflected. In order to differentiate it clearly from executive authorization, the authorities consider it more appropriate to retain the mentioning of Judge's authorization.

Madam Chairman, I would appeal to Members to reject Ms NG's and Mr TO's amendments to the Bill and support the authorities' various amendments. Thank you, Madam Chairman.

Proposed amendments

Clause 2 (see Annex)

Division 2 of Part 3 (see Annex)

Clause 8 (see Annex)

Clause 9 (see Annex)

Clause 10 (see Annex)

Clause 11 (see Annex)

Clause 12 (see Annex)

Clause 13 (see Annex)

Clause 20 (see Annex)

Clause 22 (see Annex)

Schedule 3 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO and Ms Margaret NG to speak on the amendments moved by the Secretary for Security as well as their own amendments respectively. However, they may not move their respective amendments at this stage. If the Committee has agreed to the Secretary for Security's amendment, Mr James TO and Ms Margaret NG may not move their respective amendments.

MR JAMES TO (in Cantonese): Chairman, I have observed that there are senior officials and officials of government law enforcing agencies at the public gallery. I admire them. Why? The law will be passed in no time. If they can understand better and more of the details of the concerns of Members, or their future worries, and even implementation details and internal disciplinary implications, it will be of help to their enforcing the law. I would hope more law-enforcement officers would have the opportunity to come to hear the detailed debate these few days.

Chairman, I would have to raise a few points here. First, in 1997, in the White Bill of the then British Hong Kong Government, there was indeed the concept of authorization by the Court. The concept has not been invented by me. Certainly the British Hong Kong Government would not be malicious and intended to do us any harm. They would surely have already considered these judicial principles. The worries of the Law Reform Commission can indeed be resolved.

How? For example, from a point of view of jurisprudence, the Court of First Instance has the authority to authorize anything. In practice, however, not all Judges can deal with each and every case. Then who can and who cannot? There would certainly be some internal self-regulating mechanism and form of division of labour. Their concept is the same as those advocated by the Secretary, including developing expertise, accumulating experience and sustaining confidentiality. There are family Courts in the court system, for example, where a few Judges will be hearing family cases. Accidents occurred in public seas, like collisions of ships, are dealt with under what we call "admiralty jurisdiction", that is, according to maritime laws. They are actually handled by Judges who know how to deal with these cases (frankly speaking, not all Judges know how to deal with these cases). Or, cases of death caused by traffic accidents, that is, claims of traffic accidents, they are dealt with by another group of Judges. There are certainly also a group of lawyers who are famous and specialize in these cases. Or, cases relating to intellectual property are also handled by a number of specialized Judges.

There is therefore division of labour in the Court of First Instance in the Judiciary. It can be arranged to accommodate such needs as those listed out just now including accumulating experience, developing expertise or avoiding conflict of interest. If there is a need to avoid a Judge handling cases for which he has issued warrants, it can be arranged. There is a system for it. Or conversely, if it is up to the Court to select Judges, and not up to the Chief

Executive to select Judges from the Court, it will give the entire system a new perspective in terms of its fundamental image, the way the authorization is issued as well as the question of accountability.

Take the Secretary for Security's amendment as an example. Mr Albert HO and many other Members have reminded the Secretary that that is not "judicial authorization" and that he should not be fooling himself and misleading people. The Secretary is now also saying that there is a need to clearly specify that it is a "judge's authorization". From a conceptual point of view, the most accurate way of looking at the proposed system is that it is actually an authorization from the three persons appointed by the Chief Executive who otherwise are performing the duty of a Judge. Of course, they cannot create a title in such a long-winded way. Conceptually, this is in fact a panel, but as a coincidence, they are working there as Judges. Since they are Judges, they certainly will have fundamental judicial experience, an admirable character and even a certain degree of legal knowledge. We must remember, however, that this is only an authorization by a panel, isolating from the legal system. Therefore, if I am asked to give it a name, I would rather call it a system of "panel authorization". This will be much better than a "judge's authorization". To say that the authorization is given by a Judge, however, of course does appear more credible.

A genuine system of "court authorization" will involve a series of related concepts, including the one mentioned in the consultative White Bill of the British Hong Kong Government in April 1997: there must be some circumstances prevailing for a genuine court authorization. Now we say that unilateral application is appropriate because confidentiality is required. Under the Rules of Court, there must be a full and honest disclosure for a unilateral application. What does this mean? It means that not only those positive reasons which are helpful to the Government for its application should be disclosed. The Government would of course tell those helpful reasons to get the necessary permission. Would it not? The Government will have to tell also those reasons that may not be helpful to its application. There will be provisions governing this should it be handled by the Court. There are also precedent cases under common law.

However, the present situation is such that no conditions will be prescribed in the Bill. The only thing that we have is Mr YING's remark that the requirement will be written in the Code of Practice. And still there are some things that the Government is not willing to include. What are these? It is not

willing to prescribe the need to give all "positive" and "negative" reasons, and will only prescribe the need for relevant reasons in order to facilitate the Judge to make a balanced decision. I asked if it could be written more clearly. Why did I say so? It is because the Code of Practice is a very important document. It is not only for the Inspectorate and the Superintendent ranks. In other words, if the Code is written more clearly, officers at the basic ranks, front-line personnel, policemen and CIDs would know that their supervisors (who may be inspectors) are required by the Code of Practice to produce such information, the internal discipline will require them to tell the information to their supervisors for them to include in the affidavit those factors not in their favour.

(THE CHAIRMAN'S DEPUTY, MS MIRIAM LAU, took the Chair)

Of course, it would be good if the requirement is not written, or not written clearly, in the Code of Practice. Why? It is because their supervisor will then have a "deniability" to say that he does not know or nobody has ever told him. It would be easier for him to write the affidavit, would it not? It certainly is. This is a possibility. The Code of Practice is known down to the basic ranks and the personnel at the basic levels. Everyone will know that when an application, for example, by his supervisor is submitted, the information will be going up to the supervisor's supervisor. The chain of command will ensure the inclusion of "full and frank disclosure" of information (if the application is unilateral under the law). This rule exists in the genuine Court. However, our so-called panel authorization, that is, so-called Judge's authorization, will not necessarily have this provision. In other words, the rule will exist only at the level of the Code of Practice. The Code of Practice is however subject to the revision of the Secretaries of Departments and Directors of Bureaux of the Government. It is not protection by the law at such a high level.

On the other hand, why have I found the provision of three Judges unacceptable? It is primarily because I am not satisfied with the arrangement that these Judges are selected by the Chief Executive. I would ask you all to consider this scenario: the whole scheme would involve the three Judges selected by the Chief Executive, like in a soccer game, who play the role of forwards, and the Commissioner who is also selected by the Chief Executive, who plays the role of a defender, to prevent and to monitor possible abuse of power. There is no room for the Legislative Council to intervene and play its part. And the law-enforcement officers are the Commissioner of Police, appointed by the Chief

Executive under the Police Force Ordinance and the Commissioner of the ICAC. The entire system is under one line of command. At the end of the line, there is not even any closed-door reporting to the national parliament, the legislature or any accountable intelligence committee of any kind.

We will have to handle all these points, from the beginning to the end. These would of course include what we have already debated on, regarding the principles and the criteria and so on, some of which may have already been included in the Bill. However, within the conceptual framework, if we do not have a genuine, independent Court to play the necessary role, we would not be able to give people any confidence. I therefore wish Honourable colleagues would support me.

I would like to mention here also Ms Margaret NG's proposed amendment, the basic spirit and concept of which, I believe, is in line with my amendment. Similarly, she proposes the Judges to be appointed by the Chief Justice of the Court of Final Appeal. Although the vetting and approval are done in the form of a panel or in an administrative manner, at least, the decision is not up to the Chief Executive. As the Secretary has pointed out, should there be the need for a so-called security check, it would be up to the approving authority, that is, the Chief Justice of the Court of Final Appeal to consider the reports (that is, the reports collected) and make a decision. Why? It is because the Government has emphasized each and every time that these security checks will only record information and facts discovered. There is nothing on whether or not the check is passed.

Does the approving authority consider that there is any problem prevailing? There have been, for example, questions relating to some of our Secretaries of Departments and Directors of Bureaux that make people wonder whether the requirement is overly loose. Have any problems been found? There are rumors already. The authorities however still consider that there is not any problem or it would be all right even if there are problems. If the Chief Justice selects the panel which is to determine whether there is any problem in the reports, we would not have any worries that the security check will become political vetting, or any suspicions that there would involve any unknown factors not disclosed to others. I consider this is a way out, a solution to the problem. Even if some of my Honourable colleagues consider that, regrettably, not all the 20-odd Judges in the Court of First Instance are trustworthy, at least the one who decides in a security check will not be the Chief Executive but the Chief Justice. This will at least give us more confidence.

What would it mean if the Government would still object to Ms Margaret NG's proposed amendment (what I have called menu B, that is, people from the pan-democratic camp playing the roles of forwards and defenders, to provide an alternative to our Honourable colleagues)? It would mean that those checks are not simply security checks. Whoever makes the decision regarding the security checks is the one who decides. Whoever the Chief Executive considers competent, he is competent. It is the Chief Executive who decides.

Despite what I have just said, I must point out that I do not have any disrespect to the Judges who will be appointed to the panel now or in the coming few days. It is only that under this system, in view of the prevailing appointment system and its inherent limitations, there will be blemishes to those who are selected. They will be subject to suspicions, somehow coloured, and will not be entirely assuring to other people. These are not the problems of the Judges themselves. These are the problems with our system, whereby the Chief Executive is the authority who decides whether or not a security report is in order.

This is what I feel most regrettable. This is actually very sad. On the matter, the Court is "used" or "put on the table". These are slangs but they tell what the effects are. At the end of the day, the result is difficult to predict. For example, it will be difficult to tell whether the Judges appointed in a particular year will be overly loose or strict? It will be difficult even if we are provided with some theoretical figures. If all the doors are closed and everything is done in the dark, if there is nothing that we can do to improve the system, I believe it will not help our confidence, as well as putting the rule of law into practice.

MS MARGARET NG (in Cantonese): Deputy Chairman, I have intended to propose a large number of amendments to clause 6, and I have planned to speak when the respective amendments are moved. However, since the Secretary for Security and Mr James TO have both talked about the subject of judicial authorization or Judge's authorization from a rather macro perspective, I will also first talk about the overall structure of my amendments as well as my views on this section in a macro manner.

Deputy Chairman, in the whole Bill, the section on the so-called judicial authorization is the one which I feel most disappointed and sad about. I have been a Member of the Legislative Council for 10 years. Ten years on, I have only one objective and that is to maintain the rule of law and the judicial

independence. Of course we will have to fight for democracy. Without democracy, we cannot maintain the rule of law. The rule of law is the centre of the whole thing, and judicial independence is the centre of the rule of law. When judicial independence is maintained, the division of power should also be protected. The judiciary, the legislature and the executive are separated. These basic principles are violated entirely in this part of the Bill. We do not know what is left behind, and I do not know whether this damage is done deliberately or unintentionally.

Deputy Chairman, I shall start with covert surveillance, communication interception and Article 30 of the Basic Law. This Bill intends to empower law-enforcement officers to carry out covert surveillance through some legal proceedings. It is very important to get the citizens' support and trust when doing this.

These are things to be carried out behind people's back. If there is a lack of confidence about the system in the citizens, we will be like living under white terror. We will think that the law enforcement agencies are choosing people and intercept their communications day in and day out. In the Bill, therefore, there are protections provided by the Government that judicial authorizations will have to be issued by Judges.

Judges are independent people. They are very just and fair. We therefore have trust in them. However, is this really true? When we look at the legislation, we will discover that this is a lie. We first discovered that the Bureau admitted that this was not judicial authorization but only Judge's authorization. This was not what we were told when we first saw the provisions. The Bureau told us that it was judicial authorization, done by judicial personnel in such capacity. They are actually Judges selected and appointed by the Chef Executive. When they receive applications for authorization in respect of covert surveillance, they are not doing the job in the capacity of a judicial personnel, and not following any legal procedure.

Who would the Government select to approve authorizations? They are selected because it so happens that they are Judges by profession and because they have received such training. Are we having trust in the Judges as a person? No, it has never been our trust in the Judges as a person, we are having trust in the legal system and the judicial system. We believe that a Judge will be fair and just. When he sits in a Court, he will have to follow the basic principles of judicial independence and fairness. The first is the principle of public hearing; the second is the hearing of both sides of the matter and both

parties to litigation; the third is to judge based on reasons. When a Judge makes an error on reasons, we can overturn his decision through a higher Court. This is our basic belief towards justice. The independence of the Judges and the trust we have in them is gained based on these reasons.

In authorization for covert surveillance, however, none of these principles can be observed. What we can see in the whole process is that a panel Judge will be going about doing the job in secret. The Judge is facing only the applicant, who tells him information that he cannot verify, and he is issuing an authorization which is explicitly stated that there is no need to give any reasons. Unless he refuses the application, he does not have to give any reasons. How may such a system without any review at all fulfil the objective of justice? If it is said that the whole process is that of judicial authorization, endowed with judicial fairness and independence, it would be better to say that it is a policy aimed at fooling the people. He is a Judge but he is not doing the job in the capacity of a Judge.

Deputy Chairman, We can see that the citizens are particularly having trust in the judiciary, more than they would in the executive authorities and the legislature. However, in other jurisdictions, what is the role of a Judge in wiretapping? In some places, for example the United States, there is genuine judicial authorization. The application is made by government attorney officials and the Judge's approval is subject to review by the higher Court. It is not that I am totally satisfied with this system but at the least there is an accountable system. People can see the process is quite open, and the whole process is not a matter only between the Judge and the applicant, or a matter to do with them and a Commissioner. It involves many people and the judiciary there will have to submit reports to the national congress.

Let us take a look at the United Kingdom. What do they do in the United Kingdom? They make use of the executive authorities. In the United Kingdom, all matters relating to national security are matters for the executive authorities. What is the role of the Judges here? When an executive authorization is required for wiretapping, the case will be examined by an independent committee consisted of lawyers appointed by the Queen. The case will be reviewed by a High Court Judge if they have discovered anything not in order. Under such circumstances, therefore, the integrity of judicial independence and the image of the judiciary remain intact.

It is said that our system is copied from Australia. There are some so-called eligible Judges in Australia. However, upon their appointment, they

will be asked whether they are willing to undertake such responsibility. If they are willing, they will be immediately appointed as eligible Judges. I have forgotten whether there are 30 out of 39, or 50 out of 59 Judges are appointed this way. Generally speaking, almost all Judges have to share the responsibility. There is therefore a large degree of openness, because it is not the matter of one or two persons knowing such things, or the matter of one or two people undertaking the full-time responsibility of authorizing covert surveillance. Such authorizations are actually an executive power, and these authorizations are ultimately answerable to the executive authorities and the law-enforcement agencies under confidential circumstances.

Deputy Chairman, this is a serious violation of the judicial function. We have pointed out at a meeting of another committee, that is, in a panel that a Judge should not have any political affiliations. What is the reason for it? Why can a Judge not have any other capacities? Why can a full time Judge not have any other capacities? It is because all international principles are telling people one thing: a Judge will have to be extremely cautious in the course of his non-judicial duties. He should not, foremost, undertake too many non-judicial duties, in order not to play down his role as a Judge.

Secondly, a Judge should give up his non-judicial duties when such duties are in conflict with his judicial duties. There will indeed be conflicts involved in the process of covert detection of cases, not merely a down play of his functions. We have raised at some stage that whether it is possible to draw up a list of Judges and allow the Chief Justice to assign cases of different nature, for example cases of judicial review or personal injury and death, to individual Judges so that the responsibility can be shared out among many. This is like one of the normal duties of a Judge. The Government is however not willing to consider it.

We are asking three to six Judges to be specifically tasked with performing this function. They will be issuing a large number of authorizations. How can they avoid suspicions of possible conflict of interest? Just as Ms Gladys LI, Senior Counsel, talked to us on an occasion about this Bill, it was quite like asking a Judge to hear a case in a proper and officious manner in the afternoon, after he has seen a pornographic film in the morning. Are we going to do things like this? We consider that there are serious conflicts between the two. The Government is asking the Judges to avoid possible conflict of interest after authorization is issued, and the Secretary has said just now that the Judge should avoid hearing cases for which he has issued authorization. We cannot tell how

confused the Judiciary will be. We will not know, because one Judge will not know what cases of covert surveillance another Judge is hearing. He will not know until the case is assigned to him. And he cannot talk about it. The Government is asking him to avoid hearing the case. How can he do that, and at what stage should he withdraw from the case?

There may come a time that we do not even know whether it is practically feasible when the Judiciary tells us that the Judge should not be hearing any cases that involve any authorization for covert surveillance. Even so, since our hearing process involves various parts, can a Judge always tell? We cannot tell even at this stage. The problem of avoiding conflict of interest has become more and more serious.

Furthermore, we place great emphasis on the Judiciary being a separate entity. We have many friends in the legal profession. When they have become Senior Counsels, they have the opportunity to become a Judge. We will not pretend not knowing them or stop all contact with them when they have become Judges, but we will be prudent in keeping a distance from them. They will have a separate status and identity in the Judiciary. However, we are now trying to divide the Judiciary. There are a few Judges there who have come to know a lot of confidential information and intelligence which people cannot know in advance, some of which may even involve people within the Judiciary. How would these Judges face up to their colleagues? How should they handle their duty?

For this reason, this is very disgusting to me. I do not think we should sacrifice judicial independence and the division of power for the purpose of deceiving the public and gaining its trust. I am particularly unhappy about the fact that the authorities keep telling us that the provisions have got the agreement and support of the Judiciary. The Judiciary does not have a function for legislation. If the Judiciary supports this Bill, what should a Judge do when any provisions of the Bill are challenged? Therefore, Deputy Chairman, we have reached a stage where we have come to a focal point. I think it is the most damaging provision. And I do not know why we should destroy our existing system.

MR LEUNG KWOK-HUNG (in Cantonese): This subject has been, as a matter of fact, discussed many times. The Secretary was however not present at that time. Today, I would have to repeat to him my arguments like a recording machine.

It is really boring. Let me use some more light-hearted analogies. This Judge is asked to do something out of his normal duties. He does not have to hear the submissions and arguments of the two parties to make his independent judgement like he normally does in the Court. On the contrary, he needs only to listen to one party, after which he will be on his own. He has no way to verify. He cannot ask questions even if he does not believe in what he is told. He will have to consider whether or not he would approve. If he does, he permits the applicant to carry covert surveillance or communication interception. He does not have to tell the applicant anything, not the reasons why he has agreed to issue the authorization. On the contrary, he will have to give his reasons if he refuses to issue the authorization. This system has nothing similar to that in the Court. Each time I go to the Court, I can say that "Oh, a policeman has abused his powers. He has arrested me for no reason." The Judge will be able to make his decision after hearing my arguments.

However, this new variant of a panel is formed by three to six Judges and they are not doing things in the same way. They are like soccer players being asked to play a basketball game. They are asked to do something according to other rules. How do they go about doing it? It is not that the Government does not know what the situation is. I remember that during the previous discussions, the Government emphasized numerous times that these Judges were performing a Judge's duty. Now they have changed their stand. I do not know whether some time in the future my information will be taken to a Judge to apply for a wiretapping or covert surveillance. I would feel it is very unfair to me. I would think I should request for a judicial review to decide whether it is lawful. However, if the Bill is passed today, it will be difficult for me to raise the request. A law passed by the legislature is not so easy to revise.

What are we actually supposed to do here today? We lose our sleep and suffer from hunger to pass a law which requires a Judge not to do his proper duty but will only assist the executive authorities and the law-enforcement agencies to get the special power they crave. This special power is provided under Article 30 of the Basic Law which the authorities may only exercise to a limited extent, that is, only when the need for public security and criminal investigation arises.

I would wish to ask the Secretary: would you consider that the existing system can provide sufficient protection to the people to be investigated? That person will have no way to defend himself. That is to say that each and every person who is subject to the special powers of the authorities is in a helpless position. The only person who can help is the Commissioner. I think the

Commissioner is in a most dreadful position. He knows all, and he has to do everything. We are subjecting a very important right that should be valued by all Hong Kong people to a system where there is no opportunity provided for an open and fair hearing. There the law-enforcement agency will give its unilateral arguments subjecting the Judge to seeing with one eye and hearing with one ear. Such system certainly is an unworthy system.

In my opinion, if the Government is really interested in putting Article 30 into practice, it should adopt the system of judicial authorization that it has previously talked about. Let the Court do the job. Listening to the arguments over and over, I do not really understand why the Government would not adopt judicial authorization. Up till today, the Government has not mentioned it again. Is it because that there are not sufficient Judges, or are they afraid of Judges interfering or obstructing? I have heard nothing. One thing I think perhaps deceiving is that Judges are being "put on the table". It is said that Judges find this suggestion favourable. But I have not heard of any Judges praising it.

According to normal rules, Judges will not be expressing their opinions, one way or the other, towards anything without a good cause. It is not in order for them to do so, and they will not say anything inappropriate. As a matter of fact, when would a Judge tell of his opinion? It is when he passes his judgement on a case. For example, I did not know whether it was in order when Mr TSANG issued the Executive Order. If I asked Mr LI Kwok-nang and Mr BOKHARY whether Mr TSANG was right, they would not tell me. They would only scold me and say, "Are you crazy? We are not supposed to express our opinions." However if I am in a legal dispute, they will express their views in the process of the lawsuit. The executive authorities and the law-enforcement agencies are telling the citizens that the Judiciary has expressed its agreement, but it has not said a word. Would the authorities not feel that this is deceiving or putting words in people's mouth? If I were starting a lawsuit and the Judiciary suddenly speaks up and says that it is not in order, I would then have to start it all over again. I am doubtful of the authorities' way of handling this matter.

One thing I do know however is: if what we are discussing here today is really, as the Government has said, about looking for a balance — let us assume that the Government is really looking for a balance and leave alone, for the time being, the question of protecting the spirit of Article 30, which is protecting the freedom of communication of the Hong Kong citizens and protecting the privacy

of communication by law. I would have to ask the Secretary or the Government that what they would lose if they were to adopt the alternative of requiring the Judges to use their judicial experience to make an independent judgement each time a law-enforcement agency is required to carry out wiretapping. Each time the Judge may decide based on the power vested in him by the existing law whether the exercise of power is in order. I have heard nothing to this effect. Not even by now.

Many citizens complained to me saying that "'Long Hair', you have done something bad today." I said, "What have I done wrong?" They responded, "You have opened the gate; the ghosts have all come out. The magic box is opened, now within the Government, the devils are dancing around. The Government is leaving these devils alone because it already has the sufficient necessary supporting votes in the Legislative Council to pass what it wishes." As a matter of fact, I have given it a long thought on whether I have done anything wrong to challenge Donald TSANG's Executive Order. Looking back, I do think that I have done it correctly. Whatever the outcome of our present discussion will be, even if the evil law is passed, an evil law is a law. An evil law can be opposed. It is better than before when there was not even any evil law at all.

Therefore I do hope we all would not lose heart. So long as there is a framework, there will be the opportunity for revision in the future. My regret is that clause for the "sunset Bill" as we call it and that we have proposed is not accepted. I do think that it is a very reasonable clause.

I wish to reiterate, and I would wish to appeal to Donald TSANG who is either watching the televised broadcast or the recorded clip. Please do consider and instruct the Secretary to agree to enact the "sunset clause", in order that two years later, a new round of consultation may take place (now in the Chamber our discussion has been so hasty. And previously there had not been any opportunity for a full discussion.).

My premise is simple. I know we will be voted down when we come to the voting stage. I cannot help but say it again: the Government is deceiving the Hong Kong people by objecting to adopting a system of genuine judicial authorization from the very beginning. The system of panel Judges which the Government proposes is neither here or there. It is an insult to the Judges. It is asking the Judges to do what does not commensurate with their position. It is a further weakening of the human rights of Hong Kong people. Therefore, I do wish all Members not to support the matter. Let me repeat once more: those

who are gate-keeping for the Government please take their dinner leisurely. We are now about to vote. If you slow down the pace of your dinner, there will be a better opportunity to have a little more protection to the human rights of Hong Kong people. Thank you, Deputy Chairman.

MR RONNY TONG (in Cantonese): Deputy Chairman, Ms Margaret NG just now has explained clearly the impact that the system of panel Judges now proposed will have on the rule of law and the judicial system. I fully agree to what she has said. I shall not repeat them for time consideration. But I can say I share the feeling and abhor the way it is handled. However, since I have said that I would not repeat Ms Margaret NG's views on major problems of principle, I would wish to take a look at what we will get by taking such a huge sacrifice.

The Government pointed it out repeatedly that this system of panel Judges is a safeguard. It is the first guard to protect the rights of citizens. What is the substantial evidence there to support this claim? If we take a good look at the system, we will find that the design of the system is full of contradictions.

First of all, from the very beginning, the SAR Government has been using the term "judicial authorization" to pacify the citizens. Citizens would trust the Judges, even if they may not trust the Government. At the same time, however, the Government has not revealed all the details about the devil. There are huge differences between the system of panel Judges and the judicial system that we have been putting our trust and based on which the SAR has prospered and flourished. I would only wish to point out a few major differences.

Firstly, the Chief Executive would not only have the power to appoint the Judges. He also has the power to extend the term of office of these appointed Judges. This is a very important point. According to some basic legal principles and the legal principles internationally recognized and endorsed, the appointment and dismissal of a Judge will directly affect his independence. If a Judge is empowered by the executive authorities to make certain administrative decisions, and if his appointment or otherwise is subject to the wish of the Chief Executive, his independence will be entirely eroded.

Secondly, it is clearly stated in the provision that the panel Judge does not belong to a specific Court. This short statement embraces very serious consequences. If a Judge does not belong to a Court, there will be no place for a judicial system that we are familiar with. All the judicial procedures and the

just and fair protection these legal procedures accord the citizens will all be gone and extinct. To explain, I only have to quote one simple example. According to normal judicial procedures, the applicant of a unilateral application will have the responsibility to think on behalf of the defendant and even bear the onus of proof. This is a unique quality of our judicial system under the common law. This is also the characteristic of protecting fairness and maintaining justice. However, if a panel Judge is not a Court, this characteristic will no longer exist.

Furthermore, under normal judicial procedures, there will always be a review mechanism for any unilateral decision. In other words, no matter how long the case is kept confidential, it will one day become open. And on that day, there will be a review mechanism to decide whether this unilateral decision is reasonable, whether it is in accordance with justice. However, under the system of panel Judges, we will never have such a mechanism. When we later examine the functions of the Commissioner, we will discover that this Commissioner will never become a review mechanism.

There is a third and very important factor and that is, it is stated in the existing provisions that the decision of the panel Judge does not have to be supported by any written reasons. He will have to give the reasons for his refusal, but not for his permission. I can never understand this negligence. This is because written justification is the most basic level of protection to uphold justice. Why? Firstly, even if there is a review mechanism, a review is impossible if the reasons of the Judge's decision is not known. This is a fundamental requirement.

Secondly, the SAR Government has been pacifying us that the mechanism can be corrected by judicial reviews. However, if the Judge's decision has not included reasons in writing to facilitate the consideration by the Judge of the judicial review, how can a judicial review be filed? How can it be pointed out that the Judge has exercised his powers improperly, or has even applied the incorrect legal provisions?

Thirdly, all who have been Judges would understand that if a Judge has to set out his thoughts in writing, it would help greatly his review of his own decision. I have been a deputy Judge for two terms. I understand this requirement clearly. Often my instincts would tell me in the Court that one side should be defeated. Later on, however, when I sat down to write my judgement, I might discover that my instinct had been wrong. This is the most fundamental self-correcting mechanism. Why would the provisions be devoid of such a fundamental self-correcting mechanism?

When we discover that this system of panel Judges is lacking in all of the most fundamental protections accorded by normal judicial procedures, in considering its implications, we should ask ourselves a question: what protection this system of panel Judges is giving us?

(THE CHAIRMAN resumed the Chair)

To put it clearly, it is one of the deceiving tricks: to identify a few who know the law, and use them to issue executive authorizations. And there is no specified compulsory review mechanism in the future for the decisions they make. Such is this system. As Ms Margaret NG has just asked: is such a system worthy of the huge sacrifice that we have made in the principle of the rule of law and our judicial system?

When a panel Judge handles an application before him and when there is a lack of protection accorded under the normal judicial procedures, the only thing we can rely upon is his own persistence in the rule of law. However, it is unfortunate that this persistence may not be as great and consistent in all Judges. Not all are able to grasp and be bold enough to refuse the executive authorities' application. The level of persistence of individual Judges varies. We cannot expect all Judges to be a perfect man. Furthermore, under such system, is individual persistence in the rule of law alone sufficient to carry the system through? Lastly, would they feel helpless under such a system?

Besides, we should not forget that we are requiring six Judges to handle a huge number of applications. Amongst all these applications, the Judges have to listen to unilateral arguments. I have raised this more than once that we must take a holistic view at the full ordinance looking at this particular provision. Under the system, the information that a Judge can get is limited. Are we asking for too much to expect a Judge to make a 100% correct decision to protect the rights of the helpless innocent citizens?

Therefore, I regret very much to say that this system of panel Judges is a very disappointing design from the very beginning. We should not compare it with the systems in other countries. I have said this more than once: other countries may have a similar system like this. But the major difference is that they do have a democratic government. The basic element of a democratic government is that it is elected by the citizens. It deserves the trust of its

citizens. Secondly, for example the United States and the United Kingdom, there is an able mechanism within the system to enable the parliament to supervise the government. Under our system, such a mechanism is non-existent.

Under such circumstances, I agree full with Ms Margaret NG in what she has said. The sacrifice that we make is not worthwhile. I would not feel the sacrifice worthwhile even if Ms Margaret NG's proposed amendments are carried. Without question, Ms NG's amendments are destined to be defeated. However, we still consider it necessary to speak up boldly to all what we consider is right in this Council. It is not important that we lose. We must be able to face up to our conscience.

MR MARTIN LEE (in Cantonese): Madam Chairman, I have already talked about this issue during the resumption of the Second Reading debate. By then we had seven or more minutes, did we not? We did have 15 minutes by then? Anyway, time was not enough last time for making speeches. I wish to talk more about it this time.

An experienced Judge once said to me about this subject. He sees some major problems in the Bill and hopes that we will handle them carefully. I do not quite understand why the Government has included subclause (3A) in the provision: "In performing any of his functions under this Ordinance, a panel judge — (a) is not regarded as a court or a member of a court; but (b) has the same powers, protection and immunities as a judge of the Court of First Instance has in relation to proceedings in that Court."

A Judge gets our respect and trust because the laws and institutions of the legal system which have developed and evolved through many years (for example, common law has a history of several hundred years). We do not respect the Judge himself as a person. We respect him as a member of the legal system. We are not respecting a certain Mr LEE as a Judge, but rather a Mr LEE in the system.

Therefore, as I pointed out last time, a Judge has to put on a wig and a robe because all Judges are the same. However, now we have three or six Judges — it should probably be three — who I think are not required to put on the wig and the robe. It is not mentioned here but I believe they do not have to. Here he is just like the case of a certain Mr LEE. He knows that he is not doing

the work of a Judge, because he is not regarded as a member of a Court. That means that he is not regarded as a Judge. He gets up in the morning and goes off to work. I do not know whether he is happy or he is sad. He tells his wife that he is not performing a Judge's duty on that day, most probably so this year and in the subsequent three years. However, he is probably getting a salary higher than that of a Judge. I believe his salary will only be more, not less, than that of a Judge. He will go off to work as usual but his work will be part of the Government setup. He is a member of the executive authorities. His residence will still be a judicial quarter, though.

However, I cannot imagine that if I were a Judge taking up the job of a panel Judge, what would I feel when I meet with other Judges. Would I feel glamorous, or would I feel ashamed? Although my job is different from theirs, I enjoy the same authority as they. I wonder whether we have imagined this: if a Secretary of Departments or a Director of Bureau is assigned to a special duty, he cannot be regarded as a Secretary of Departments or a Director of Bureau, but he continues to enjoy the powers of a Secretary, what would the situation become? A policeman is assigned to a special duty and cannot be regarded as a policeman but he continues to enjoy the same authority as a policeman. What does it mean to us?

It has been working like this in some countries: they deploy a special duty troop to complete a job not in accordance with the law. Law and order is restored, because the so-called triad leaders are all eliminated. Although they are policemen, they cannot be regarded as policemen in the course of performing their special duty. The reputation of the police will then be left unblemished. Is it the case here now? If the Secretaries of Departments or the Directors of Bureaux likewise do not regard themselves as Secretaries of Departments or Directors of Bureaux when they carry out their duty, what does it amount to?

Madam Chairman, I would not dare to refer to you, because it would amount to gross disrespect. However, I really do not know what to describe my feeling. I am very unhappy. Madam Chairman, we have been debating for a long time, and I do not quite know how long we still have to continue tomorrow. The Secretary is going to have someone to replace him, like in a soccer match, but we Members in attendance would have no one to replace us. We do our best in the debate. But whenever it comes to the time of voting, those who have not been present will be coming back. They are now currently enjoying their cups of tea or coffee. Madam Chairman, I discover that a quorum is not met at present. *(Laughter)*

CHAIRMAN (in Cantonese): Mr Martin LEE is requesting for a head count. By the sight of it I would also think that the quorum is not met. Clerk, please ring the bell to summon Members back to the Chamber.

(After the summoning bell had been rung, a number of Members returned to the Chamber)

CHAIRMAN (in Cantonese): A quorum is now present. Mr Martin LEE, please continue with your speech.

MR MARTIN LEE (in Cantonese): Chairman, I am actually considering whether each time when the forum is not met I should request for a head count. I think this is very unfair to us because we are discussing a subject of grave importance which we consider is harmful to our rule of law, and which is, and should be, of great concern to the people in Hong Kong. However, our Members are not concerned. They only come back at the sound of the bell to cast their vote. They are otherwise unconcerned, taking their rest outside. Therefore, if the Chairman decides on an overnight meeting tomorrow, that will be very unfair to us. They can sleep outside and come back only to cast their vote, and we have to go on very hard with the debate.

Chairman, I would wish you to reconsider this problem as it has put tremendous pressure upon us. Do we have to speak less for the sake of our health? There is indeed tremendous pressure. If I were just now saying ……

CHAIRMAN (in Cantonese): Would you please return to the subject under discussion?

MR MARTIN LEE (in Cantonese): Madam Chairman, what if somebody replaces the Secretary? Can the Secretary for Security go home to sleep because he is not the person responsible for the work relating to this Bill? He is still the Secretary, but he is not regarded as the Secretary who is responsible for this Bill, and the Secretary for Constitutional Affairs who has just come in cannot be regarded as the Secretary for Constitutional Affairs as he is doing the job of the Secretary for Security. By the same token, a policeman cannot be taken as a

policeman. But he does have the power of a policeman. I really consider that there is no reason for this. Should the panel Judges be called Judges with Chinese characteristics? They do not put on dark robes and wear wigs. Will they be putting on a green uniform? I would rather wish the authorities not to do anything to break down our judicial system. Let them ask the policemen to do the job. Why? If the job is not done well, it is the Superintendents who are not doing a good job. Nothing must be done to break down the judicial system.

I heard the speech of Margaret NG just now. I agree with her. I become a politician because I wish to maintain the rule of law and the independence of the judicial system. But the authorities are breaking down the judicial system completely. Why would they not just ask senior police officers to do the job? It is all the same. It is all the same that they are asking a good guy to be a Judge but not doing the job of a Judge, and it will be prescribed as not the job of a Judge. Why would they break down the system like this? I believe the authorities have already identified Judges for the job. If I were a Judge, I would not take the job. More so if I am offered a more lucrative remuneration, others would tease me and say that I take up the job for money. Give me less, and people may think I am not all for the money. However, would the authorities do it this way?

Madam Chairman, it is because of Article 30 that this Bill is produced. We all know that the Chief Executive had been stubborn to have issued the Executive Order which the three Courts of the CFA all judged it to be unconstitutional and inappropriate. Hence comes this Bill. I do not understand why we should come up with such a thing. As a matter of fact, I do not believe in the Administration ……

CHAIRMAN (in Cantonese): If you object to the Bill, you should raise it in the resumption of Second Reading debate. Would you please return to the subject of judicial authorization now?

MR MARTIN LEE (in Cantonese): I am talking about the subject.

CHAIRMAN (in Cantonese): The amendment is about amending "authorization" to "judge's authorization".

MR MARTIN LEE (in Cantonese): Yes, I am talking about the same issue — we are fundamentally changing the whole system. Mr Ronny TONG has said it right earlier that the authorities are cheating when they talk about authorization. Those are not genuine Judges. Perhaps we should not call them panel Judges. We might as well call them fake Judges. We would then not be cheating people. The situation is actually so. Therefore, Madam Chairman, had the Government not been in such haste to enact the law, they would not have acted in such a way when they had the time to think carefully about it. I may be naive, but I still have some confidence in them. If they were not in such haste, they would not have done it this way.

The "sunset clause" covered here may become a "sunrise clause" by tomorrow night. Therefore, Madam Chairman, at this moment of great importance, I would wish that Members would not cast a supporting vote simply because they are pro-government. Most Members I see here are Members with a conscience. Please take a moment to consider justice. Every Member, including those most anti-democratic, would say to me that the rule of law is important. The rule is law is now breaking down. I would wish that no one would again talk about the so-called balance. How to achieve such a balance? And what is to be balanced? If our legal system and judicial system were balanced, what would be left? What is left is the lie of the Government to the citizens that we should trust the Judges if we do not trust the Government. But now the Judges are not really Judges. I would wish you all to understand that although they originally are Judges, they are no longer Judges now. What they do are not matters that Judges will do. But the Government is asking the citizens to trust it.

Madam Chairman, there is one further point. These panel Judges, when they resume their role as a normal Judge, must not be responsible for cases they have previously been involved. In my opinion, they must not be hearing any cases involving disputes between any citizens and the Government. When I represent a citizen in a case, I will certainly apply to prevent a Judge who has been a panel Judge to hear the case, because he has been working for a government department for three years, or even six years.

When the system of division of power and rule of law have been ruined, I will tell my client, for his benefit, that the Judge is actually a good guy, but he has been a panel Judge for three years, and that it has been prescribed that while doing that job he is not regarded as a Judge. During those three years, he has vetted many cases. Although there may not be any direct relationship with my

client's case, I will certainly inform my client. What will he think? Will he not consider that he may not get justice if the Judge continues to be responsible for his case? We all know that there is a saying in English: "justice must not only be done, but it must be manifestly and undoubtedly be seen to be done". What would my client think? I would therefore certainly represent my client to request for the exclusion of the Judge from his case. I trust most barristers will do likewise. What will happen in the future? Will those panel Judges only be panel Judges forever? Thank you, Madam Chairman.

MR ALBERT HO (in Cantonese): Chairman, I know the subject has been under discussion for a long time. It is in fact an extremely important subject.

We expressed our very strong views when the Bill was examined. For the record, I have to reiterate some of the points we have made. I will try to do it concisely.

Generally speaking, in drafting the Bill, the Government was hoping that the vetting and approval procedure, that is the authorization of Type 1 covert surveillance, can have the credibility of judicial authorizations. However, the Government was not willing to accept the fairness of a judicial authorization procedure. Here is a major contradiction. The Government knows that the citizens trust the judicial system. It therefore wishes the procedure to carry the label and so it specifies subconsciously a procedure of judicial authorization in the Bill. However, the Government clearly and specifically states that these Judges are not Judges in the Court and they are not Judges of the Court. As such, where does judicial authorization come in? The Government is finally willing to, though it cannot help it, accept an amendment of Judge's authorization.

However, is the way and capacity these Judges will be discharging their responsibility the way that normal Judges go about doing their job that we know and trust? There is a major doubt. I am not going to discuss it at great lengths. Just now, quite a few members have spoken very well on the subject, particularly Ms Margaret NG. There is one point that she has pointed out very clearly and that is, the tradition of judicial independence depends on the Judges. That Judges are independent, able to carry out their duties without prejudice and bias depends not only on their training and character but also on the culture and tradition within the judicial system. These are all important. If Judges are seconded outside the judicial administration and are required to work not

according to the normal judicial procedures, can they be expected to carry out their duties in the same spirit of judicial independence?

I have actually pointed out in the Bills Committee that the Government is adopting a strategy of incorporating judicial procedures into the executive procedures. It is a term I made up. The reason that this point comes up to my mind is — we all know that in colonial times, there was a theory, proposed by Prof KING Yeo-chi, of the executive incorporating politics, which means that the Government took in many people of political ability. Particularly in its consultation machinery, the Government delayed democratization, hoping that people with talent and ability can be recruited to become advisors to the Government in the think-tank or various statutory bodies, advisory bodies or within the Government. There were many advantages in recruiting these people, the least of which being these people were more susceptible to the influence of the executive authorities. The most successful aspect of absorbing politics into the executive has been reducing the development of independent political forces in society. However, it is not a subject about which I wish to go into detail.

The consequence of the executive incorporating the judiciary or the Judges is that the whole legal framework will be seen as an extension of the executive authorities. The procedures are devised by the executive authorities with a purpose to meet administrative needs and objectives, and these procedures are totally different from the judicial procedures that we know so well. The job of those Judges who are seconded or recruited are to comply with the work of the executive authorities. Many other problems will arise and they are not we have expected. What we expect is as I have said, Judges should perform their duty as Judges.

Someone may ask, why is this amounting to the executive incorporating the Judges or the judicial procedures? While examining the Bill, we discovered that, there was no provision for the third level, that is, the highest level, of extended integrity checking for these Judges in the original proposal. The first level is appointment checking, and the second is probably the more extensive checking. However, this one is the most extensive integrity checking, stricter than that imposed upon the Judges or Directors of Bureaux. It is clearly pointed out in government documents that these checks cover not only the integrity and criminal records of the Judge concerned, but also his social links and social relationships. What are the criteria involved? This is what causes our major doubts.

Well, when a checking report is completed, it is up to the Chief Executive to have the final say, and he does it without the need to give any reason. What will this become? Inevitably, the outside world will doubt whether it is a kind of political vetting. Although it is called an extended integrity checking, it is in effect a political or administrative vetting, the purpose of which is to ensure that the Judge's thinking and style will comply easily with the work of the executive authorities, and to achieve what the authorities call consistency, that is, a consistent way of doing things. What is consistency? It is predictability and uniformity.

The establishment of such predictability and uniformity, however, will not be achieved through a gradual exchange of legal argument and reasoning between Judges. It is likely to be a closed door or a black box operation, the result of lobbying and one-sided applications from, and information provided by, the executive authorities. Because of the small number of people involved, their decisions do not need to be open and will not be subject to outside monitoring and supervision. And there will be no exchanges with the academia or academic exchanges between colleagues. This is the way consistency will be established. It is the most convenient way to the executive authorities as they will know the thinking of all the Judges as well as their orientation. In these circumstances, and under this system, there will be a gradual influence over the Judges as to the meaning and interpretation of this piece of legislation. The Administration's requirements will be met when the law is applied.

I have said a lot. I believe the Government will say that we have dwelled on the worst scenarios, and that we have always mistrusted the Government and the Judges. I believe, however, the Government is saying this because it cannot put up any reasonable arguments against me. What I have said is well supported by reasonable analyses and evidence.

One last point. I would have to come back to our two amendments. Why can it not be left to the Court for authorizations? If the Government is worried about the problem of confidentiality in that there may easily be leakage to require an authorization from all the Judges, we have in fact proposed an alternative of requesting the Chief Justice to establish a division to deal with these cases. It will be up to the Chief Justice to appoint Judges to deal with these cases and the Government can submit the checking reports to the Chief Justice. However, why is that these cases cannot be handled in the Court? The Court may have some special rules but why do we have to second Judges

from the Court and ask them to work outside the Court in a statutory environment with which they are not familiar?

We therefore consider that there is no reason that these cases cannot be handled with real judicial authorizations, as originally prescribed in the law. Evidence shows that judicial authorization is practised in other countries — at least in the United States. Why can we not do it? Why is that we do not adopt the good practices of others, but rather the bad ones, for example the lack of a definition for public security? This is the first point.

Alternatively, as proposed by Ms Margaret NG, why can we not submit the extended integrity checking reports to the Chief Justice instead of the Chief Executive, and let the Chief Justice decide whether a Judge is suitable for appointment? Why would the Chief Executive not avoid the possible suspicion and tell the public that the Chief Executive would, because of the possible misgivings, rather not be responsible for the appointment, and thus maintaining the independence and integrity of the judicial system? Why can this not be done?

If the Government cannot provide good answers to all these "whys" — I do not believe the Government can because they have already heard a lot — I believe the two amendments deserve the support of all Members. The first is on the rationale for judicial authorization which I believe should deserve acceptance and support. I wish Members would all support Mr James TO's amendment. Or alternatively, that of Ms Margaret NG's amendment.

MR RONNY TONG (in Cantonese): Chairman, there is one point that I missed just now when I spoke. Ms Margaret NG reminds me of it. I would like to make a supplement.

I would like to remind Honourable colleagues that just now I mentioned that under this system, there is no way for a judicial review, because the panel Judges will basically not provide any reasons in writing in their judgements. However, a more important point is that clause 58(3) of the current law prescribes that, in any proceedings before any Court, any evidence or question which tends to suggest any of the following matters shall not be adduced or asked, including, first, where an application has been made for the issue of a relevant prescribed authorization, or the issue of a warrant for the renewal of the prescribed authorization under this law, and second, detailed information contained in the warrant.

In other words, it is impossible to raise any reason or evidence, or to apply to the Court for a review of the Judge's decision. This has led us to doubt the credibility of the whole system of panel Judge. Thank you, Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, I think we can all see that we Members attach great importance to matters relating to the Court. It is also not necessary for me to repeat the words of others; and I only wish to thank Members for using this opportunity. As a matter of fact, the reason that we have placed such importance on proposing the "sunset clause" is that there will be such a serious damage to the Judiciary.

There is one point I wish to further emphasize and that is, what will a Judge do when he is chosen by the Chief Justice and recommended to the Chief Executive for appointment? Will he accept it? When he issues the authorization, he is separated from his other colleagues in the Judiciary. He is isolated, or he may be looked upon specially. Will his career be adversely affected for doing jobs not of a Judge? How do people see these Judges of the Court of First Instance who are also panel Judges? Will he have a better, or worse, prospect for promotion to the Court of Appeal?

From a reality point of view, Chairman, according to information provided by the authorities, among cases of communication interception and covert surveillance, there will be around 159 to 180 cases requiring a panel Judge's authorization in every three months. If there are three panel Judges, each of them will have to handle about 16 to 20 cases each month. It is calculated based on the present situation in the absence of a law. It is very likely to be more after the enactment of the ordinance. If there are three Judges, how much time will be required of each Judge? It is not that they are only required to deal with one case occasionally. They have to deal with these cases all the time.

Chairman, on the other hand, let us look at the Commissioner. It is proposed in the Bill that he is to be appointed from the serving Judges. Chairman, the system will require our judicial authorities to deploy major manpower resources to deal with covert surveillance authorization matters. Chairman, I have a compromising alternative which I originally intended to

propose under clause 6: a Judge undertaking panel Judge duties will be regarded as on an outside secondment, and will not be required to perform the duty of a normal Judge. The authorities however objected to this proposal, claiming that this will mean more spending on public money.

Chairman, you did not give me permission to propose the CSA under the Rules of Procedure. However, according to Rule 57(6)(c) of the Rules of Procedure, it is not absolutely impossible for me to propose it. Under the Rule, a CSA may be proposed upon the agreement of the executive authorities. It is of course not possible when the executive authorities object to it, but now it seems that it is only a matter of money. Chairman, when we came to the discussion about resources in the course of examining the Bill, the authorities stated many times that they will provide the judicial authorities with adequate resources, no matter how much is required. This is a problem relating to resources rather than unresolvable system or institutional problems. Nonetheless, the stance of the Government remains as rigid. We find the whole system grossly disappointing.

Chairman, I would not dare to anticipate what far-reaching effects it will have on the whole system of Hong Kong when this system comes into effect. Chairman, therefore, I am not going to talk about this motion, that is, the Secretary for Security's amendment or my amendment to clause 8(1). I wish to take the opportunity to propose a macro view, so that my speech could be briefer when the subject of panel Judges is examined later item by item. Chairman, I am however grateful that there has been such an opportunity for all of us to speak up. I wish the authorities will listen to our warning and heed our caution. What the Government is doing now is basically damaging the existing system. It is a major blow to all who are protecting the rule of law. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): Chairman, I do not need to speak again.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Chairman, I have nothing to add.

CHAIRMAN (in Cantonese): Before I put to you the question on the Secretary for Security's amendments, I will remind Members that if those amendments are agreed, Mr James TO and Ms Margaret NG may not move their amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr

CHEUNG Hok-ming, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Ms LI Fung-ying, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr Fernando CHEUNG, Mr Ronny TONG and Miss TAM Heung-man voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 46 Members present, 26 were in favour of the amendment and 19 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the amendments were carried.

CHAIRMAN (in Cantonese): As the amendments moved by the Secretary for Security have been passed, Mr James TO may not move the amendments relating to "judicial authorizations", namely, clauses 8 to 13, subclause (1)(b) of clause 20 and clause 22, Parts 1, 2 and 4 of Schedule 3, and the amendments relating to "panel judge", namely, subclause (1) of clause 23, clauses 6, 24, 32, 33, 34, 46, subclause (3) of clause 50 and subclause (1)(b)(ii) of clause 57.

Mr James TO may not move his amendments to subclause (1A) of clauses 9, 12 and 24, subclause (3) of clauses 41, 46 and 50 by replacing "judge of the Court of First Instance" with "panel judge" as the amendments so revised will be the same as those to be moved by the Secretary for Security. Also, Mr James TO may not move his amendment to clause 39 as the amendment so revised will be the same as that to be moved by Mr Albert HO.

Ms Margaret NG may not move her amendment to clause 8(1).

I will give permission for Mr James TO to revise the terms of his amendment to be moved later on the proposed new subclause (1B) for clause 51 to replace the reference to "judge of the Court of First Instance" with "judge".

CLERK (in Cantonese): Division heading for Division 2 of Part 3, cross-headings immediately before clauses 8 and 11 as well as clauses 10 and 13 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the Division heading, cross-headings and clauses 10 and 13 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 34 stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

MS MARGARET NG (in Cantonese): Chairman, I move to amend clause 6(1). Clause 6 is on the appointment of panel Judges. According to clause 6(1), the Chief Executive will appoint three to six eligible Judges to be panel Judges, and

an eligible Judge means a Judge of the Court of First Instance, that is, serving Judges, on the recommendation of the Chief Justice of the Court of Final Appeal.

Chairman, there are voices in the community that have suggested that the system whereby panel Judges are appointed by the Chief Executive will undermine the independence and credibility of these panel Judges, and there is no need for such an arrangement. I therefore propose to delete the section regarding appointment by the Chief Executive to the effect that the Chief Justice shall directly appoint these three to six eligible Judges.

Chairman, just now I was speaking from a macro perspective, and Members would all appreciate that I absolutely object to the establishment of panel Judges, whether they are appointed by the Chief Executive or the Chief Justice. What I am doing now, therefore, is only to reduce the adverse effect of this very bad and terrible system. I believe that if the panel Judges are not appointed by the Chief Executive, their credibility will not be further undermined.

The Bureau has repeatedly pointed out that we should not object to the appointment by the Chief Executive. After all, under the current system, all Judges are appointed by the Chief Executive, and there is no question of intervention of judicial independence. However, Chairman, why do these Judges who have been appointed have to be appointed a second time, and to be selected by the Chief Executive for a specific purpose? Furthermore, the procedure whereby Judges are appointed by the Chief Executive is only a formality, because according to the Basic Law and the laws of Hong Kong, in appointing Judges, the Chief Executive has to follow the rules of the Judicial Service Commission. So this is totally different from the normal circumstances. As a matter of fact, in explaining why panel Judges are to be appointed by the Chief Executive, the Bureau has given the reason that it considers that the panel Judges are exercising an executive power, and their appointments are for an executive position. It is appropriate for the Chief Executive to appoint them to an executive position to exercise an executive power.

Therefore, we can all see that it has been exposed that this is not a judicial authorization at all. The executive role of these panel Judges is clearly emphasized. And it also relates to the arrangement where highly sensitive or very thorough checks are usually called for when the Chief Executive appoints people to sensitive posts, which require the relatives, family members,

clansmen, relatives by marriage, friends and acquaintances to be subject to the same checks — I do not know how to describe these checks. It would not be appropriate to call them security checks or integrity checks. I do not really know whether these checks are required for such an appointment, or that it is because checks are required of the persons to be appointed. All in all, it can be seen from subclause (1) that the system is unacceptable. The purpose that we are proposing for the deletion of the part regarding the Chief Executive is only to make it less offensive.

Thank you, Chairman.

Proposed amendment

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Ms Margaret NG's amendment thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, just now when Ms NG's amendment to clause 8(1) was discussed, I have clearly explained the Government's position. I would not wish to repeat it here. Madam Chairman, I would appeal to all Members to object to Ms NG's amendment to clause 6(1) of the Bill. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, I do not need to say anything. But I was preoccupied just now with voicing my own views, without calling on Members to support my amendment. This is all that I wish to add. *(Laughter)*

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Ms LI Fung-ying, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, six were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 21 were present, 13 were in favour of the amendment and seven against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

MR ALBERT HO (in Cantonese): I move the further amendment to subclause (1) of clause 6.

Chairman, just now we have had a lengthy discussion on the question of panel Judges. We have all heard that it would be extremely bad for whoever selected to become a panel Judge, based on whatever methods, including ballot draws. There would be no use crying. You cannot really blemish your integrity in order to fail the integrity check. You can only accept the job. The three of you will be crammed in a small room, with a great mountain of administrative system hovering on the side. You are really lonely and under great pressure. How can the problem be solved? Frankly speaking, under such limitations, since all the provisions have been carried, we can only think of one solution — I do not know whether this is workable, but I hope that we can have a discussion about it. The solution from the Democratic Party is to increase the number of the people selected, so that they can become a group. A

group can be formed by 10 Judges to help and support each other, to eventually develop an independent working style that is typical of Judges.

Do not lead people to think that the same three prescribed Judges will bring about stability, consistency and predictability. It will be fine to have stability, predictability and consistency from an administrative point of view. It is however not quite so in reality. Even in the Court, why are we always appointing different lawyers for different cases? It is because there are different points of view. When the law is applied to different cases and different situations, different Judges may come up with different results. It is an inevitable outcome when the judicial system is independent. Even when legal points are well established and when common grounds are found after interactions and communications about them, when they are applied to different situations in different cases, different Judges may yet come up with different conclusions.

Of course, different outcomes may not always arise. However, absolute consistency will only come about under manipulation. The advantage of having 10 Judges is that they will be able to interact and communicate before a judgement is handed down, to the effect that jurisprudence, for example, in public security, can be established. It may be beneficial to future long-term operations, and may help lawmakers bring about better revisions in the future review. It is an obnoxious job which would be better shared by 10 persons rather than by three persons. We would wish these 10 persons can help and support each other to really work independently. This is the purpose of our amendment. We wish Members would consider and support it.

Proposed amendment

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the amended clause and Mr Albert HO's further amendment thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities object to Mr Albert HO's amendment to increase the number of panel Judges to not less than 10 of Court of First Instance Judges.

The Bill prescribes the appointment of three to six panel Judges. It has already fully taken into consideration the relevant workload, the need for the Judges to accumulate experience and the need of work deployment of the judicial authorities. To avoid any conflicts of interest, the judicial authorities will not arrange any panel Judges to hear any criminal cases during their term of office. There are at present 27 Judges in the Court of First Instance. To increase the number of panel Judges to 10 or more will create major difficulties.

Madam Chairman, I would appeal here to all Members to object to Mr HO's amendment to clause 6(1) of the Bill. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak?

(Mr Albert HO shook his head to indicate he did not wish to speak again)

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak?

MS MARGARET NG (in Cantonese): Chairman, I only wish to ask the Secretary a simple question. The Secretary said just now that the panel Judges will not be hearing criminal cases. Why only limited to criminal cases? Is it that he considers that covert surveillance will only target people involved in criminal cases? Or, when involved in civil cases, will he come to know information of those involved in the cases which is not known to others?

CHAIRMAN (in Cantonese): Does any Member wish to speak again?

(No Member indicated a wish to speak again)

CHAIRMAN (in Cantonese): Mr Albert HO, do you wish to speak again?

MR ALBERT HO (in Cantonese): Chairman, I wish to speak briefly. Every Judge knows the need to avoid conflict of interest. While avoiding conflict of interest, he may still hear other cases. At present we have 27 Judges. And there is no need for the 10 Judges — since the number is greater now — to constantly spend a great deal of time to handle these authorization cases. In other words, a Judge may have relatively more time to handle other cases. I feel that if only the principle of conflict of interest can be strictly upheld, there would not be a serious impact on judicial manpower resources as the Secretary has claimed.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I have nothing to add.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr Albert HO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Albert HO rose to claim a division.

CHAIRMAN (in Cantonese): Mr Albert HO has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 25 were present, four were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 21 were present, 13 were in favour of the amendment and seven against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendments to subclause (2) and to add subclause (4A) to clause 6. The contents have been set out in the papers circularized to Members.

The purpose of the relevant amendments is to prescribe more clearly the provision regarding the appointment of panel Judges, that is, the reappointment should also be on the recommendation of the Chief Justice of the Court of Final Appeal. I wish Members would support the amendments. Thank you, Madam Chairman.

Proposed amendments

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the the Members present. I declare the amendments passed.

MS MARGARET NG (in Cantonese): Chairman, I move the deletion of subclause (3) from clause 6.

Chairman, subclause (3) states that the Chief Executive may, on the recommendation of the Chief Justice, revoke the appointment of a panel Judge for a good cause. Chairman, since I object to the appointment of panel Judges by the Chief Executive, I therefore propose to delete the provision relating to the Chief Executive's power to revoke a panel Judge. I wish Members would support my amendment. Thank you.

Proposed amendment

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Ms Margaret NG's amendment thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government objects to Ms Margaret NG's proposed amendment. I have already stated my reasons in my earlier speeches. I appeal to Members to support the Government and to object to Ms Margaret NG's proposed amendment to the abovementioned provision of the Bill. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): No. Thank you, Chairman.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Ms LI Fung-ying, Dr Joseph LEE, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 26 were present, six were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 12 were in favour of the amendment and seven against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): The Secretary for Security has given notice to move the amendments to add subclause (3A) to clause 6 and to the definition of "court" in clause 2(1) and Ms Margaret NG has also given notice to move an amendment to add subclause (3A) to clause 6.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon the Secretary for Security to move his amendments.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendments to add subclause (3A) to clause 6 and to the definition of "court" in clause 2(1). The contents of the amendments have been set out in the papers circularized to Members. The relevant amendments are to respond to the views of the Bills Committee, especially Ms Margaret NG's suggestion to include in the main body of the Bill some of the working procedures and other matters relating to panel Judges that are previously set out in the Schedule. We propose to remove the provisions relating to the position and powers of the panel Judges originally listed in Schedule 2 of the Bill to clause 6(3A). The definition of "court" in clause 2(1) should also be amended accordingly.

Since the authorities have proposed an amendment which has incorporated in clause 6 Ms Margaret NG's newly added subclause (3A), Ms NG's amendment is therefore not necessary. The authorities' proposed amendment is more concise and consistent. I would therefore wish Members would support the authorities' amendment. Thank you, Madam Chairman.

Proposed amendments

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendments moved by the Secretary for Security as well as her proposed amendment. However, no amendment may be moved by Ms Margaret NG at this stage. If the Committee has agreed to the Secretary for Security's amendments, Ms Margaret NG may not move her amendment.

MS MARGARET NG (in Cantonese): Chairman, the Secretary was right. It is me who propose to move the paragraph here from Schedule 2. Chairman, if Members are familiar with the history of the examination of this Bill, they will know that there was a lot that was not said in the original clause 6 regarding panel Judges. We would think Judges are Judges. Having read Schedule 2, however, we discover that these Judges are not Judges while exercising the power. I think we should establish …… excuse me, Chairman. When Members take a look at Schedule 2, they will discover that the content is very untidy. The Schedule talks about the position of the Judge, the powers of the Judge, the procedures facing the Judge, and also how the Judge should compile documents and records. It also states that the Judge in performing his functions is not regarded as a member of the Court. I do not consider it appropriate for the content of the Schedule to be so untidy. Such important matters as the position and powers as well as the jurisdiction of the Judge should not be listed in the Schedule. I therefore propose to the authorities to move this information up here. I myself have proposed an amendment to the same effect.

Chairman, although I do not really agree that the Secretary's proposed amendments are better than mine, there is no difference in substance between the two. Thank you, Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, someone has asked me whether he should support the Secretary or me. I have wanted to say that he might as well support the Secretary. However, after some thoughts, since I do not think the Secretary would ever support me once and also for the strategy of voting, I would rather appeal you all to support my amendment, and object to the Secretary's. It does not matter if the Secretary's amendments are voted down. Mine is more or less the same, and my drafting work is probably better.

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, if my amendments are voted down, there will be no room for hers. Therefore, I would still appeal to you all to support my amendments.

CHAIRMAN (in Cantonese): Before I put to you the question on the Secretary for Security's amendments, I will remind Members that if the Secretary for Security's amendments are agreed, Ms Margaret NG may not move her amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendments passed.

CHAIRMAN (in Cantonese): As the amendments moved by the Secretary for Security have been passed, Ms Margaret NG may not move her amendment to

add subclause (3A) to clause 6 as this is inconsistent with the decision already taken by the Committee.

MS MARGARET NG (in Cantonese): Chairman, I move to add subclause (3B) to clause 6. However, Chairman, I am not too sure whether there is any mistake in the procedure of the papers. Can I take a look at it? My proposed subclause (3B) is actually the same as the Secretary's subclause (3A)(b). Chairman, I do not know how to handle this. I would not wish to appeal to Members to object to my amendment. However, if this is the only way out, Chairman, I am very willing to "commit suicide" insofar as this item is concerned.

CHAIRMAN (in Cantonese): Yes, please be seated. Let me take a look.

Ms Margaret NG, your subclause (3B) reads "For the purpose of performing any of his functions under this Ordinance, a panel judge may administer oaths and take affidavits". There is no such provision in the Secretary's subclause (3A) which has just been passed.

MS MARGARET NG (in Cantonese): Thank you, Chairman. Yes, I see it clearly myself. It is really that way. Chairman, this is probably because the Secretary is still keeping the provision in the Schedule. Chairman, why would I rather prefer to put the provision, that is, subclause (3B), in this place? The major reason is: what are the powers of a panel Judge? What are the limits of his powers? If he can administer oaths, the provision on the relevant powers should be prescribed here, rather in Schedule 2. This is because I think Schedule 2 is for procedural matters. I would therefore not appeal to you all to reject my amendment. I would appeal Members to support my amendment. Thank you, Chairman.

Proposed amendment

Clause 6 (see Annex)

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Ms Margaret NG's proposed clause 6(3B) involves the work arrangement of the panel Judges now listed in Schedule 2 of the Bill. The authorities consider it more appropriate for it to remain in the Schedule. As a matter of fact, having taken Ms NG's proposal into consideration, the authorities have moved the relevant provision from Schedule 2 to clause 6. The authorities therefore object to Ms Margaret NG's amendment. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

(Ms Margaret NG indicated that she did not wish to speak again)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Albert CHENG voted for the amendment.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 12 were in favour of the amendment and seven against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CLERK (in Cantonese): Clause 6 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 6 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

MS MARGARET NG (in Cantonese): Chairman, I move the amendments to add subclause (1B) and (1C) to clause 8 and subclause (2A) to clause 11 regarding hearings held for applications for authorization for interception or Type 1 surveillance.

Chairman, since we cannot obtain adequate fairness on the issue of appointment and composition of panel Judges, we would wish to make the procedure as open as fair as possible. Clauses 8 and 11 both relate to applications to the panel Judge. Clause 8 relates to first-time applications for authorization, and clause 11 relates to applications for renewal of authorization. In the Bills Committee, we had the support of many Honourable colleagues. The application procedure involved should actually be *ex parte* (that is, unilaterally). There is a procedure for submitting an application *ex parte* to the Court. I am therefore proposing an amendment to more clearly specify in subclause (1A) to (1D) the procedure. First, the application shall be made in writing *ex parte* and supported by an affidavit. The term of *ex parte* means that, as already explained by other Honourable Members (for example, Mr Ronny TONG) just now, when someone submits an unilateral application to the Court, he must provide detailed and truthful facts, and he must frankly tell all information. Whether or not these facts are favourable to his application, he is obliged to tell them in order to facilitate the decision-maker to make a correct and fair determination. This is therefore the first step in the compulsory procedure.

Subclause (1B) specifies that a panel Judge may order a hearing with a view to arriving at a decision. In the hearing, he may summon whoever who can provide the information — that is the person who states in the affidavit that he honestly believes that certain matters are bound to happen and who is the source of the information. He may be a police officer, or a staff of the ICAC. In the inquiry, the panel Judge may order the person to appear before him for examination, to assist him to make an independent assessment of facts, despite the fact that the information is only the opinion of one party. At the same time, however, the panel Judge may determine the application without a hearing, and to state that should a hearing be conducted, it should be conducted in private. Subclause (1C) specifies that regardless of whether a hearing is held, the panel Judge shall give his determination in writing. Subclause (1D) specifies that all documents and records shall be maintained as provided in Schedule 2. Chairman, we all know that the remaining part of Schedule 2 deals mainly with how the confidentiality of the files should be maintained, and what is required for the movement of files, and so on. The procedure for handling applications before the panel Judge is also clearly specified.

The provision of clause 11D is relatively simple. Subclause (2A) of clause 11D provides that a panel Judge may order a hearing for an application for renewal of authorization, and any informant to be questioned. He may also determine the application without a hearing. Any hearing of the application shall be held in private.

Chairman, I am trying to explain the overly general application procedure in a more orderly manner, in order that the applicant may know the procedure required, and that the panel Judge may know the legislation to follow, the information he is empowered to have, and the kind of questioning he can make.

I implore Members to support my amendments. Thank you, Chairman.

Proposed amendments

Clause 8 (see Annex)

Clause 11 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Ms Margaret NG's amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government objects to Ms Margaret NG's amendments.

Clause 1(3) of Schedule 2 of the Bill, after amendment, has clearly specified that the panel Judge may consider the application in such manner as he considers appropriate. Furthermore, there is no need to add a provision in clause 8 to specify that the panel Judge may order a hearing. The same consideration applies also to clause 11.

We have serious reservations about the proposed clause 8(1B) and clause 11(2A) where the panel Judge may question any informants. We believe that the informants Ms NG refers to are what we would normally call informers. We may imagine just how many informers would be willing to show up to in a Court? If they are discovered coming to the Court and that they are not attending any open hearings, they will be suspected, and their identity as an informer will easily be exposed. We therefore consider Ms NG's proposal not workable.

As to Ms NG's proposed inclusion of clause 8(1C), there already exists relevant provision in the Bill, for example, clause 9(3), providing that the reasons for authorization and refusal must be issued in writing, except in the case of oral authorizations. Ms NG's amendment is therefore not required.

As to whether or not the panel Judge shall explain the reason for this authorization, the Bills Committee has had a thorough discussion about it. There is no need for us to rigidly require a panel Judge to provide additional reasons for his determination to issue an authorization. We have consulted the Judiciary and it holds the same view. Now the Bill has already specified that a panel Judge has to state in writing the reason for his refusal when he refuses an application. We consider this adequate. Therefore, we object to Ms NG's proposed amendment. It will also affect other provisions in the Bill concerning authorizations.

Here, I would also like to respond to Ms NG's proposed amendment regarding unilateral applications. I do not consider it appropriate to describe the procedure regarding panel Judges with expressions like "unilateral applications". The concepts is applicable only to judicial procedures involving two parties where one of the parties cannot be involved at a certain stage but later on the two parties will face each other in the Court. This concept is totally different from the authorization system regulated in the Bill. Because of the nature of the operation, the application will obviously not involve either party at any stage. The expression of "unilateral applications" will lead to misunderstanding. Therefore, the authorities object to the amendment.

Madam Chairman, I apeal to all Members to object to Ms Margaret NG's amendments to the above provisions. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): First of all, the Secretary has mistaken informant as informer. In general terms, an informer is an "informer". We would have to see what kind of information is referred to in the affidavit. If the applicant states that he knows of some information, he himself is an informant. If he says that he was informed by a colleague, then his colleagues is the informant. What we hope to achieve is to let the panel Judge know as far as possible first-hand information and to ask the person to tell the panel Judge personally, not through hearsays or that he says he only knows that the information is contained in the files. Even if he says that he knows the information is contained in the files, it is he who says so. The information is that he has seen it in the files. He may then be able to appear before the panel Judge for questioning and tell what he has seen from the files. Therefore, I do not consider that there is anything ambiguous here.

Chairman, the Secretary mainly opposes the wording of my amendment. My amendment actually will help people see clearly each step. The authorities however prefer the provision to be vague. All in all, the panel Judge has the power to decide everything. He will have a hearing if he prefers one, and the reverse is also true. The original provision specifies that he may consider the case and make his decision in private. This appears vague even more.

Chairman, I have said it many times, and I wish to repeat it once more here. It is not a matter of whether we trust or do not trust the Judges, or we trust or mistrust a certain authorizing person. It is that we trust the procedure that is specified under the law. If the procedure is clearly and concisely specified, we will then know what the procedure is. The vague statements of the Secretary are no substitutions for a clearly specified procedure. From this, we can see clearly that the authorities are not willing to give us a clearer procedure and more concise legal provisions.

Therefore, I implore Members to support my amendment. Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, in fact I also have been listening very carefully for it appeared to be the first time that I heard the Government's response. Ms Margaret NG indeed did not get it listed out in detail at the Bills Committee. Mr YING chose to remain silent when she spoke on the amendment. Therefore, I did not know his line of thinking. It was not until today that for the first time, I hear from the Secretary the Administration's comments on (1A), (1B), (1C) and (1D) proposed by Ms Margaret NG.

Having heard the Administration's comments, I have a little doubt. If it is said on the part of the Government that it has already made amendment to make it possible for a Judge to grant approval in manner he considers appropriate, then, on the basis of what the Secretary said, does appropriate manner mean that under all circumstances there will be objection to the Judges (that is, panel Judges) to send for certain persons, who might even be the informers referred to by the Secretary? Surely, Ms Margaret NG has just made it clear that those persons are informants. For a police inspector making an application, it is possible for the informant to be an informer of one of his colleagues. Then I wonder if the Secretary really believes that the legal terminology being provided by him to the Judge, that is, giving approval in such manner he considers appropriate, is broad enough to embrace all informants referred to by Ms Margaret NG, even covering informers.

Of course, I do understand that, more often than not, there will inevitably be problems in asking an informer to make visits to the Court. However, what if the panel Judge, because of certain circumstances, genuinely finds the matter involved in the application very serious? Say, the scale of the wiretapping or

the event involved appears to be very serious, something likely to be a replica of September 11. Yet, after thinking it over, the Judge notices that there is just that informer. It is possible for him to come to the view that in such manner as he considers appropriate is one that includes questioning the informer. At least there should be personal questioning before it is possible to determine on matters such as whether or not it is necessary to clarify other related issues, whether or not information is just that much and whether or not the statements made by the informer to colleagues of the police inspector are consistent. In the event that the Judge insists on doing that at the end, then there is the possibility that the police may find it very troublesome to summon the informer, and, therefore, it is left to the Judge to decide whether or not to grant approval. Surely, whether or not to provide information is up to the police.

However, here is the question. If the Government is to say that as it has been spelled out in black and white by Ms Margaret NG, it definitely must be objected. Then I would find it hard to understand. That is to say, the appropriate manner of the Government definitely does not cover the abovementioned situation. Then I have to raise this question: where to put it down in writing? Will the Government again — I do not know how it is done through what sort of people, perhaps it is through the applicant or it is by tutoring the Judges all the time or it is by some other means, so as to be able to make the Judges say no, and it is no in all cases. Only in a certain case can the authorities tell the Judge, through the applicant, that is, a police inspector, that it is impossible to do so in the case concerned. What if the Judge insists? Is the applicant to tell the Judge that he cannot insist as the Secretary had already said in August when examining the Bill round the clock that it should not proceed in such a way? In what manner is this to be done? I really would like to be enlightened on the question as to why the Secretary has said so.

In addition, Members have just said that application made *ex parte* will inevitably engender rules and requirements that require compliance. The Secretary's reply is very funny. He repudiated that view, even calling into question the advisability in bringing in such concepts in view of the absence of *inter-partes* situations. It occurs to me that we should be fair and square first, and have a debate to see whether or not the Secretary agrees that in law — I am not talking about the Code of Practice as Mr YING has already told us that he probably will write into the Code of Practice such concepts or something similar — I am saying that in law, whether or not the Secretary agrees that in law it ought to be just like an application made *ex parte* to the Court, with all factors,

both favourable and unfavourable to one's own side, made known to the panel Judge in good faith. If the Secretary agrees, then, in the first place, I think that for the Government not to take the initiative to state so in the law, that is to say, the Government does not take the initiative to state so while it is indeed not explicitly stated to be *ex parte*, it is already something not quite right by itself. It already deviates from the due responsibility of a government. This is the first point.

In the second place, given the fact that so far there has been no such a requirement in law, yet Ms Margaret NG applies such a concept, and the concept is one that will not bring about an *inter-partes* situation eventually, but the Government still raises objection, then the Government is under the suspicion of taking advantage of a technical loophole. First, it does not do it itself. Second, when somebody does it, that person's proposal is said to be not good enough on technical grounds. To put it bluntly, the Government is eventually trying to avoid having to mandate or to state explicitly in law the responsibility of good faith as in the case of making *ex parte* application. This indeed gives me the feeling that the Government is indeed somewhat "cunning". I do not know whether or not the Government is really like this. I am waiting for the Secretary and the legal support behind him to see if they can provide an answer.

The Secretary perhaps may feel relieved on one point. It is that the Attorney General of the previous British Hong Kong Government was not too bad. He ultimately submitted an application in respect of the White Bill to the Court in April 1997 — at that time Mr WINGFIELD was still in office and quite senior in rank — at that time all officials did consider all such concepts. However, in the end, he still adopted the *ex parte* concept. Apparently, the so-called application to the Court at that time never envisaged a situation of *inter-partes* or contention. I am not sure if this can relieve the Secretary of the worry that it may eventually engender contentions. I hope that the Secretary can give a better reply of a higher standard and put the focus on one point.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR RONNY TONG (in Cantonese): Chairman, in the speeches delivered earlier on, Ms NG and I have already fully expressed our concern. As a matter of fact, the amendments we now propose seek to bring the procedures as close as

possible to the judicial procedures under common law and at the same time strive not to affect the work of law-enforcement officers. Basically, with respect to the need to uphold justice, I can see no justification for the authorities to raise any objection. It is definitely not my wish to see the authorities raise objection just for the sake of objecting solely because the amendment is one proposed by Ms Margaret NG. At present I can see no reason why it cannot gain the authorities' acceptance though the arrangement will not affect the operations of the Government and the amendment can enhance the protection and credibility of the system. I indeed would like to hear the authorities' arguments in detail.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, earlier on I already stated our stand. I do not want to repeat.

MR JAMES TO (in Cantonese): This time I have to make a clarification. This time is what I consider to be disgraceful — there was probably some misunderstanding last night, I was not talking about individuals. This time what I consider to be disgraceful is that there can be such specious argument even though the department has got so many legal experts. Furthermore, there is an issue about being intellectually dishonest. It is indeed like that. At this level, if the authorities are against such a concept, the one on disclosing all factors to the Court in good faith, the authorities can indeed object. But they should explain clearly instead of branding the concept problematic with some specious arguments, without answering the question whether or not it is against it. If the authorities are not against it, then policy-wise this is an "omission". It is also dereliction of duty not to do it itself!

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

(The Secretary for Security indicated that he did not wish to speak)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard

YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 14 were in favour of the amendment and seven against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Ms Margaret NG has given notice to add subclause (1A) to clause 8 and subclause (2) to clause 11, while Mr James TO has given notice to add subparagraph (aa) to subclause (2) of clauses 8 and 11 regarding "ex parte application".

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendments.

MS MARGARET NG (in Cantonese): Chairman, I move amendments to add subclause (1A) to clause 8 and amend subclause (2) of clause 11. Madam Chairman, earlier on I already spoke on the two subclauses, which in fact are about *ex parte* application. So I need not speak again. Thank you.

Proposed amendments

Clause 8 (see Annex)

Clause 11 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO to speak on the amendments moved by Ms Margaret NG as well as his own proposed amendments.

MR JAMES TO (in Cantonese): Chairman, I just want to repeat the last part of my speech delivered just now. I hope that the Secretary can give a response that is of a high standard, positive and focused. Otherwise, the Government is going to look very bad on the record and become the loser in this battle. The reason is that even a first or second year student of the law faculty can see how badly the Government lose on this occasion.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, earlier on, when responding to the amendments moved by Ms Margaret NG regarding

clause 8(1B) and 8(1C), I have already explained why we are against the amendment regarding application made *ex parte*. Madam Chairman, here I call upon Members to vote against the amendments proposed by Ms NG and Mr TO to the abovementioned provisions of the Bill. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): Just to add one sentence. I wonder if the Government agrees that in law there should be a provision requiring police inspectors making applications to disclose information faithfully and fully. This includes information both favourable and unfavourable to the applicant. Should such a requirement be written into the law? I call upon the Secretary to reply whether or not this is the Government's policy stand.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHAN (in Cantonese): Chairman, I did not take part in the examination of the Bill. So, my understanding of many of the details therein is not as good as members of the Bills Committee. During this debate, a lot of queries and simple direct questions have been brought up by many Members. For instance, Mr James TO has repeatedly put questions to the Secretary. In my opinion, a government claiming to be one of strong leadership and governance has the duty to give response to every query.

Surely, in dealing with Members' queries, the Government may choose to be brazen-faced by adopting the attitude of one who neither talks back nor strikes back. However, to be brazen-faced is not showing strong leadership and governance. I do not know whether or not it is because the Government has learned from the experience with the legislation to implement Article 23 of the Basic Law. In view of the fact that half a million people took to the streets, provoked by the former Secretary for Security when she said it was beyond the understanding of taxi-drivers and things such as "wait and see", the Government now changes its tactics in dealing with the present legislation, one resembling the legislation to implement Article 23 of the Basic Law. It has adopted an entirely brazen-faced attitude. This is indeed a great insult to the 160 000 civil servants.

Right in front of senior members of the Government are some very simple queries from Members, raised in this Chamber and directly related to the ordinance. A responsible government should not adopt such an attitude, unless it has already turned into a brazen-faced government. If the Secretary still does not respond to those simple queries just raised, then the Government is acknowledging tacitly that it is a brazen-faced government.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT CHENG (in Cantonese): Chairman, I did not take part in the examination of the Bill. Earlier on I heard what Mr James TO has said. That constitutes a serious accusation against those working in the Department of Justice. I consider that to be dereliction of professional duty. If the Government does not respond, it is most likely to give me or other members of the community the impression that the Government is tacitly acknowledging that the Secretary for Justice is remiss in performing his duties and his legal advisers are incompetent.

Chairman, I very much hope that the Government can clarify whether or not it is tacitly acknowledging the charge levelled by Mr James TO and whether or not Mr James TO is talking nonsense. I really want to know this. If the Government remains silent, then I will take it as tacit acknowledgement. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr Albert CHAN, speaking for the second time.

MR ALBERT CHAN (in Cantonese): Chairman, I would like to let the Secretary answer first. I will speak again once he has made his reply. I hope after Mr Albert CHENG has spoken, the Secretary can ask for five minutes' adjournment in case he does not know how to respond to Mr James TO's query. This is to make it possible for him to be briefed by experts of the professional department on how to respond. He then can give clear and concise replies to Members' queries.

SECRETARY FOR SECURITY (in Cantonese): Chairman, regarding Mr TO's question, the point is that the amendment now under discussion is about

applications made *ex parte*. All of a sudden, Mr TO raised a query, making the allegation of unfair disclosure on the part of my colleagues. This is a serious accusation. Furthermore, it has nothing to do with the amendment now under discussion. However, I can tell Mr TO that all our colleagues definitely act in compliance with the law. What he has just said is something unreasonable and slanderous against our colleagues.

MS MARGARET NG (in Cantonese): Chairman, this is rather crucial. When bringing up the amendment earlier on, we also mentioned the reason for using the term specifically. Do we not understand English? That such a Latin term is being resorted to is due to the fact that behind the term is some meaning commonly known to all. That is to say, when someone is making application *ex parte*, all relevant facts must be disclosed fully and honestly. Everybody is aware of the reasoning behind the term, namely, the need for the applicant to state all facts, including those to his disadvantage. When the Bill was being examined by the Bills Committee, Ms Audrey EU said that almost all members of the legal profession mentioned one point, namely, that they considered that to be particularly important. The reason is that the applicant is to appear before a panel judge or authorizing officer in secret. It is especially necessary to state the facts if there is to be impact on others' rights. If now it is just because the Secretary does not like the term, then it is another matter. Mr James TO asks what his policy is if he dislikes the term. Or is it that the policy is just the same, but the Secretary dislikes the wording and considers the use of such wording to be inappropriate?

Chairman, indeed I find this issue very important and crucial. Whether a person agrees or not is one thing. What we respect is justification. A Court has the power to make rulings. Whether or not we respect court rulings also must depend on justification. Chairman, you too made a lot of rulings that we disliked. However, whether or not we gave respect also depended on the justifications you gave, Chairman. Sorry, Chairman. It seems that I am suddenly flattering you. *(Laughter)* I think this is parliamentary tradition. We bring up some amendments within a very tight time frame. When there is objection from the authorities, it is up to the Chairman to make the ruling.

Even if the Chairman has only 24 hours or 36 hours, and has to go about by dividing that into two parts, the Chairman still has to listen to the views held by those supporting and those objecting, as well as the opinions of the Legal

Adviser. Only then is she to present her own ruling and the justification for that. In case we are not convinced by the Chairman's justification, unconvinced to such an extent that we are to move a motion of no confidence against the Chairman, there is a basis for us to do so. How come the Secretary takes that as slander when we are now discussing in this Council very important procedural and policy matters? Why can explanation not be given to us? Chairman, today we have proposed many amendments. There are still some more. The outcome of this battle is not to be noted solely from the result of the vote. Whether or not our amendments are unjustified whereas the Secretary's objections are justified is also a determining factor. Also to be determined is whether or not our amendments are very justified while the Secretary's objections are very unjustified. We have no regard for today's outcome. However, whether or not the Secretary is able to let us have some convincing justification is a matter of fairness in history. Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, I understand that in the first place, the Secretary has not been a member of the legal profession. This is a limitation. In the second place, the Secretary is probably one coming from the disciplined services.

I would like to clarify with the Secretary. The query I raised earlier on is one on policy. Whether individual cases are having, or are going to have, such problems is not my point. My question is simply this. Policy-wise, does the Government agree that the requirement that there should be a legal responsibility for the applicants, that is, the Secretary's colleagues or subordinates, to state the facts, both favourable and unfavourable to their side, when making applications and this ought to be clearly stated in the law instead of just in the Code of Practice?

If this point ought to be stated in the law, and yet the Secretary finds the wording used by Ms Margaret NG or me not good enough, the drafting can in fact be done by Mr WINGFIELD or colleagues sitting in the back benches. If it has not been so drafted by the Secretary, it means an "omission". But never mind. If legal opinion is that even the adoption of the formula of Ms Margaret NG or that of mine still will not eventually lead to *inter-partes*, that is contention. This is still acceptable even though it is not necessarily perfect, as the policy objective can be realized. Why does he not change his course now? If he

agrees, there is a possibility for us to have a breakthrough right away. He probably would have accepted this point earlier. Perhaps there are far too many amendments. It has gone by unnoticed. As a result, he missed it. Or perhaps this, for some reasons, has been overlooked by parties that support the Government. With the debate reaching this stage, it is still not too late. The others will all vote for it so long as the Secretary makes known his support. Then we can make up for the "omission" in the policy. If this is his original intention, then let us discuss along this line. It is not that I query that his subordinates will do that on purpose.

It is my hope that the Secretary, on understanding this, is able to see that there is no need for him to take this to heart. I am not questioning whether or not his colleagues will do that or whether or not his colleagues will really do that. The question is whether or not it is necessary to state in the policy that the applicants have such a responsibility.

MR RONNY TONG (in Cantonese): Chairman, if the Secretary is unwilling to consult his legal advisers, I can give further explanation to make it clear to him.

When I spoke on the amendment earlier on, I stated that this was one of the pivotal judicial safeguards. With regard to an application made *ex parte*, it means in the context of judicial procedure that a person making an application *ex parte* has legal responsibility. The responsibility is to present for the absent defendant arguments favourable to the absent defendant. There is even the onus of proof. This responsibility serves as the minimum requirement for the protection of justice. If in the future it turns out that we ought not to have *inter-partes* proceedings, or proceedings for both sides to contend, he may decide in this way. However, in an application made *ex parte*, a requirement to uphold justice should not be disregarded.

So, in this matter, it is not all right not to answer us, and just say that this is the way he wants the legislation to be enacted. This is not an answer, definitely not an answer. If he is to handle this piece of legislation in such a manner, he is projecting the fact that the SAR Government has no regard for the requirement of justice, and it objects just for the sake of objecting. I have the feeling that as it gets closer and closer to twelve o'clock, we find the authorities' stand very, very disappointing.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, in fact Mr James TO need not be so angry. I remember that towards the final stage of the work to enact legislation in connection with Article 23 of the Basic Law, someone "disdainfully" said that she would not answer your questions. The Government's performance now has already improved greatly, with the Secretary taking the trouble to stand up to say he had nothing to say instead of "disdainfully" saying that he was not responding since you were so impolite.

As a matter of fact, to pay no heed to someone or to treat someone as invisible is the greatest insult. The current Government in fact treats us as invisible. As I stated earlier on, for the two preceding topics, Mr TO posed questions twice consecutively and I did that once. Even ZHUGE Liang, having been visited three times at his straw hut, had to come out to give a response. Is it that a fire has to be set on you before you will come out, as in the case of ZHUGE Liang? Do you want me to set a fire on you? With regard to this issue, it is not possible to force him to make a response as the Chairman's power is limited.

You make no reply when you are asked questions. What does it mean? It means treating others as non-existent as well as showing no respect. When walking on the street, I heard hawkers soliciting business by saying, "Come and take a look even if you are not buying, come and swear even if you are not buying." It is just like that. Mr Secretary, you should understand that I have no bias against you. However, you have your duty. You refuse to reply when questions are put to you by Members. There are only a few possibilities: first, you insist on giving no reply; second, you do not know how to reply; third, your reply may be to your disadvantage, so you make no reply.

In fact, I recall that this matter has already been discussed in the Bills Committee. I also repeatedly reminded Mr WINGFIELD and Mr WONG the Secretary for Justice that in case the Secretary could not bear it, then they should come out and respond. What Members have asked is about legal opinion, or legal practice, as Ms Margaret NG calls it. In fact, I do not know that term as well. But the topic is so clear. Here is a team working under a strong leadership and governance, yet on seeing one of their men about to get drowned, they just step aside for coffee. It is now like that. Nobody is responding.

The Secretary just sits there, saying again and again that he is not answering or that he has nothing to add. In fact, there are at least seven persons

here who have asked him to reply. Yes, seven persons. Seven persons have asked him to reply, but he still makes no reply. The entire team of the Government is here, all on pay-roll. That day, when the Bill was being examined, Mr YING was very sharp. However, he makes no reply today.

The Chairman often says that we are saying too much, and tells us not to be repetitive so as not to waste time. However, the Secretary often repeats the sentence "I am not replying". He too is wasting time. So, may I again earnestly ask the Secretary, do you think that with regard to applications made *ex parte*, your people, those making applications *ex parte* — your people most likely, since the relevant authority referred to in Article 30 means your people — have the obligation to inform the Judges of all the facts, including factors likely to be to your disadvantage? This is a safeguard. If you do not think so, what is the reason? In fact we have said again and again that if you leave it to the Judges, then there is no need to argue over this matter. You, however, refuse to do that.

Though repeatedly asked by others, you just refuse to reply. What is meant by that? Is it that you want to say again that you are not replying? Let me tell you. Pan-democratic Members are going to ask you further as such an attitude is very insulting. When others ask you questions, you make no reply. Have you had your meal? You again make no reply. This is simply not right.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, perhaps it is necessary to speak on this matter more clearly. When I replied to the previous amendment of Ms Margaret NG earlier on, I also mentioned the legal opinion we hold with regard to "application made *ex parte*". Perhaps I should repeat now that in our opinion, it is not appropriate to use the words "application made *ex parte*" to describe panel Judge's proceedings. This concept is applicable only to situations where, with two parties involved in judicial proceedings, one party is not allowed to participate at a certain point and yet eventually the two will appear in Court as contending parties. This concept is totally different from the authorization system governed by the Bill. For reason of the nature of the operations, it is very obvious that the relevant applications will at no time get parties on the other side involved. The use of the expression "application made *ex parte*" is likely to be misleading. This is our legal opinion with regard to "application made *ex parte*".

With regard to what Mr James TO has said, it is something which can be called disclosure of information. According to my understanding, it was Mr YING who attended the Bills Committee. Mr YING told me that the Bills Committee had spent a lot of time on the discussion about disclosure of information. The Administration stressed again and again that if the applicant fails to disclose all relevant information when making the application, then any authorization even if obtained cannot be regarded as valid later on. That is to say, it is our policy to make it mandatory for our officers carrying out the operations to disclose all information.

MR JAMES TO (in Cantonese): Chairman, fortunately, the Secretary gave a reply on the policy requirement. However, reply has yet to be given with regard to another aspect, namely, the question as to where the authorities can implement the policy. I know that the Code of Practice appears to be trying to implement the policy. This is the first part. However, what I want to know is this. It is because Ms Margaret NG now wants to put the policy into effect in the main body of the ordinance as well as in my amendment. Next, we will respond to the views given by the Secretary. According to him, the *ex parte* concept will only be used where the situation is one going to turn into *inter-partes* later. Only in such a case will there be reference to this concept at the start, when the application is being made *ex parte*.

If it is so, the responsibility shouldered by the authorities is even heavier. Why? Suppose that the application made *ex parte* is for an interim injunction, and that there are going to be opposing sides afterwards, then, in other words, there will be a so-called return day. That is to say, the parties will come back to "get on with the fight". That's to say, when adversarial process is in progress, there will definitely be opportunity for examination to see if there is fulfillment of the duty to make full disclosure in respect of affidavit and information submitted when making the application *ex parte*. So there will be opposing parties.

At this point of time in the future, there will be no adversary. If it is so, in the event that later there is disclosure by adversary called *ex parte*, that is, application made *ex parte*, then in law it is not enough to state in writing *ex parte* for the present application of ours. It will have to be stated in writing as *ex parte*^{2}, that is, to the square of itself. That is to say, to have double *ex parte*.

Why? It is because ultimately nobody is going to take *inter-partes* proceedings to challenge you on whether or not there is full disclosure in the affidavit.

Therefore, if *ex parte* is now stated in writing, then it is just like what I said. In 1997, when the British Hong Kong Government had an intact legal team, there was a comprehensive study. In the consultation version of the Bill they drafted, that concept was also stated in writing. So, whether or not the concept will in the future lead to one of *inter-partes* is something non-existent. It just will not. The Secretary is also not saying this. In the second place, the presence of such a concept can clearly show in law that the loftiness of the policy has such a requirement. Then, the authorities' Code of Practice can be in line with the requirement of the law in this aspect. I, therefore, do not understand why it is necessary for the Secretary to oppose Ms Margaret NG's amendment and that of mine.

If the authorities are to say that such cases can be stated in the law, it should not be stated in this way. Surely, the authorities are most welcome to write double *ex parte*, special *ex parte*, or *ex parte*^{2}. It is because it shows that there will be no *inter-partes* in the future. The responsibility of the authorities will be even heavier. Probably it is going to be necessary to use even more serious words. Yet the authorities have not done that. Given the fact that the Secretary has stated that the policy is like that, I wonder how to put that into effect in law. Or is it that he simply is not going to put it into effect? Then he is just "paying lip-service". Actually what is the policy of the authorities?

It does not matter whether or not this amendment can be passed. If possible, it is hoped that the Secretary can now, as an act out of the blue, reverse the course of events so that Honourable Members can jointly support Margaret NG's amendment. At least we can get something done, adding to this piece of legislation a little merit, or making it more refined. If the authorities are firmly against it, I still hope that the Secretary will bear this in mind. Perhaps let the Secretary for Justice sitting in the front bench note it down. It will have to be reversed when it is time to conduct a review. Otherwise, it will indeed be a laughing-stock.

MS MARGARET NG (in Cantonese): Chairman, sorry for taking up everybody's time. However, why must we state that in the main body of the Bill? In fact, we have to trace the origin back to Part 3. That is, Chairman,

what every person calls the core or soul of the Bill. The reason is that you say when making an application, the application must meet these conditions and the conditions have to be supported by an affidavit. What about the particulars of the affidavit? The particulars of the affidavit will be shown in Schedule 3 later. So, if you ask for something like *ex parte* in the procedure, it means that all information, whether or not to your advantage, must be disclosed, especially factors referred to in the relevant conditions. In this way, you will have a set of comprehensive and water-tight requirements for law enforcement officers to know the materials required when making applications.

However, you prefer to be loose, not water-tight in every place. If you were like that in just one place or two, I would have let it go. However, the arrangement of the entire Bill is like this. Inevitably one has this feeling. If we want to be exact in doing something, and yet every place is loose, then the whole thing will be out of shape. Also, it will be very difficult to get something to rely upon.

Just now there was reference to the Code of Practice. What do you say with regard to the Code of Practice? Have you adopted those words? Never mind if you do not use *ex parte*. However, you must make it clear that all information, whether favourable or unfavourable to you, is required to be disclosed. Here you still have to refrain from overdoing it. You say "all information known to the applicant that is relevant to the determination". A little is still missing here. But you still do not make it clear. Well, would you tell us under what circumstances one will render the authorization that one originally applied for invalid? In paragraph 45 of the Code of Practice, you say as follows: "an authorization obtained on the basis of such false information could be determined to be invalid, and any operation based on the authorization could be determined to have been conducted without the authority of an authorization". In other words, although all information has already been disclosed at the beginning, ultimately it is false information that will turn a valid application into an invalid one. Chairman, this really does not measure up to our standard or requirement.

Chairman, therefore, I hope very much that the Secretary can provide a more acceptable solution. This also shows why after spending 130 hours on examining the Bill, in the end we still find it necessary to have a "sunset clause". This is the reason. It is because many matters are not tightly linked up with each other. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you need to speak again?

(The Secretary for Security indicated that he did not need to speak again)

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendments, I will remind Members that if Ms Margaret NG's amendments are agreed, Mr James TO may not move his amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 23 were present, 14 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your amendments.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to add subparagraph (aa) to subclause (2) of clauses 8 and 11 regarding "ex parte application".

Proposed amendments

Clause 8 (see Annex)

Clause 11 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is not agreed by a majority respectively of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendment negatived.

CHAIRMAN (in Cantonese): Ms Margaret NG and the Secretary for Security have separately given notice to move amendments to subclause (2) of clause 8.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendment.

MS MARGARET NG (in Cantonese): Chairman, I move to amend clause 8(2). Chairman, clause 8 is on applying to panel Judges for authorization. The amendment to subclause (1) is on the application procedures which I have just

explained. The amendment to subclause (2) specifies the need for an application to be supported by an affidavit to provide the facts. The affidavit is to comply with Part 1 or Part 2 of Schedule 3, depending on whether the application is on interception of communications or on covert surveillance. This is proposed according to the sequence of clause 8. I call upon Members to support my amendment.

Proposed amendment

Clause 8 (see Annex)

CHAIRMAN (in Cantonese): I now call upon the Secretary for Security to speak on the amendment moved by Ms Margaret NG as well as his proposed amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities have proposed an amendment to make technical changes to the clause. In our opinion, the amendment originally proposed by Ms NG is no longer required.

Madam Chairman, here I call upon Members to support the authorities' amendment. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak again?

(The Secretary for Security indicated no wish to speak again)

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendment, I will remind Members that if that amendment is agreed, the Secretary for Security may not move his amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is not agreed by a majority of each of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendment negatived.

CHAIRMAN (in Cantonese): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to subclause (2) of clause 8.

Proposed amendment

Clause 8 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the amendment passed.

MS MARGARET NG (in Cantonese): I move the amendment to add subclause (1D) to clause 8. Chairman, subclause (1D) is on the point that the panel Judge should act as provided in Schedule 2 when handling those confidential files. This is just the arrangement of drafting. I implore Members to support my amendment. Thank you.

Proposed amendment

Clause 8 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Ms Margaret NG's amendment thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR JAMES TO (in Cantonese): Chairman, the Government's tolerance can, in my opinion, be judged from the amendment just passed. Why? It is apparent that the two are identical in nature. It is just because it was Ms Margaret NG who moved the amendment first according to the order of sequence that the Government asked others to vote against it. This can show the Government's tolerance. It is very simple.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government objects to Ms Margaret NG's amendment. It is already clearly specified in clause 3 of Schedule 2 of the Bill that documents and records made available to the panel Judge at the time of application are required to be maintained. So, the authorities find it unnecessary to mention it again here.

Here I call upon Members to vote against Ms NG's suggestion to add clause 8(1D). Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you need to speak again?

(Ms Margaret NG indicated that she did not need to speak again)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Mr Martin LEE rose to claim a division.

CHAIRMAN (in Cantonese): Mr Martin LEE has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 23 were present, 14 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CLERK (in Cantonese): Clause 8 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 8 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): The Secretary for Security, Mr James TO and Ms Margaret NG have separately given notice to move amendments to paragraph (b)(ii) of subclause (2) of clause 11 regarding "a copy of any affidavit".

As the Secretary for Security's and Mr James TO's amendments are identical, I will call upon the Secretary for Security to move his amendment, as he is the officer-in-charge of the Bill.

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon the Secretary for Security to move his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move amendment to clause 11(2)(b)(ii) with regard to "a copy of any affidavit" as set out in the paper circularized to Members.

In response to the suggestion from Mr James TO and Ms Margaret NG, we wish to state more clearly that the applicant concerned must make available to the authorizing authority copies of all affidavits of previous renewal applications, replacing in the provision the word "any" with the word "all".

Madam Chairman, as there is proposal for amendment from the Government, similar amendments to clause 11 of the Bill proposed by Ms NG

and Mr TO are no longer required. I would also like to respond to the allegation of intolerance made by Mr TO against us. Mr TO, we are in fact not intolerant. We respect very much Members' opinions. Hence, we took in their opinions to make the Bill better still. If Mr TO can study our amendment to clause 8(2), he can see that it is a little different from Ms NG's amendment. We add the words "to be made in writing".

Proposed amendment

Clause 11 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO and Ms Margaret NG to speak on the amendment moved by the Secretary for Security as well as on their proposed amendments.

MR JAMES TO (in Cantonese): Chairman, very simple. The Secretary has just now mentioned "to be made in writing". In essence, there is no difference. Anyway, forget about it. It is already history. In reality, intolerance is intolerance. There is no need for me to speak now. I thank the Secretary for taking in my opinions.

MS MARGARET NG (in Cantonese): Chairman, I am afraid that the Secretary's …… Why is it necessary for us to make an amendment here? It is because "a copy of any affidavit" in the original is incorrect. It means that all relevant affidavits are to be made fully available. So the Secretary has it amended to read "copies of all affidavits". However, Chairman, "copies" is also incorrect. The reason is that it is just one copy if all affidavits are grouped together. Therefore, I amend it to read "a copy of every affidavit", that is, all the relevant ones. So, I think my wording is correct.

In fact, Chairman, in my amendment, there is one editing mistake. In my marked-up copy are the words "judicial authorization". I wonder if there is an omission in the correction. It is because we have just passed a motion to change all references to "judicial authorization" to "judge's authorization". So, in the event that the amendment is carried, the editor of the Laws of Hong Kong, I believe, is still entitled to amend it. Apart from this, its wording is clear enough. Technical amendment can still be made later. However, I think it is

necessary for me to point this out to Honourable colleagues. I call upon Members to support my amendment.

In case of rejection, besides the many legal experts, the Secretary probably has some language experts too. The reason is that a language expert and a legal expert are not necessarily the same person..... It is most desirable to keep the grammar of the Bill correct, not incorrect. Thank you, Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

CHAIRMAN (in Cantonese): Does any Member wish to speak?

MR MARTIN LEE (in Cantonese): Chairman, I agree with what Ms Margaret NG said about the English wording. Moreover, she has made less correction. It is already "a copy" in the provision. She only changes "any" to "every", amending one word only. The Secretary uses the word "copies", changing it into plural. Then it is amended to read "all affidavits". There is also reference to Chapter 1 of the Laws of Hong Kong, where it is stated that plural covers singular. Why take all such trouble? So, the English used in Ms Margaret NG's amendment is comparatively better.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If no Member wishes to speak, Secretary for Security, do you need to speak again?

(The Secretary for Security indicated that he did not need to speak again)

CHAIRMAN (in Cantonese): Before I put to you the question on the Secretary for Security's amendment, I will remind Members that if that amendment is agreed, Ms Margaret NG may not move her amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by the Secretary for Security be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr James TIEN, Dr Raymond HO, Dr David LI, Mr Bernard CHAN, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr LI Kwok-ying, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr CHEUNG Hok-ming, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted for the amendment.

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Albert CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, Dr Fernando CHEUNG, Mr Ronny TONG, Mr Albert CHENG and Miss TAM Heung-man voted against the amendment.

Mr Patrick LAU abstained.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that there were 49 Members present, 27 were in favour of the amendment, 20 against it and one abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the amendment was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Ms Margaret NG may not move her amendment to paragraph (b)(ii) of subclause (2) of clause 11 regarding "a copy of any affidavit", which is inconsistent with the decision already taken by the Committee.

CLERK (in Cantonese): Clause 11 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 11 as amended stand part of the Bill. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(No hands raised)

CHAIRMAN (in Cantonese): I think the question is agreed by a majority of the Members present. I declare the motion passed.

CHAIRMAN (in Cantonese): Ms Margaret NG and Mr James TO have separately given notice to move amendments to clauses 9(3) and 12(3)(a) regarding the requirement for the relevant authority to give reasons for his determination of application for prescribed authorization.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Ms Margaret NG to move her amendments.

MS MARGARET NG (in Cantonese): Chairman, I move to amend clause 9(3) and clause 12(3)(a) to require the relevant authority to give reasons in determining the application for authorization.

Chairman, in fact during the debate earlier, we have already spoken many times on the principle of giving reasons. There is no need to repeat the reasons now. I just want to remind Members of where this is. Clause 9 is on how the Judge is to make the determination of authorization. It is stated in subclause (3) that a Judge, when making such a determination, must give the reason. Clause 12 is not on the initial application for authorization. It is on application for renewal. In such case, there must also be a reason for the determination to grant or refuse to grant renewal.

Chairman, I just want to remind Members of this point. I hope Members will support this amendment because reasons are very important. In future, they will be of great use in, say, conducting the review, and exploring areas for improvement. Also, they can make the whole process fairer and more convincing.

Thank you, Chairman.

Proposed amendments

Clause 9 (see Annex)

Clause 12 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO to speak on the amendments moved by Ms Margaret NG as well as his own proposed amendments. If the Committee has agreed to Ms Margaret NG's amendments, Mr James TO may not move his amendments.

MR JAMES TO (in Cantonese): Chairman, I would like to say a little more in supplement. I remember that when the Government was trying to sell the idea,

it said it would be a panel Judge, not a Court. Why? According to the Government, there could be judicial review. That was one of the selling points. This has always been the Government's argument.

The term judicial review gives us the impression that there is a channel for lodging complaints, right? However, when deliberations of the Bill drew to an end, we put to the Government a request that there should be specific stipulation for giving reasons and justification in writing. According to the Government, if the panel Judge approves the applicant's application, it means that his reasons for making the application satisfy what is stated in, say, section 3 with regard to the test of proportionality, and that, in such case, there is no need. However, it is different in the case of refusing an application. He is required to point out the area not meeting the requirements, at least convincing the inspector of the law-enforcement agency making the application. Furthermore, fresh application can then be made when the applicant notices that some information is missing or new information is available. So it can be seen that the consideration of the authorities is entirely centred around law-enforcement agencies.

However, unfortunately, if what comes next is indeed judicial review, then it will really be awful. It is because the Judge grants approval without giving any reasons. We have to bear this in mind. The order itself will subject some people to covert surveillance or wiretapping. If there is a wish to seek judicial review and yet the Judge — not the Judge, to be correct, it is a member of the panel who happens to be a Judge — has not provided any reasons, then I wonder how a judicial review can be conducted. It may mean conducting the judicial review merely on a piece of paper, one on which is written the word "approved" whereby the operation is approved. As far as normal proceedings of judicial review are concerned, this is, in my opinion, impossible or bizarre. Even when matters requiring judicial review (not these ones) come to the executive authorities or the approving agency, there has got to be adjudication. Is this right? It is definitely necessary to state in writing the reasons involved.

On the other hand, it is also my worry that if there is indeed going to be a judicial review, and yet it is then noticed that no reason has been stated, then does it mean that the relevant determination is one delivered without any consideration and not supported by reasons? Has the panel not made any careful consideration? For it is not possible to tell. It is awful to be like that. Does it mean that it is easy for people to seek judicial review? I really have to seek the advice of my learned friends. Will it be like that? It is because if it is so, there will be a big problem. Worse still, by then, whoever who seeks a

judicial review will surely win. If so, it would be terrible, right? It is not our wish to have such a situation. The reason is that when giving the approval, he probably has his reasons and has taken all factors into consideration. So, at least he ought to state what has been considered and that all the requirements have been satisfied. In this way, there can at least be a simple reason, and other people will be able to know all the matters that he has considered.

Otherwise, another Judge from the Court of First Instance of the High Court conducting the judicial review might wonder and say, "It's awful. Has this colleague (indeed his colleague, but that person has not delivered the determination in a way as a Judge does) considered all matters? He has failed to show a convincing procedure, his views in terms of justice and the reasons which he claimed to have considered and on which his determination was based. This would be terrible. How to tell if he has given any considerations? However, his determination has affected someone's rights." This is really bad. I wonder if there will be a big loophole here by then. I really dare not say. I dare not say whether or not it is going to be the case.

However, if reasons are to be given, in the first place, as far as logic goes, I believe it is not going to be that difficult administratively, the reason being that there is expectation for the Judge making the determination to do some writing. Do not hold the illusion that some time can be saved for him by telling him not to do any writing. It is not so, for he expects the need to write some documents as well as the requirement to weigh the justifications for the granting of approval and to justify it if it is granted. So it can be said that the Judge expects that he will do some writing.

In the second place, if he states in writing, then a decision can be made. What is more, these constitute the reasons justifying his agreement to granting authorization. It is because later in clause 35 — if what I recall is correct, the provision stipulates that a Judge making the determination may impose some conditions. Sorry, it is clause 37..... No, clause 37 is on retrieval. Sorry, let me find again — anyway, there is a provision to the effect that a Judge making determination is allowed to impose conditions, that is, he finds it necessary to impose conditions even though approval can be granted. In other words, he will have to state why he thinks that the imposition of conditions satisfies what is stated in clause 3, for example, the test of proportionality, and that the imposition of such conditions is required in view of certain factors that merit consideration. The Judge is required to note down all the points. Refusal on the ground of non-compliance with conditions may lead to a request

for judicial review. So, the justifications considered by the Judge when he imposed conditions can serve as the factors for judicial review.

Therefore, we indeed have been in too great a hurry in the deliberations, making it impossible for us to consider these situations. Such ludicrous or incongruous things should have been detected much earlier. Had it been detected earlier, the Government probably might have agreed to prescribe under clause 9(3)(a) the requirement to state reasons. It is very unfortunate that it is only now that we bring it up. To be honest, the process has been too hasty and such a big rush. It has not been possible for us to be meticulous. Such odd contradiction has just gone unnoticed. As a result, it has not been possible to draw this to the attention of the Government earlier.

Mr WINGFIELD is now sitting in the back bench. My wish is for him to focus a response to this argument. Is it going to be possible for such a situation to crop up? If his answer is in the negative, then at least he should answer in the negative. Should something go wrong later, we will then be able to know whom to blame — OK? It is because his judgement might be faulty. If what he says turns out to be correct, then we will say that officials from the Department of Justice are indeed "smart". The question is put to him at such a late stage of the process, and yet he is able to answer after giving it a thought. This is really "smart".

CHAIRMAN (in Cantonese): Members may now jointly debate the original clauses and the amendments thereto.

MR RONNY TONG (in Cantonese): Chairman, I would like to speak on Mr James "TSUI"'s amendment — sorry, it should be Mr James TO, I often get your name wrong. One of the reasons mentioned is that there is an arrangement for renewal in the mechanism. Renewal can be made once every three months at the maximum. What if the panel Judge concerned, having granted approval, three months later forgets about it or passes it onto another Judge for attention? If no reason is available, how can he renew such an order? This is one of the reasons why we put up the request for giving reasons in writing. To be honest, in my opinion, all those with good legal knowledge will find such request a matter of course. Even if I were to dream about it 12 times, it would still be impossible for me to figure out the reason why the SAR Government will oppose these amendments, unless it is that the authorities are not satisfied with only

having the Legislative Council as a rubber stamp, also want the panel Judges to be rubber stamps as well.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

MR ALBERT HO (in Cantonese): Chairman, in answering our questions, government officials give people the impression that it is very simple so long as there is approval and it is fine so long as there is total agreement with the Government's words. However, what is meant by total agreement with the Government's words? This is very hard for people to understand.

Take an example. Even if there is agreement, it is still possible to have different lines of thinking. In our opinion, there are advantages in giving the reasons in writing. In the first place, as pointed out by Mr James TO earlier on, it can note down the reasoning process of the officer concerned with regard to the ways in which he considers every requirement, every test and every factor as prescribed by the law. Furthermore, when considering each factor, the officer concerned can do some thinking to see whether he is already very clear, whether the application complies with all the requirements, or whether he still finds some problems even though it is on the whole acceptable. Points can also be noted down for use as reminder to applicants making applications in the future. There may also be a lot of ideas for an approving officer to write down when approving an application.

Here is one thing even more important. With regard to issues of public security, the current concept is in fact quite vague. When giving approval in the future, each Judge may analyse the facts of the cases, giving reasons in writing to explain how the cases pose hazards to public security. To those who have the opportunity to access those files again in the future, the information thus noted down is helpful.

Besides, what Mr Ronny TONG has said just now is very correct, renewal is something very important too. It is because it is possible for the Judge concerned to note down some problems when approving the application for the first time. It is possible that he finds the application on the whole in compliance with the requirements of the law. However, there can be records if those problems are noted down. When it is time for application for renewal, he may reconsider those problems.

All these, therefore, are important. Do not think that it is simple so long as there is approval, and that only a chop needs to be put. As a matter of fact, for use as reference with regard to applications for renewal in the future or for the accumulation of experience for future Judges, these records are also very important.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities are against the amendments of Ms Margaret NG and Mr James TO. The amendments concerned stipulate that panel Judges must state in writing the reasons for giving authorization or approving renewals.

During the earlier discussion on clause 8(1B) proposed by Ms Margaret NG, I already explained why the relevant amendment is not appropriate. In fact, the issue has been thoroughly discussed in the Bills Committee. The Bill clearly provides that a panel Judge may grant an authorization only if he is satisfied that the prerequisites set out in clause 3 have been met. So, there is only one situation for the granting of authorization, namely, that he is satisfied that the conditions set out in the Bill are met. So, there is really no need for us to make it mandatory for panel Judges to provide additional justifications for delivering determinations granting authorization. At that time we reported to the Bills Committee that we had consulted the Judiciary on the matter, and that it was of the same view. Therefore, we are against the amendments proposed by Ms Margaret NG and Mr James TO. This amendment is likely to affect the other related provisions in the Bill on authorization.

Madam Chairman, I call upon Members to vote against the amendments to the abovementioned provisions proposed by the two Members. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): No.

CHAIRMAN (in Cantonese): Ms Margaret NG, do you wish to speak again?

MS MARGARET NG (in Cantonese): Chairman, all of a sudden, the Secretary brought up the point that the judicial authority had agreed with the view of the authorities and he used it as justification. I am very much against this. Whether Judges of the judicial authority are required to give reasons when delivering verdicts is, according to law, the responsibility of the judicial authority. It is the responsibility of the legislature to prescribe what should be done in a procedure. There will be enforcement by the Courts so long as the law so prescribes. The Court must not act the other way round and tell us what sort of legislation to draw up. I pointed out a long time ago that the most basic principle is the division of power among the three branches of government. How can the judicial authority be dragged into such wrong? At that time members of the judicial authority were not present, and they were unable to tell what had been said.

Chairman, I would like to point out in particular that these few provisions are very deliberate. Please refer to clause 9(3) which is divided into two portions. It reads, "in case of subsection (1)(a), issuing the judicial authorization in writing; or, in case of subsection (1)(b), giving the reason for refusal in writing". That is to say, if it is agreed, then just agree, there is no need to say anything more. However, in case that it is not agreed, then it is necessary to state the reasons clearly. This in fact is not alright. Earlier on, Mr James TO noticed a problem by just looking at the front portion, leaving out the rear portion. The reason is that under clause 9(1)(a), it is mentioned that applications can be approved with or without variations. In case of a request to make variation, should some reasons not be given? This is also a reason why we think it is advisable to have the amendment incorporated into the Bill.

Under clause 12(3), there is also deliberate mention of the point that there can be either approval or refusal. However, it is stated that in the case of approval, there is no need to give any reason, and the approval is just granted. On the basis of the same reasoning, the authorities can also prescribe that the panel Judge need not give any reason for not granting an approval. The Judge need only state that refusal is due to failure to satisfy the conditions required of

the application. This is based on the same reasoning. The applicant may re-apply. To find out the reasons, it is necessary to submit a written application or make a telephone enquiry. Only then will explanation be given. How come it is paradoxically so deliberate in the case of refusal, and there is even the claim that the judicial authority endorsed and spoke well of the arrangement? How can this be done?

This time, the situation is no different. Regardless of the outcome of the vote, it is the reason given that really matters. If he thinks it is not necessary to give any reason, or that his reason will go unnoticed, I believe, he will find out that he is wrong. Thank you, Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, Mr Ambrose LEE, the Secretary for Security, said again and again that there was consultation with the judicial authority and that it did not object. I consider that to be very ridiculous. He has no proof, merely saying so. I can also tell the Secretary that yesterday, when I was having tea, I overheard Judges sitting at the next table attack the authorities for such an approach. This is what I heard, and to that I can testify. Is it acceptable? Certainly not. The Secretary surely will want to know who the Judges are and which tea house it is. Yesterday I indeed overheard some Judges talk. They said, "How can they do that? Is something wrong? What sort of government is this?" I really heard these remarks. Will the Secretary look for proof? The Secretary certainly will. He will even point out that it is wrong for Mr LEUNG Kwok-hung to bear false witness. This is not acceptable. Does the Secretary understand?

Surely, with me saying this, Members are all laughing. They will say I should not make a joke out of such matters. However, just now he casually claimed that the judicial authority approved of that. To be honest, if a more serious approach was adopted, I might have asked how the judicial authority gave him consent and when and where that happened. It is not all right for him to be so rash. All along, whenever there is mention about the judicial authority, the point that they dare not speak out will be taken advantage of. The reason is that it cannot make any casual remarks. However, I think there is no reason for the judicial authority to agree with the authorities. The reason is that in my lawsuit against Donald TSANG, when coming to the question as to whether or not he had breached the constitution, the Judges frequently said that they would not act for the legislature or the Government. It does not matter whether or not

the authorities will sign the previous legislation on wiretapping, they are unable to make the authorities sign it. They will not meddle with such matters. The question as to when the Legislative Council will draw up the legislation has nothing to do with the judicial authority. They can only rule whether the concerned are constitutional acts. They have again and again told the entire Hong Kong community that, first, they will not interfere with the Government or teach the Government to do things, and second, they will not do anything on behalf of the Legislative Council. They have said so many times.

However, according to what the Secretary now says, they approve of the approach taken by the authorities. So, of the Ten Commandments I mentioned yesterday, he is in breach of the Ninth Commandment. My words turn out to be correct, and that is one shall not bear false witness. This is real. He should not do that. The point is just that we can do nothing about him. It is because we cannot force him to state when he consulted the judicial sector. In fact, I can tell him that this further proves why the authorities do not adopt judicial authorization. It is because if judicial authorization is adopted, the Judges will speak up and seek confirmation from them.

If the authorities adopt authorization by panel Judges instead of judicial authorization, the Judges can be taught how to go about the matter, and the rules can be stipulated on when to and when not to give reasons. Have the authorities given them any respect? It is not the same for me to seek judicial review now. The reason is that it is a panel of three Judges. The Judges will definitely not say whether the executive authorities are correct or wrong; nor will they say whether the Legislative Council is correct or wrong. The situation is like that.

However, the Secretary took someone else's job into his own hands, saying that they approved of the authorities' approach. Yet the approach will create an impact on them. The Secretary's meaning is that many Judges approve of the authorities' approach. That is to say, when they deliver determinations granting authorization, there is no need to give reason; but they must do so when they turn down, or refuse, the applications. In fact, this is likely to bring about an objective result, namely, some people might end the matter by giving an approval because they do not want to get into trouble. The reason is very simple. Given the fact that there is no need to give reason if authorization is granted for the authorities to conduct wiretapping but it is otherwise in the case of refusal. They also do not want to do extra work. So, objectively, this is possible.

All along I have been arguing with the authorities over the question of whether or not judicial authorization should be adopted. Why must the Secretary switch over to authorization by panel Judges? Here is the answer to the riddle. The reason is that once it has changed over to authorization by panel Judges, there will be no more judicial independence. The reason is that panel Judges are transferred to executive positions while they are serving as Judges. When one is holding an executive position, one has to follow the authorities' executive orders. Is this not a plot? Ultimately, there is solid evidence of the plot. It is right here that it is exposed.

Never have I heard of a Court told by an executive authority what to do. Nobody has the guts to do that. So, the authorities have to make the change, paying no notice to the advice we give repeatedly in pointing out that this is going to damage the division of power in the three branches of government. However, the authorities still make the change, entrusting the work to panel Judges. It is further amended to be subject to Judge's authorization. The authorities can indeed do such ludicrous things. The Judges are to be told what to do. What is more, we are told that the Judges approve of such a practice. This is most ludicrous. "While man is doing things, Heaven is watching." I am telling the authorities this. Do not ever let me overhear what Judges say while they are having tea at the table next to mine and do not ever let me hear them condemn the Government. I will definitely testify here.

Now I ask the Secretary to give replies. (Whether or not he is to reply is up to him.) When did he consult the judicial sector? Through whom? Who made the response? In the opinion of the judicial sector, in what way is this arrangement good? If the Secretary is unable to answer, I have just one remark. My advice is for him to read again the Ninth Commandment of the Ten Commandments when he is home tonight — "Do not bear false witness."

MR MARTIN LEE (in Cantonese): Madam Chairman, in fact what LEUNG Kwok-hung has said is right. According to the Secretary, there is consent from the judicial department. However, I do not believe that the Secretary gave the judicial department a full version of the clauses and then asked the people there whether they totally agreed with those clauses. This is impossible. Logically, when there was discussion with the judicial department at the very beginning, the discussion should have been on the basic concepts. The authorities would have just indicated a wish not to use government officers as the people trust the

Judges. It also would have asked the question whether or not the judicial department would assign Judges to do such work if the Legislative Council gave its consent. The authorities would only engage in consultation on the principles and ideas only. How possibly can all the clauses be given to the head of the Judiciary? I do not know whether the consultation held was with Andrew LI. I do not believe that the authorities gave him all the clauses, asked him to go through each of them, and told him that once a Judge was appointed to such a post would no longer perform the work of a Judge. I do not believe they asked him to go through each clause and mark each one with a "√"?

Therefore, with the Secretary saying that there is consent from the judicial department, I wonder how consent was given. What is more, the judicial department has not listened to our debate. It is also not possible for the people there to listen so carefully. Even we as Members have to work so many hours. However, the judicial sector and judicial department cannot afford so much time to study such a complicated Bill, right?

The Secretary should not have cited those words. To say so is really to "set us up," namely, to suppress us by claiming that there is consent on the part of another party. May I know how the other party gave its consent? Consent to what? The Secretary has the obligation to inform Members of all these. Otherwise, the Secretary is letting down a certain person — I know not who he is. The Secretary simply said that he had fully agreed. How could the Secretary say that?

Chairman, we are soon going to be "midnight cowboys". Why am I saying this? Chairman, I do have reason. It is because I have seen the scenario of the Finance Committee, and I know the Government's tactics. First presented would be the most troublesome proposals even though it was well understood that we were going to have rounds of heated argument. Put at the end would be the important ones. After rounds of argument, we would be left with no time. Finally, no one would speak, thus allowing the proposals to go through. Why am I saying this? The point is that in the future, the Government will approach those Judges with piles of documents shortly before midnight. The Judges would think that if they agree, they need only check each item with a "√" and put down their signatures; but if they disagree, they will have to do some writing for each item, which is going to take a lot of time. Guess whether or not the authorities will look for those Judges in the middle of the night. Of course, yes. The authorities will resort to all sorts of ploys.

To be honest, it is very hard to expect me to have confidence in this current government. My forecast is that the Government is going to use every sinister ploy available. It is no different from the coercion applied to us by the authorities in a bid to force us to pass it faster. Similarly, it can even be said that there will be no time for sleep. What is more, the application is to be made to a Judge only. If it gets signed, then there will be no trouble. If it goes unsigned, then there will be writing to do. Never have I seen such an approach. For years I have been engaged in lawsuits, but I have never come across such a situation, that is, under certain circumstances it is to be like that and yet under some other circumstances, reasons will have to be given. Such a situation only crops up between me and my wife. If I agree with her, there is no need to give any reason. If I oppose her, then reason has to be given in writing. *(Laughter)*

CHAIRMAN (in Cantonese): Mr Ronny TONG, speaking for the second time.

MR RONNY TONG (in Cantonese): Chairman, I do not know in which restaurant Mr LEUNG Kwok-hung overheard the conversations among Judges having lunch. However, I have discussed these matters personally with several veteran Judges. Of course, I cannot disclose their names. They told me that they were absolutely against such a system, adding that they would not accept the job even if they are invited. So, it can be certain that these Judges will not be the six to be selected by the Government. I can make the relevant information known, but I wonder if the Secretary can provide information on the person he consulted. Is he a Judge? If that person is a Judge, then has the Secretary consulted other Judges?

However, Chairman, this is not the most important issue. What matters most is the point that this is not an issue which Judges can determine. One cannot say that there is no need to give reason because one does not like to do so and expects acceptance by the Legislative Council. Why are we putting up the demand that reasons be stated? It is not for the Judges' convenience. It is to see that justice is done. It is to make it possible for us to see it ourselves in case of mistakes on the part of Judges. If the Judge is right, we should not wrongfully say that he is wrong. So, this is not something that Judges may bring up or ask for. It has to be prescribed by the Legislative Council by means

of legislation so as to stipulate that, for the sake of justice, a Judge must state his reasons in writing to explain why he authorizes acts that infringe upon human rights protected by constitution. Therefore, we must not put the cart before the horse.

MS AUDREY EU (in Cantonese): Chairman, as this is basically a very important principle, I also would like to express my views. Sometimes the Legislative Council would consult some relevant bodies. Occasionally, even the Judiciary is consulted, for example, when the decisions we make are likely to impact the administration or expenditure of the Judiciary. Take this Bill as example, if the Government is to appoint panel Judges to take charge of the hearings, there is a question about the availability of Judges as well as question of the availability of space in the Court for the papers. Because of the impact on the operation and administration of the Judiciary, we certainly ought to consult the Judiciary. This is only right.

Turning now to the issue that the Secretary spoke on just now, that is, the question as to whether or not the Judges should give reason when granting approval or refusing. For questions of this type, it is not acceptable to consult the judicial authority first, and then, after noting the views given by the judicial authority in response, say that it is necessary to respect the relevant views. The reason is that such an approach has a serious impact on the division of power. What is more, if someone in the future is to challenge the constitutionality of a certain provision of the Bill, can we say that it is wrong as for the matter we have sought advice and obtained consent from the Judiciary? If it were so, then in future we can challenge the constitutionality of any legislation passed by the Legislative Council without relying on any provision of the Basic Law. The reason would be that the legislation cannot possibly be wrong as we have consulted the Judges on all issues to see if they are agreeable, and there is consent from Judges in the Judiciary or from the Chief Justice.

So such practices or habits definitely should not be encouraged. It must be made very clear. My wish is for the Secretary for Security or all the Directors of Bureaux not to tell us during the process of legislation that the authorities need not give justifications for a certain provision as the authorities have already consulted the Judiciary and consent has already been obtained. This way of doing things is not acceptable. Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr Martin LEE, speaking for the second time.

MR MARTIN LEE (in Cantonese): Chairman, earlier on, when talking about my wife, I came to a halt naturally, as a result of which I missed one paragraph in delivering my speech. *(Laughter)* In fact it is like this. Chairman, now the Government is telling us that consent has been obtained from the Judges. In such case, are the authorities telling us that those Judges will object if we propose an amendment to stipulate that no matter whether or not there is authorization, it is still necessary to state reasons? For the scenario to make sense, it has to be like this. Otherwise, what is the point for the authorities to tell us this? What do they approve of? They probably approve of the idea of seeking the help of Judges. It is not likely for them to agree with such a clause. However, I am sure that the Secretary has nothing to add. Chairman, it is because he can say nothing. So there is nothing to add.

MS MARGARET NG (in Cantonese): Chairman, earlier on, when we were dealing with the matter on page 8 of the second script — at that time the Deputy Chairman was chairing the meeting — I talked about the system of panel Judges from a broad perspective. Towards the end of my speech, I also mentioned a point in the Bill that I find most unacceptable, namely, that the authorities incessantly told the Bills Committee that the Judges approved of such and such clauses. I said a long time ago that it is very inappropriate to do so.

However, I wonder whether Members have the feeling that such things have never happened before and the Secretary is just putting up a show for us to see. This is a very basic concept. If the executive authorities have not got the basic constitutional knowledge to respect the Judiciary and the legislature, I wonder how we can go on. How can there be any confidence in the authorities? Earlier on the Secretary told us that the law-enforcement officers had been consulted, and that law-enforcement officers disapproved of having criminal offences to restrict them. The purpose of enacting this law is to find out what sort of restriction to lay down so as to be in line with public interest.

Chairman, I just want to state one point, namely, that I pointed out earlier that such an approach is much to be regretted. However, the Secretary put up a show for us right away. In my opinion, Chairman, this will not only have an impact on how we see the provisions of the whole Bill, but also makes us wary of the implementation of the Bill.

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, earlier on I listened to Ms Margaret NG's views from a broad perspective. I understand that Ms Margaret NG feels considerable qualms about the current arrangement of letting Judges scrutinize the applications. Surely, when we tried to work out the draft of the Bill, because it involved the approval by Judges with regard to the interception of communications and Type 1 surveillance, inevitably we had to consult the Judiciary. We have not the slightest intention of interfering with or compromising judicial independence. Nothing of that sort whatsoever.

MR MARTIN LEE (in Cantonese): I have assumed the Secretary had done some consultation. But my question just now was about what consultation the Secretary had done. Did you consult the Judiciary if it would accept the provision as amended by us?

CHAIRMAN (in Cantonese): Does any other Member wish to speak?

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If no other Member wishes to speak, Secretary for Security, do you wish to speak again?

(The Secretary for Security indicated that he did not need to speak again)

CHAIRMAN (in Cantonese): Before I put to you the question on Ms Margaret NG's amendments, I will remind Members that if Ms Margaret NG's amendments are agreed, Mr James TO may not move his amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Ms Margaret NG be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

Ms Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes, after which the division will begin.

CHAIRMAN (in Cantonese): Will Members please proceed to vote.

CHAIRMAN (in Cantonese): Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Functional Constituencies:

Ms Margaret NG, Mr CHEUNG Man-kwong, Dr Joseph LEE, Dr KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mr Bernard CHAN, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Ms LI Fung-ying, Mr Tommy CHEUNG, Mr Vincent FANG, Mr WONG Kwok-hing, Mr Daniel LAM, Mr Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong, Mr Patrick LAU and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Mr Frederick FUNG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Mr Ronny TONG and Mr Albert CHENG voted for the amendment.

Mr James TIEN, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr LI Kwok-ying and Mr CHEUNG Hok-ming voted against the amendment.

THE CHAIRMAN, Mrs Rita FAN, did not cast any vote.

THE CHAIRMAN announced that among the Members returned by functional constituencies, 27 were present, six were in favour of the amendment and 21 against it; while among the Members returned by geographical constituencies through direct elections, 23 were present, 14 were in favour of the amendment and eight against it. Since the question was not agreed by a majority of each of the two groups of Members present, she therefore declared that the amendment was negatived.

CHAIRMAN (in Cantonese): Mr James TO, you may move your amendments.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to clauses 9(3) and 12(3)(a) regarding the requirement for the relevant authority to give reasons for his determination of application for prescribed authorization.

Proposed amendments

Clause 9 (see Annex)

Clause 12 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments moved by Mr James TO be passed. Will those in favour please raise their hands?

(Members raised their hands)

CHAIRMAN (in Cantonese): Those against please raise their hands.

(Members raised their hands)

CHAIRMAN (in Cantonese): I think the question is not agreed by a majority respectively of the two groups of Members, that is, those returned by functional constituencies and those returned by geographical constituencies through direct elections, who are present. I declare the amendment negatived.

SUSPENSION OF MEETING

CHAIRMAN (in Cantonese): I declare also the suspension of the meeting until 9 am tomorrow morning.

Suspended accordingly at six minutes past Twelve o'clock in the Morning.