

OFFICIAL RECORD OF PROCEEDINGS

Friday, 4 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.

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

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 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 ALBERT HO CHUN-YAN

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 FREDERICK FUNG KIN-KEE, S.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**

CLERK (in Cantonese): Clause 24.

MR JAMES TO (in Cantonese): Chairman, I move the addition of the definition of "Privacy Commissioner for Personal Data" (the Privacy Commissioner) to clause 2(1) and the addition of subclause (1A) to clauses 9, 12 and 24 respectively.

Chairman, we have talked a lot about this in the debate yesterday. We know that, firstly, this sort of applications will be made in secret; secondly, due to their nature, they will surely be made unilaterally and it will be impossible to send for the crooks so that they can dispute the matter. Therefore, I think that in this mechanism consisting of members of the panel — and they so happen to be Judges — there should be a system that will enable people to dispute the claims. However, how can this be done? In view of this, I hope that the Privacy Commissioner can be included as a special advocate. Of course, the Privacy Commissioner is an expert in privacy and he is well-versed in the scope of protection, the areas that merit attention and whether conditions can be included in certain circumstances to strike an appropriate balance, so that they can be reflected in the authorization. Moreover, he will have issued a lot of codes of practice in many cases and investigated a lot of cases involving the violation of privacy in actual practice. In addition, he has to fulfil the basic responsibilities on confidentiality and comply with the codes concerned, therefore, I believe it is among the necessary to include the Privacy Commissioner in the Court not the Court but among the members of the panel — who happen to be Judges — and being invited under such a system to do so, he can provide some viewpoints and analyses, so that members of the panel can form comprehensive and balanced views when approving applications. Of course, ultimately, it will be members of the panel who make the judgement.

Some people may ask if the Privacy Commissioner will be very busy in that event. Some people even say in that case, the Privacy Commissioner probably would not have any time to go to the washroom, since there will be over a thousand cases each year and the Privacy Commissioner probably would have to be present every day. Of course, Members can hold different views, but I personally estimate that, firstly, members in the panel are themselves

Judges; secondly, when the Bill initially comes into effect, members of the panel may invite the Privacy Commissioner to attend more frequently because they may not be too familiar with some specific terms in the Bill, such as what amounts to "reasonable expectation of privacy". The legislation itself has not specified them and the Privacy Commissioner may have in-depth knowledge on the laws and literature on personal privacy worldwide and he may even have special understanding of the latest developments on the concept of privacy. A lot of concepts therein on privacy have not yet assumed an important place or become significant and balanced concepts in our law. Therefore, at the initial stage of implementing the legislation, the Privacy Commissioner can provide more views. If members of the panel invite the Privacy Commissioner to be present, then he can offer more views in this regard. However, I expect that as time goes by, after the three members in the panel have accumulated some experience and some case laws as well as exchanging their experience, when they are to put it into practice, the likelihood of having to frequently invite the Privacy Commissioner to be present will be much reduced. Of course, when sensitive, important and complicated cases are involved, the panel may still invite the Privacy Commissioner to be present from time to time to offer advice. This is because there is a lack of an adversarial system. They hope that the Privacy Commissioner can provide alternative views or views from the perspective of privacy, so that members of the panel can make all-round considerations when considering applications. I hope Honourable colleagues can support this amendment.

I have discussed this matter with the Privacy Commissioner. As far as I understand, he is a bit concerned about the manpower issue. If this is really put into practice, I believe a responsible Government will certainly not turn a blind eye to this. Initially, the Government said that the inclusion of the Privacy Commissioner might involve public funds, so it voiced its opposition to the President of the Legislative Council on giving approval to moving my amendment. However, the final ruling made by the President is that approval is given to the moving of my amendment. Therefore, judging from the President's ruling, Members can have an idea of whether a lot of public funds will be required. Furthermore, as Ms Emily LAU said when quoting the Government, if more manpower is required to implement this piece of legislation, we will definitely approve the funding. Therefore, if this amendment is passed, I believe the Government will definitely fulfil its pledge by giving the Privacy Commissioner adequate manpower and resources to fulfil his legal responsibilities and assist members of the panel in fulfilling their legal responsibilities better.

Proposed amendments

Clause 2 (see Annex)

Clause 9 (see Annex)

Clause 12 (see Annex)

Clause 24 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Mr James TO's amendments thereto.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If no Member wishes to speak, I now call upon the Secretary for Security to speak.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government opposes Mr James TO's amendment which provides that the authorizing authority may invite the Privacy Commissioner for Personal Data (the Privacy Commissioner) to act as a special advocate.

There are a lot of uncertainties in Mr James TO's proposal: the provision does not set out the rights and obligations of a "special advocate" and his role is not spelt out in the provision or even in the entire Bill. The design of the entire Bill is to ensure that there are adequate checks and balances in the regime while keeping the confidentiality of the operation. It is not a way to strike a balance to add other restrictions or conditions when we have already reached an appropriate balance.

We believe that to put in place the arrangement suggested by Mr James TO will only add another kind of procedure to the present safeguards, but it will not

be adding any extra substantive safeguard. The Bill, coupled with the authorities' amendments, has already taken safeguard measures in different aspects in the whole process of authorization and execution before, during and after the operation. Insofar as safeguards and other rights are concerned, it is as adequate as, if not more than, the relevant regimes in other common law jurisdictions such as the United Kingdom, Australia and the United States.

In fact, according to the Bill, the authorizing authority already has to balance factors such as law enforcement and privacy. Therefore, we consider it unnecessary to set up an additional mechanism as proposed by Mr James TO.

Moreover, the powers and functions of the Privacy Commissioner are clearly stated in the Personal Data (Privacy) Ordinance and the functions of a special advocate are not included in it. The proposed new post will make it difficult for the Privacy Commissioner to focus on the execution of the legislation on privacy.

Madam Chairman, I call on Members to oppose Mr James TO's amendment.

Thank you, Madam Chairman.

MS AUDREY EU (in Cantonese): Chairman, after listening to the response from the Secretary, I find it necessary to respond to the following points he has made.

Firstly, he said that this would increase uncertainty as he was not sure what special advocate means. This is in fact very simple. He has only to ask the officers of the Department of Justice and they will tell him what a special advocate means. This is not a newly coined term. Moreover, Mr James TO has already explained it very clearly in his speech. For example, sometimes, Judges may want to understand issues such as what reasonable expectation of privacy means, and as the Privacy Commissioner for Personal Data (the Privacy Commissioner) is an expert in this area, he can offer a lot of advice in this regard. This will certainly be of great assistance to the Judges. Just imagine, under this newly designed system, Judges have to undertake work that they normally would not do as a Judge and they have to undertake administrative work. When they work as Judges, lawyers representing both parties will assist them at any time, therefore, if you ask all the Judges, they will all say that they need very much

and often, they will rely on the work in this regard. Therefore, when they are to undertake this new duty, if someone who is at a comparatively speaking independent position can offer assistance and professional advice to them, I believe any Judge will feel grateful for this and find this necessary.

The second reason given by the Secretary is that under this newly designed mechanism, a great many safeguards have already been put in place, so a balance has been struck. However, of the numerous measures the Secretary has mentioned, and even after looking at the entire Bill, no safeguard or measure like the one proposed by Mr James TO can be found. Also, this safeguard or measure is not at odds with all the other designs. Therefore, such an argument does not hold water at all. When responding to the first point raised by the Secretary, I have said that if such assistance is available, the Judges will feel grateful and find this necessary.

The Secretary said that the third point is the need to balance personal privacy, so it is hoped that not too many people will know about the applications or matters relating to the people concerned. However, the Secretary must not forget that the amendment moved by Mr James TO now is to specifically invite the Privacy Commissioner to offer advice and this is precisely his specific job — to protect privacy. In view of this, to invite an expert in privacy to make submissions in camera will definitely give more protection to privacy. What sort of problem is the Secretary thinking about? It is the violation of other people's privacy. What sort of advice will be sought from the Privacy Commissioner? It is on how to better protect personal privacy. Therefore, why does the Secretary consider this from the contrary and rule out or disagree with Mr TO's proposal? I believe this point cannot hold water either.

The fourth and also the last point is that the Secretary said that this specific task is not prescribed in the Personal Data (Privacy) Ordinance. Of course, it is not there because when the Ordinance was passed, it never occurred to anyone that this Bill, which would violate privacy and would be so much inadequate in the protection on privacy, would ever come into being. Mr TO's proposal seeks to better protect personal privacy in this area, moreover, this job will not be in conflict with the daily work of the Privacy Commissioner in any way.

Therefore, the four reasons cited by the Secretary are absolutely unjustified and they even run counter to the concept of a Privacy Commissioner

and his duties. I hope the Secretary can reconsider Mr James TO's proposal. Thank you, Chairman.

CHAIRMAN (in Cantonese): Before I call on Mr James TO to speak again, does any Member wish to speak?

MR MARTIN LEE (in Cantonese): Madam Chairman, in fact, what do we want those so-called panel Judges to do? Their power is the same as that of the Judges. If I were a panel Judge — of course, I will not be one, but even if I were a Judge, I would be the one with the least chance of becoming a panel Judge. If I were a panel Judge, what would I do? I would be hearing submissions from the Government all the time and it will always be from the government side and I would not be able to know anything about the other side at all.

Today, we are talking about a balance in law. In that case, does a Judge have to strike a balance? The Judges will always listen to the submissions of the police, telling him how serious the crimes are. However, in fact, the so-called serious crimes are just punishable by a maximum penalty of three years of imprisonment, but the police will always maintain that they are serious. The panel Judge will of course want to strike a balance but he cannot, he cannot do so every day and he cannot do so for years. In that case, very soon, the panel Judges will become the buddies of police officers because their way of thinking will just be the same as the police officers. If one really wants to say that they are Judges, why not give them the chance? If one says that doing that is no good because they are not Judges actually — it is possible to say so — then, please do not call them Judges.

Therefore, I find it very strange. If it is stated clearly that they will not be regarded as Judges but they are called panel Judges, this is something that deceives the public and it is blatantly deceptive. Now, Mr James TO is saying that we will help them and let them hear the views from the other side so that the matter can be looked at from the perspective of privacy and some advice can be given to the panel Judges, however, the Government says that it will not do. They are in fact government officers, so let us just call them government officers, or, give them another name, something like commissioner or whatever. However, there is already a Commissioner, so I do not know what else they can be called but there is no reason to call them Judges anymore. Their power is

the same as Judges. When exercising such a power, they certainly need some sort of balance but the Government says that this will not do. Therefore, Madam Chairman, I now tell the Administration that if it really wants to do it that way, the word "Judge" must be deleted as they should not use the title of "Judge". They will be working for the Government paying no attention to.....

CHAIRMAN (in Cantonese): Mr Martin LEE, concerning this point, you have already explained clearly last evening.

MR MARTIN LEE (in Cantonese): I did not raise this point last evening. I did not mention doing away with the title of "Judge".

CHAIRMAN (in Cantonese): You said they were actually regarded as executives. You did say so.

MR MARTIN LEE (in Cantonese): I am saying that the title "Judge" should not be used. This point only occurred to me today. I hope that the Secretary will not say that this has already been raised in the Bills Committee more than a dozen times. I am very sure that I thought of this point only just now.

Therefore, if one really wants to confer the title "Judge" on them but does not want to deceive people, one should actually support Mr James TO's proposal.

Thank you, Madam Chairman.

MS MARGARET NG (in Cantonese): I agree totally with Ms Audrey EU's arguments and there is no need to repeat them. However, there is another reason that I have to support Mr James TO's amendment. I have been looking at the present Bill and found that the situation there is a serious cause for concern. In fact, only an applicant will appear before the panel Judge and according to this Bill, this panel Judge cannot discuss this matter with anyone else. We can see that usually, when a Judge conducts a trial, often, he has to make independent decisions on his own, however, there are also opportunities

for him to listen to other people's views, including discussing with other Judges from time to time.

However, in this situation, no third party whatsoever is present. If we look at other systems, for example, the system of making an application to a Judge in the United States, there are two hurdles to clear. Firstly, the application is not made by law-enforcement officers but through the attorney general. Therefore, at this level, not only is there an official in a legal department to check the relevant information, it is also necessary to give an account to another person, that is, one more person is in the know. Furthermore, in the American system, after the Court has made a ruling, it is possible for the Courts at higher levels to conduct a review. Therefore, we can see that in such a system, more than one person is involved. In the British system, even though there is no need to make applications to the Court and they are only dealt with internally by the executive, such matters have to go through a committee consisting of several members. Such a system of review can enable more people to be in the know.

Chairman, in the examples given just now, a lot of people are in the know and they are all trustworthy people. Why in Britain are lawyers involved, that is, why a committee consisting of lawyers is responsible for dealing with such matters? This is because it is totally natural for the legal profession to maintain confidentiality for people concerned, so there is no need to worry about this and the more so because Mr TO's proposal seeks to enlist the assistance of the Privacy Commissioner for Personal Data (the Privacy Commissioner). If the Government thinks that even the Privacy Commissioner is not trustworthy, then who can be trusted? The Government wants the public to believe in Judges, however, in fact, even the Government itself does not trust Judges because even Judges have to be screened. However, the Government still thinks that the selected Judges are untrustworthy and it believes that if the Privacy Commissioner is included, there will be problems in maintaining confidentiality. Chairman, this is why we have such serious misgivings about the whole Bill.

Members can see that the Privacy Commissioner is just one person and he has to deal with the law-enforcement agencies and the Chief Executive but he does not have to face the public. Given such a lack of transparency and such black box operation, the public will not have any confidence. Therefore, I support very much the addition of the Privacy Commissioner proposed by Mr TO. Apart from being able to offer assistance to the panel Judges, as Ms

Audrey EU said, law-enforcement officers and applicants will know that a third party is present and they will be more cautious.

Finally, Chairman, I have already said yesterday that as panel Judges only deal with one person all the time and since so many things are involved, it will be very easy for them to approve applications. But if they reject them, they have to give a lot of reasons and there may also be a lot of troubles in the future. This makes us concerned that a very close and even cozy relationship will develop between a small number of panel Judges and the same group of law-enforcement officers. However, if there is a third party, the panel Judges will have to be more vigilant. If their decisions and grounds are disclosed, will they stand up to queries?

Therefore, Chairman, I support the amendment moved by Mr James TO.

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

MR LAU KONG-WAH (in Cantonese): Chairman, Mr James TO has commented on the issue itself and explained why the "Privacy Commissioner for Personal Data" (the Privacy Commissioner) should be added. There is no problem about that and it is only a matter of different viewpoints. However, Mr Martin LEE's queries concerning future panel Judges have aroused my concern. No matter what views he holds on this Bill, in future, they will really operate. According to Mr Martin LEE's line of thinking, he thinks that members in the panel cannot be called Judges in the future. I believe one cannot do that. Moreover, it seems that Mr Martin LEE is showing a great deal of disrespect for this group of Judges who will be entrusted with such important duties in the near future. He seems to be saying that after taking up the positions of panel Judges, they would surely come under the influence of the Government and will surely be biased, and even the wisdom of a Judge will be tested. I think it is not proper to say so and this is disrespectful to the Judges. Moreover, Mr Martin LEE is probably still not yet fully awake as he said that all the crimes involved in the present applications were punishable by less than three years of imprisonment. However, I would invite him to take a good look. The threshold for the interception of communications is more than seven years. Chairman, although I do not want to say too much, I cannot help but raise this very crucial matter.

MR MARTIN LEE (in Cantonese): Madam Chairman, it is not Martin LEE who is not respecting the so-called panel Judges but rather, it is the Government and Members who support this Bill, such as Mr LAU Kong-wah, who is being disrespectful. Why? The present Bill specifies that a panel Judge, when performing any of his functions under the Bill, "shall not be regarded as a Court or a member of a Court", that is to say, not a Judge. In other words, when a Judge is performing such functions, no one can regard him as a Judge. Actually, is it me who do not respect the Judges, or is it them who do not respect the Judges, or is it the present enactment of the legislation that does not respect the Judges? Members can all see that. Therefore, I thank Mr LAU for reminding me. It is not me who does not respect them. I have the greatest respect for the Court, rather, it is this piece of legislation that does not respect Judges. Therefore, if this is the case, how can they be called Judges? They can be called Judges when they are walking on the streets. But when they are at work, they cannot not be called Judges. The word "regard" means to look with one's eyes. They shall not be regarded as Judges, however, verbally, they can be called Judges. So, does it mean that our eyes and lips have to go their separate ways? This is precisely what this Bill is doing. Therefore, it is good for Mr LAU Kong-wah to raise this point, but he has made a mistake. He should say that to the Government.

Moreover, Madam Chairman, just now, I have forgotten to raise another point. In the operation of the Court, if a Judge finds that a party is too strong whereas the other party is not represented, legal issues may arise, so the Court will invite a barrister to "do a good turn", that is, what is done is free of charge and he is called a friend of Court, and is responsible for checking the law for the Judge free of charge. Since one party is represented and the other is not, he will have to give the Judge his opinions and make submissions to the Judge with impartiality, so that the Judge can balance the two sides and be assisted in making the right decision. However, this Bill does not allow this to be done because it states clearly that the panel Judge "shall not be regarded as a Court or a member of a Court", so there cannot be any friend of Court. Mr James TO's amendment has in fact taken many approaches into consideration, however, as restrictions have been imposed, he has no alternative but do it this way.

Thank you, Madam Chairman.

MS MARGARET NG (in Cantonese): Chairman, in this regard, what Mr LAU Kong-wah has said just now makes me find it necessary to respond. He said

that they should continue to be called Judges in order to make the public believe that the authorization of covert surveillance and interception of communication is dealt with by Judges. This runs directly counter to the intention. Why do we seek to put the contents of Schedule 2 in clause 6? The most important reason is to remind the public that when granting authorization, Judges do not act in their capacity as a Judge, only that they have the experience and knowledge of a Judge. What we are most worried about with regard to this system is that once there are panel Judges, in the mind of the public, will Judges play an impartial role or will they do anything improper with the executive authorities behind closed doors. Since no one can see that, it will subject the invaluable treasure of judicial impartiality and judicial independence to very great risk.

Chairman, as clause 6 has already been passed, the system of panel Judges will definitely be put in place. In that case, what sort of remedial work are we doing now? It is to alleviate the consequences as far as possible and to use the impartiality of procedures — procedures and impartiality that can be seen — to dilute the sense of cronyism as far as possible. Increasing the number of Judges also serves the same purpose. Therefore, the Government cannot on the one hand, request that such a system be put in place, so that people will continue to get the false impression that they are Judges, while on the other hand, it does not allow us to add some provisions, which will absolutely not damage confidentiality, procedures or to anything and it opposes our attempts to improve this system. Thank you, Chairman.

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

MR JAMES TO (in Cantonese): I have now thought of a name. In fact, it should be called the Chief Executive-appointed authorizing panel. This sounds better. Besides, it is not a bad name either because it makes clear that they are appointed by the Chief Executive. This is just like we will not address Mr WOO Kwok-hing as Honourable Mr Justice WOO Kwok-hing. He is a Judge when performing his daily duties in the Court, but when he is acting as the Chairman of the Electoral Affairs Commission, he is its Chairman. It is only that we are used to calling him Judge WOO. In reality, when he is performing that particular function, he is not working in the capacity of a Judge and this is very clear. Moreover, the Commission is also responsible for approving the

use of logos by political parties. However, we will not say that it is a Judge who approves the use of those logos.

No matter what, I am grateful to several Members for stating the rationale just now. The only point that I wish to add is, why is the Government opposed so strongly to this? For what reason? The Secretary said that it was due to the lack of certainty. Why is there any uncertainty? The Secretary is saying that things will be much more certain without the Privacy Commissioner and without an alternative voice. However, why would it be more certain without an alternative voice? This is because only one side of the story from the inspectors will be heard and this will be the result. With the presence of the Privacy Commissioner, when an inspector makes an application — the applicant must be of the rank of inspector or above — he will know that there are other voices. We must remember that the attendance of the Privacy Commissioner is not mandatory on each occasion. It is only when this authorizing panel appointed by the Chief Executive finds that it is necessary to do so in a particular case, when they find that they have no one to fall on, as Ms Margaret NG has said, that it is not possible to find other people and discuss the case — since these matters are confidential and the system does not allow them to discuss them with other people — that the Commissioner will be invited to attend.

Last evening, the Secretary made one remark, saying that there could be an appropriate way to deal with it. However, that will not work either because this approach is restricted by past developments. When such a situation arises, they cannot just talk about it briefly with the Commissioner. The appropriate way suggested by the Secretary definitely would not be very broad in scope. Unless he is saying that in fact, it has a very large scope, otherwise, I really want to know what panel Judges can do when they think that outside help is required and they want to hear alternative voices, so that there can be more views to assist them in considering how to strike a balance, for example, when deciding what a reasonable expectation of privacy is.

In fact, the Commissioner will be invited to attend only when it is deemed necessary. However, the Government wants to block and kill even this. It is because the Government only wants the panel Judges to hear only what inspectors have to say and this is what the Secretary means by certainty.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, some Members said just now that the Government mistrust Judges but I think I do not agree with such a view. I think Members should not query or doubt the independence and ability of our Judges, that is, saying that as time goes by, panel Judges will become the friends of the police and they will be like rubber-stamps, approving each and every application in the future. I do not agree with this point.

Now, it is not the case that this Bill does not care about the privacy of members of the public. We are very much concerned about that, therefore, there are three tiers of supervision under our present system. There include supervision prior to the operation, that is, we need approval from Judges; then, during the operation, the department will act in accordance with the Code of Practice; and afterwards, we have the Commissioner. Precisely because we consider that we have taken adequate measures to protect privacy, we think that we are by no means compared unfavourably with other common law jurisdictions. Therefore, we consider it unnecessary to include the Privacy Commissioner.

MS MARGARET NG (in Cantonese): Really, no matter what we say, the Secretary just cannot see the point.

Chairman, really, it is not a matter of whether we respect Judges or whether we trust them. If one really attaches such great importance to judicial independence — just as we attach great importance to judicial independence and the principle of the rule of law — we need to put in place all sorts of systems to ensure the independence of Judges. These safeguards should not be removed, so that the public will have no idea how independent and impartial these Judges are. If panel Judges are often said to only listen to the views of one party, how can they convince people that they can maintain their independence? Should such doubts occur, it would be difficult for the confidential procedures to have any credibility. It is because of this that we have made such a lot of effort, that is, in such circumstances, we try to find all sorts of ways to ensure they do not just listen to the views of one party.

Therefore, Chairman, I dearly hope that when the Bureau and the Government take judicial independence into account, they can also think about the system and not the Judges themselves. We are not saying that we have to trust Judge YEUNG, Judge LI or Judge CHEUNG but that a system must be put in place to protect privacy.

Thank you.

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

MR MARTIN LEE (in Cantonese): Madam Chairman, it is not true that we do not respect or trust Judges. I have said frequently that it is this Bill that is so. The provision in the original version was not like this. There was one more point in it, that is, a panel Judge shall act judicially. But this point can no longer be found. In that case, what actually does the Government want?

If the panel Judges look at the original version and present version of this Bill, the original version says that they are to act judicially but this is no longer the case and it is even said that they "shall not be regarded as a Court or a member of a Court", that is, other people cannot regard them as Judges, so what actually are they supposed to do? This is really perplexing. They cannot act judicially; they cannot do so because the word is no longer there. It is very obvious that the word was there originally but now it is no longer there, yet the message is still there, so what should they do?

Furthermore, Secretary, I did not say that the Judges would become your rubber-stamps. This comment is only your own interpretation and I did not say so. However, why does the Government want them to listen to some one-sided claims day after day and for several years? I only said that if they were asked to do so all the time, their way of thinking and viewpoints would become the same as those people whom they see frequently. We have explained many times why we respect and trust Judges so much. This is because they often associate with one another, have their own dining room and they often chat with one another. In this way, they have their own small circle. However, this will no longer be the case. They will be removed from this setting and when they go to work, they cannot even go to the Court. This is how the situation will be like. The

present approach is to isolate them from the tradition and habits of Judges as far as possible and turn them into another type of people.

Therefore, it is not us who do not respect or trust them but the Government and Members supporting the Government who do not respect or trust them. Therefore, I hope Members will not give their support. Mr LAU Kong-wah should know by now that this Bill is obviously problematic.

MR JAMES TO (in Cantonese): Chairman, I wish to talk about two points. In fact, it is good for Secretary Ambrose LEE to speak more because the more something is debated, the more truth will come out of it.

From the comments made by the Secretary just now, Members can have a clear understanding of the flaws and arguments there. For example, he said that the Government has put in place a well-organized team and the Commissioner is acting as a defender. However, please remember that even under the Government's current proposal, the Commissioner cannot oversee Judges for what they have done and he should not do so either because members of the panel happen to be Judges. Therefore, the Commissioner cannot oversee members of the panel when they make decisions. Moreover, do we also think that since he has no power to oversee matters such as the so-called applications, he is also using what is called the standards of judicial review? However, the problem now is that, when judging whether an application should be granted, about what angle should be adopted with regard to privacy or what additional conditions should be imposed, it is totally impossible to make any decision in the subsequent supervision. I can say that it is very difficult to provide protection to the overwhelming majority of the applications approved by this group of panel members who happen to be all Judges by means of supervision.

The Secretary also talked about doubting the ability of Judges. The issue now is not that there is any doubt about the ability of Judges but that if members of the panel who they happen to be all Judges consider that there is no need to invite the Privacy Commissioner at all and there is no need to do so in their three-year term and there is no need to do so in one single case, then it will not be necessary to invite the Privacy Commissioner. We are not saying that the Privacy Commissioner has to be invited no matter what and that the Privacy Commissioner must be there. This is not what we mean. We are now seeking to give them an opportunity and a possibility so that they can invite the Privacy

Commissioner when they want to. However, what the Government means is that they cannot be given this opportunity. Therefore, it is the Government that has doubts on why they have to seek the advice of the Privacy Commissioner. Panel Judges are already Judges and they are appointed because the public trust them as Judges, even though they are not to be regarded as Judges. If the Government is saying that should this amendment moved by Ah TO be passed and the Privacy Commissioner is to be consulted, the public will call the competence of the panel Judges into doubt. I wonder if this is what the Government means? It is the Government that has doubts and not me, is it not? The Government can refrain from inviting the Privacy Commissioner, can it not? Conversely, I should say that the Government doubts that if this amendment is passed, people will doubt the ability of the Judges. Is this the Government's argument? However, this is not what I gathered on listening. This is a funny argument that I derived as I make my own interpretations.

In the final analysis, the Government wants members of the panel (and they happen to be Judges) to listen to one-sided claims and one-sided views and even if panel Judges think it necessary to invite the Privacy Commissioner to offer advice, the Government wants to exclude this possibility, so that they cannot invite the Privacy Commissioner or have such an arrangement at their disposal. If the panel Judges cannot figure it out, how can they strike a balance? Do they dare refuse an application? Would Members just think about it, how great will panel Judges be under pressure?

MR LAU KONG-WAH (in Cantonese): Chairman, I think I want to avoid letting Mr Martin LEE have a beautiful misunderstanding. He said that I should understand by now but I understand by now that his thinking is really problematic, so I have no choice but to respond.

He said that as this group of panel Judges will only listen to the one-sided claims of government officers all the time, their views would be increasingly like those of the Government and the longer the time, the closer they would be. However, this reasoning is not sound. I have served in this legislature together with Mr Martin LEE for 10 years but we still do not see eye to eye on a lot of things. Even though Judges see one another frequently in Court, they still have differences in opinion. Therefore, his reasoning does not hold water at all. If this unsound reasoning is adopted to draw conclusions about the future panel

Judges and it is said that there may be such and such a problem with them, this is really being disrespectful to the work of this group of Judges in future.

I will also respond to Ms Margaret NG in passing. She kept stressing two terms. The first one is "black box operation". I have difficulty in understanding if it is necessary to make public all the discussions if it is not held in the Court. Is it necessary to have a sitting to discuss whether an interception should be approved? This is impossible. The second term that she mentioned is "one-sided claim". This is something improbable. If Judges do not listen to the one-sided claim of law-enforcement agencies when considering their applications, are they supposed to invite the person on whom interception will be carried out to come and hold a debate together? This is not possible. I think their thinking is too piecemeal and imbalanced, this is unacceptable to me.

MR MARTIN LEE (in Cantonese): Madam Chairman, Mr LAU Kong-wah has in fact put it quite well. He gave an example, saying that although he and I had known each other for 10 years, our views were totally different. In fact, we have known each other for more than 10 years. In 1990, he ran for the seats in the District Board, the Regional Council and the former Legislative Council as a candidate of the United Democrats of Hong Kong (UDHK). At that time, I was the Chairman of the UDHK. Why did our views frequently differ? The reason is that when he withdrew from the UDHK later. I said that it was a very happy day for me.

Why should a Judge not listen to the views of one party? Mr LAU Kong-wah does not understand the reason for this. In the past, a Secretary for Justice — and some Judges too — were often seen having lunch together with inspectors after Court. This should not happen. Why? Members can just imagine: if that inspector has to appear in the Court presided by that particular Judge and it so happens that he has also had lunch in the same restaurant and was seen, when the trial begins in the afternoon, the Judge is presiding in the Court and the inspector is the prosecution, what will the defendant in the dock think? Therefore, it is not a right thing to do. Moreover, except for Mr LAU Kong-wah and I, one takes on the colour of one's company and this we all understand. Therefore, why do Judges socialize with one another? Judges will also have lunch with counsels from time to time. However, for the same reason, they do not always get together as this will be unfair to everyone.

Therefore, they have to keep a distance and this is a healthy situation. Since Mr LAU Kong-wah is not a member of the legal profession, I will not blame him.

Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG, speaking for the fourth time.

MS MARGARET NG (in Cantonese): Chairman, I also wish to respond to Mr LAU Kong-wah. This is definitely not just personal opinion.

Chairman, we have come across a lot of international documents concerning judicial independence and what is the principle mentioned there? The principle is that the paramount position of a Judge must be protected. Therefore, should a Judge do jobs not related to any judicial duties for extended periods of time? What sort of people does he associate with? As a Judge, his association with other people and the distance that should be kept during trials and so on are all prescribed by international principles. It is definitely not because Margaret NG is being wary of this Bill, a certain Judge or law-enforcement officers. All such matters are governed by principles. Chairman, I hope this point can be put on record. Thank you.

MR JAMES TO (in Cantonese): Chairman, I just want to say a word.

Mr LAU Kong-wah said that the representation would be just one-sided and asked whether it is necessary to listen to comments made by the other side as well. Now, it is precisely because I do not want to listen just to the claims of one party, yet I cannot hear comments from the other party, that I want to have the Privacy Commissioner for Personal Data (the Privacy Commissioner) to act as a special advocate to express some other viewpoints, so as to give the Judge a balanced view. This is what I mean.

I designed this system because I know that under this system, we cannot invite the culprit or the target person. Therefore, this system can in fact ensure confidentiality as well as enable the Judge to invite the Privacy Commissioner when necessary. It is after I had balanced all the viewpoints that I came up with this minor improvement despite the difficult situation. However, the

Government wants to block and kill even this minor improvement. I find that this is really difficult.

CHAIRMAN (in Cantonese): Are there any Members or public officers who still wish to speak?

(No Member or public officer indicated a wish to speak)

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 Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 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, Mr LEUNG Yiu-chung, Ms Emily LAU, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG 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, 22 were present, four were in favour of the amendment and 18 against it; while among the Members returned by geographical constituencies through direct elections, 19 were present, 10 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 negated.

CLERK (in Cantonese): Clause 9 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 9 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): Mr James TO, Ms Margaret NG, the Secretary for Security and Mr Albert HO have separately given notice to move amendment to clause 12.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 12 because I think that when considering the renewal, one should take into account the number of renewals and the duration in the past. Why? This is because the issue of how to strike a balance between operations and human rights is always involved.

Sometimes, it is a must to take into account how much time the operation has taken and how much information has been obtained, which is commonly referred to as whether there is "anything in it". All these must be taken into consideration. The authorities may say that some operations may take years and they will surely say that they will find something very soon. However, we must bear in mind that the infringement on privacy does not merely involve the affected person but also a host of other matters.

Moreover, Members have to understand that, as we have debated yesterday, that the large amount of information obtained will become intelligence no matter if it will ultimately be used in prosecution. Therefore, the longer time it takes, in fact, eventually, all other so-called intelligence, be it criminal intelligence or non-criminal intelligence, will also cause infringements to a lot of people. This is collateral damage, which means that a wrong target is hit and other people are affected. Therefore, there has to be an appropriate balance. I hope the authorities can set this down explicitly.

When considering a renewal, it is true that the authorities can renew the authorization and the person-in-charge will of course say that there is still reasonable suspicion and what they have been waiting for will soon appear. However, when the time for the next renewal comes, what is being waited for still does not appear, or the things they want are not obtained, or the target person still does not do anything and it seems the target person is not related to the project, activity or criminal act alleged by the person-in-charge. The official concerned, that is, the panel Judge, should consider how many times in total has approval been given to such an application, and since approval has been given for such a long time, whether renewal should come to an end, so as to strike for a balance. Therefore, I have added this concept of having to consider the total duration.

Proposed amendment

Clause 12 (see Annex)

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

MS MARGARET NG (in Cantonese): Chairman, I agree with what Mr James TO has said because my amendment is pretty much the same. When dealing with applications for renewal, the panel Judge must take into account the total period of wiretapping. Chairman, I want to point out one more reason and that is, since each renewal is backed by some reasons, it is possible that a sort of habit will be formed as everything is more or less the same as the previous occasion, so renewal will continue to be granted. However, if someone is subjected to surveillance or wiretapping for an extended period of time, the damage done to him will not last for just a fortnight or a couple of months. Rather, the long-term surveillance or wiretapping he is subjected to will be a serious intrusion to him. Therefore, Chairman, this is already a factor that warrants extra consideration. In our discussion on these issues in the Bills Committee, the reply from the authorities is that if such a situation occurs, the panel Judge

can consider the proportionality or balance and he should have considered these factors. Therefore, in principle, the authorities are not opposed to consideration of these factors by the panel Judge.

What it is opposed to is our request to put these requirements down in writing. Chairman, why do we request that the provision be set out? As we have already explained this many times, I will just talk about this briefly. If a factor has been spelt out, the panel Judge will naturally take note of it at the time of renewal and he will naturally consider the matter from that perspective. When he gives his reasons, of course, the authorities will say that he does not have to give any reason, however, at least, the authorities will not disallow him to give his reasons, so when he gives his reasons, this point will be noted down. Therefore, this is a kind of protection to the whole system, the Judge, the applicant and also to the target concerned. Therefore, Chairman, I cannot see the reason for the authorities or other Members to oppose our request to put this requirement down in writing. We are just asking the panel Judge to take this point into consideration.

Moreover, in the debate earlier on, Mr Ronny TONG said that if this requirement is not spelt out in writing, it might lead to doubts on whether he must consider the requirement. This is because we can see that in fact, it is possible to fulfil all the conditions in clause 3, so should renewal be granted? In particular, when an application is refused and a reason has to be given, if the person has been wiretapped and put under surveillance throughout for an extended period of time, it can also be a reason for refusing to grant approval. Chairman, I think it is absolutely justified for us to propose the addition of this provision and I hope Members can support it.

MR FRED LI (in Cantonese): Chairman, regarding the conditions for renewal of authorization under c12(4) and c18(4) of the Interception of Communications and Surveillance Bill, I now propose an amendment on behalf of the Democratic Party. We suggest that a Judge's authorization and executive authorization should be renewable for periods of not exceeding one year and this one-year period is the total period of authorization including the first issuance and the subsequent renewals of the authorization. We believe that this can enable law-enforcement officers to achieve a balance between the maintenance of law and order and the protection of people's rights and any bias in favour of any aspect can be avoided. Therefore, even if we have retained the proposal of allowing more than one renewal, the duration of authorization has to be limited

to avoid renewal be given indefinitely. Otherwise, the privacy and freedom that Hong Kong people are entitled to under the Basic Law and international covenants will be undermined by this legislation on interception. Therefore, on behalf of the Democratic Party, I urge Members to support this amendment. Thank you, Chairman.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Ms Margaret NG and Mr James TO have separately proposed that the authorizing authority should consider the period of time since the first authorization when considering the renewal of an application. As we explained to the Bills Committee, when considering whether the application meets all the prerequisite conditions in clause 3 of the Bill, in particular the proportionality of an operation, the authorizing authority will definitely take into consideration the total duration of the operation taken in respect of the target person. However, we agree to elaborate on this point further in the Bill. Therefore, I have proposed an amendment which has adopted Ms Margaret NG's and Mr James TO's amendments in this regard.

However, we oppose the setting of a maximum total duration for authorization. The reason is that this will unnecessarily limit the ability of law-enforcement agencies to clamp down on crimes such as syndicated ones as the surveillance required will usually be longer. The renewal period should depend on the circumstances of each case and it should be decided by the authorizing authority. Everything will be just like the initial application and any renewal application must conform to the purpose and various requirements such as proportionality and necessity.

Moreover, it is also specified in the Bill that each application must include an assessment on the value of the information obtained through the operation as at the time of submission of application and an explanation must be given as to why renewal is necessary. Once the purpose of the interception of communication or covert surveillance is served or the conditions for the continuance of the authorization are no longer met, the operation must discontinue even before the expiration of the period and the renewal has to be revoked immediately. We have studied the relevant legislation in other common law jurisdictions such as the United Kingdom, the United States, Australia and Canada and found that they do not impose any restriction on the number of renewals or total duration. Our proposal is in line with the arrangements in other relevant common law jurisdictions.

Madam Chairman, I hereby call upon all Members to oppose the amendments concerned and support the Government's amendment. Thank you, Madam Chairman.

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

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

MR RONNY TONG (in Cantonese): Chairman, after hearing the Secretary's comments, I am a bit worried as the Secretary may be confused about the objective of this Bill.

Chairman, this Bill seeks to enable law-enforcement departments to carry out interception and covert surveillance but the aim is not purely to collect intelligence. It is clearly stated in the Bill and also provided in Article 30 of the Basic Law that the only ground for infringing upon the right of privacy of Hong Kong residents is the need to detect and prevent crimes. Therefore, prolonged collection of intelligence is not an aim. If it is said that someone has been put under investigation and surveillance for two years but it is still not known what sort of crime he intends to commit or he has still not been prevented from committing a crime, I would think that there is something very wrong about this. I do not believe that such a situation will happen to the law-enforcement agencies in Hong Kong, particularly to the police, which is reputed as the finest law-enforcement department in Asia.

Moreover, it seems that the Secretary has also overlooked one thing, that is, this proposal does not provide that any surveillance can only be carried out for two years, after which it must discontinue and no surveillance is allowed thereafter. It is only a mandatory stage of review, that is, a review must be conducted two years from today. If, after two years of investigation, it is still unknown as to what the target person wants to do or what one wants to prevent him from doing, then, the existing grounds will be insufficient. In other words, the authorities concerned have to make a new application. In fact, the intention of our amendment has been explained clearly in the meetings of the Bills Committee. It is not to prevent law-enforcement officers from making a new

application, but to compel the authorities concerned to review whether the evidence on which they have been relying throughout are proportionate to the product obtained and whether it is necessary to reconsider the matter. Therefore, I believe the Secretary might have misunderstood our intention. The provision concerned does not provide that no further surveillance can be carried out two years later. At the same time, I wish to remind the Secretary that this piece of legislation does not empower him only to collect intelligence.

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, as I am the person who proposes this amendment, I would like to clarify one point.

What Mr Ronny TONG has just said is quite correct. The discussion of clause 12 is focused on renewal only, and renewal is not to be continued for more than two years. Fresh application has to be made after two years. As for the number of fresh applications of renewal, there is absolutely no limit imposed on it in my amendment. Chairman, this is the only point that I would like to clarify. Thank you.

CHAIRMAN (in Cantonese): Mr Fred LI, do you wish to speak again?

MR FRED LI (in Cantonese): Chairman, I wonder if the Secretary could tell us the number of previous operations on wiretapping which had been carried out for more than two years. I wonder if he could provide us with a record of this.

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

SECRETARY FOR SECURITY (in Cantonese): I do not wish to speak again.

MR JAMES TO (in Cantonese): Chairman, my speech is very simple. As a matter of fact, when you make a fresh application for renewal, you can make use of the intelligence, that is, the so-called "info" collected in the past. If you wish to make a renewal continuously — just like what Ms Margaret NG said — despite the fact that you have got "no useful info", you still wish that the renewal can be continued for more than a year or so, you will face a lot of problems.

The ways of handling this in overseas countries, the United States in particular, are very interesting. It is the attorney general who is responsible for considering these requests. I had once talked to their officials about this. They said that they were most concerned with the question of resources because a lot of resources would be consumed in that kind of work. In fact, if so much time and resources are consumed, the same amount of time and resources will be sufficient to crack many other cases.

Sometimes it is certainly worthwhile to put more resources in important cases. However, as a whole, when there is still "no useful info" after devoting this amount of resources, even if a balance in internal resources can be achieved, this mechanism of resource allocation cannot be said to be good at all.

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

MR HOWARD YOUNG (in Cantonese): Chairman, I remember the Bills Committee has discussed several times about the upper limit of renewals. The Liberal Party considers that to rigidly put in place a limit of one year or two years is neither necessary nor practical. This is particularly so when I heard from Ms Margaret NG just now that fresh application had to be made if renewal was refused. Of course, certain serious crimes can be tackled in this way since it actually takes more than one or two years to detect these crimes. However, it is not our wish to see that our disciplined forces being restricted by these measures to the extent that they are unable to carry out their job of detection.

I have also noticed that the Secretary has indicated adequately in his amendments that on considering a renewal, both fresh assessment on whether the application still meets the requirements set out in subclause (3), and consideration on circumstances of previous renewals will be required. I think an appropriate balance has been made in this regard.

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

MS EMILY LAU (in Cantonese): Chairman, I support the amendment proposed by Ms Margaret NG. In respect of granting the relevant power to law-enforcement agencies, I am worried that if it is granted too easily, it will actually be abused. Thus, I think it is perfectly in order to put in place a mechanism — not a hurdle — that requires more consideration of certain information, such as the number of times the authorization has been renewed, when applications are submitted.

Chairman, let us look at the Code of Practice which is a Code given by the authorities to front-line officers. I have no idea which paragraph I am referring to as the Code of Practice has been amended. According to paragraph 41 of the original text, in the event that the renewal of authorization is more than five times, the application should be made to the Commissioner. As a matter of fact, I think the authorities understand that a mechanism should be put in place to monitor continuous renewals of authorization. As the authorities have specified in the Code of Practice that a renewal of the authorization for more than five times should be handled by the Commissioner, and since eventually everyone has to observe the Code of Practice, then why not set it out in the legislation? They have accepted the fact that continuous renewals should not be allowed, and therefore a mechanism of monitoring should be put in place. Since such a case has to be handled by the Commissioner, I hope that the Commissioner has the authority to hear their explanation. Unfortunately, we will not be able to know any of these, as everything will not be conducted openly.

That is why I agree that it would be best if this is written more specifically in the Bill. Thank you, Chairman.

CHAIRMAN (in Cantonese): Does any Member who has not spoken wish to speak? If not, Secretary of Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, as Mr Howard YOUNG has pointed out, this topic has been discussed many times by the Bills Committee. Regarding the question on information raised by Mr Fred LI, it has also been discussed in the Bills Committee. Right now I do not have any complementary comments. I fully agree with Mr Ronny TONG that we must have a very stringent mechanism. Very detailed vetting has to be conducted every time an application for renewal is handled to assess if there are sufficient reasons for the granting of renewal. According to the existing requirements, instead of two years from the granting of approval, vetting on each application is to be conducted before renewal can be granted. Applications can only be made to a panel Judge when there are convincing reasons. In fact, the departments have already put in place a mechanism to terminate an operation even within the duration when the authorization still takes effect. When the department concerned considers that the purpose of the operation has been achieved or the purpose no longer exists, the operation will be terminated even before the duration of authorization expires.

MS AUDREY EU (in Cantonese): Chairman, I have been patient for quite a while. I think I have to clarify a point. Today, in the Chamber, I have heard many times in the discussion of this Bill that the views had been discussed during the debate of the Bill and therefore will not be repeated. However, I can mention at least two important points which are worth mentioning and will illustrate the reasons for the vast difference between scrutinizing the Bill in the meetings of the Bills Committee and today's discussion in the Chamber.

The first point, the point with a lesser difference in the two points, is that the Secretary has never attended the discussion of the Bills Committee. Therefore, there is a difference when he speaks in his capacity as the Secretary for Security in the Chamber with that of the Permanent Secretary when he spoke in the meeting of the Bills Committee. This is the first point.

The second point, a more important point, is that it is very difficult for the public to obtain a record of the debate of the Bills Committee. It will take a lot

of efforts to obtain the minutes if they want to read them. However, as today's discussion is the Second Reading debate, whether it is the debate on the resumption of the Second Reading or discussions on each clause, the details will be recorded in the Official Record of Proceedings of the Legislative Council, that is, the Hansard. It will be available to the public if anyone wants to take a look at it.

The third point, another important point, is that lawyers like us must observe certain regulations if we wish to quote from any of the Legislative Council papers in the Court when we are engaged in lawsuits. If we need to read the relevant papers before a Bill is passed, we will have to study the documents of the Hansard. As for the discussion papers of the relevant Bill, generally speaking, they are not available to Courts and lawyers. It does not matter how many meetings the Bills Committee has held or how many hours of discussion, say 130 hours, these meetings have undergone. So it is clear that there is a vast difference between the two. As today's discussions and the official response from the Secretary will be recorded in the Hansard, I hope that some important views, even though they had been discussed during the scrutiny of the Bill, can also be discussed here. It is all the more important as this meeting is broadcast live by television now.

Take the question raised by Mr Fred LI to the Secretary as an example. He said that we were discussing a practical question, namely renewals for two years. The Secretary has also admitted that the duration of a renewal should not be too long. Regarding the questions of whether there is a necessity for a renewal, and under what circumstances should renewals be approved for two years, the Secretary replied that they had been discussed before. However, the audience watching the television broadcast has never had any knowledge of this. Neither had the Secretary told them before. So I would like to ask the Secretary whether he thinks he should respond to this specific question.

Moreover, Ms Emily LAU has also raised a very specific point. She said that the Secretary has indicated in the Code of Practice that renewal could not be unlimited. However, when I asked the Secretary to set it out in the legislation, why did the Secretary refuse to do so? I believe the public watching the television broadcast now would really like the Secretary to respond to this. I hope the Secretary will no longer use "we have discussed this many times" as an evasive answer to the public. Thank you, Chairman.

MR RONNY TONG (in Cantonese): Chairman, there is something I simply have to say. I would like to make a complementary comment. Meanwhile, I also agree with the argument of Ms Audrey EU.

Chairman, we are Members of the Legislative Council and our job is to legislate. What does the job of legislating represent? As a matter of fact, the job does not only mean joining this Bills Committee. Unfortunately, though there are 60 Members in this Council, the record shows that the average number of times for Members attending the meeting of this Bills Committee is 0.5. That is, attendance of the meetings is 0.5 times per Member. In other words, many of our Honourable colleagues have not participated in the work of the Bills Committee. I am not criticizing them. However, Chairman, we must understand one thing, many of our Honourable colleagues are only joining in the debate of this Bill for the very first time today, and they are still figuring out how they should vote.

I do not care about the "bundling of votes" exercised by the Government, nor do I care whether it has listened to our voices. I consider these not important. But this is part of the legislative procedure which should be respected. Many of our Honourable colleagues had attended the meetings of the Bills Committee, but often they left the meeting to enjoy their coffee after reporting their presence. This is a fact. Anyone who had watched the television live broadcasts knew what was happening. So please do not say in this Chamber that all these have been discussed. Please do not say that any more. It violates our obligation and our legislative procedure. I do not wish to hear these words. In my opinion, those who have spoken these words are inflicting insults on our legislative procedure as well as our system. I am sorry.

MS MARGARET NG (in Cantonese): Chairman, I would like to make a complementary comment. The views raised at the Council meeting in which the legislation is passed have usually been discussed at the Bills Committee. We do not wish to have new views cropped up in the Chamber all of a sudden. I know that Mr James TO often has such excellent new views. But generally speaking, we hope Members would not do something like that.

Furthermore, why do we often propose amendments? In her capacity as Chairman of the Bills Committee, Ms Miriam LAU always says, "You have

spent a long time presenting your argument which we disagree. You had better propose an amendment." That is why we propose our amendments. And when we speak, we usually remind Members that we have discussed the views in the Bills Committee. Since our views have not been accepted by the authorities, we have to propose amendments.

I would also like to make a complementary comment on Ms Audrey EU's speech. Minutes of meetings of Bills Committees do not record details. Tapes of meetings may be kept for a period of time. It is a question of utilization of resources. Chairman, I believe you are very sensitive to the question of whether we use our resources wisely. Eventually we have to submit our reports and there will be debates in the Legislative Council. So minutes of these meetings do not actually exist.

Thank you, Chairman.

Chairman, based on the abovementioned reasons we have given, I would like to ask the Secretary for Security to reply to the questions raised just now by Ms Emily LAU and Mr Fred LI.

CHAIRMAN (in Cantonese): If no other Members wish to speak at this stage, Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, 130 hours of meetings have been held by the Bills Committee in which many views have been repeatedly discussed. In order to maintain the efficiency of the Legislative Council, I wonder if we still have to repeat the discussions of those 130 hours in this meeting. Based on this factor, I wish all of us will consider the question from the aspect of efficiency. Are we really prepared to have this meeting going on for several consecutive days and nights?

Regarding the question raised by Ms Emily LAU, I have already incorporated the matter into my amendment which reads "the respective numbers of judge's authorizations and executive authorizations that have been renewed under this Ordinance during the report period further to five or more previous renewals". It has already been stipulated in my amendment.

MR JAMES TO (in Cantonese): Chairman, I hope the Secretary or the Permanent Secretary would correct me if I do not remember accurately. The question raised by Mr Fred LI just now was the number of previous wiretapping operations carried out for more than two years. I remember it seems that the Secretary has never given us the information. I do not know why the Secretary has said that the issue has been discussed. Though I will not say I have attended all of the 130 hours of the meetings, I have at least attended 80% to 90% of them. I could not help missing a meeting as I was sick for half a day.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, it is true that I have never attended any meeting of the Bills Committee. But according to the information given to me by my colleagues, the issue has indeed been raised before. At that time my colleagues replied that as no information was available, they were unable to provide it to the Bills Committee.

MR JAMES TO (in Cantonese): Does this serve as a reply?

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendment, I will remind Members that if that amendment is agreed, Ms Margaret NG, the Secretary for Security and Mr Fred LI may not move their amendments.

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 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 LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG 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, 25 were present, five were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 17 were present, eight 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): Ms Margaret NG, you may move your amendment.

CHAIRMAN (in Cantonese): Page 34.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 12.

Proposed amendment

Clause 12 (see Annex)

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 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 LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG 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, 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, 17 were present, eight 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 negated.

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

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 12.

Proposed amendment

Clause 12 (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)

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

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Mr Fred LI may not move his amendment to clause 12, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 12 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 12 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): Mr James TO, Ms Margaret NG and the Secretary for Security have separately given notice to move amendments to clause 17.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 17. The purpose of this amendment is to stipulate that application for an executive authorization should be made in the form of an affidavit and through the *ex parte* procedure.

I would like to point out, firstly, with regard to executive authorization, originally I wish the amendment to be read as "District Court authorization". This amendment was not approved by the President on the grounds that the amendment involved the utilization of resources. What remains of the amendment now is the approved "executive authorization". This means that the authorization has to be given by an officer equivalent to that of Senior Superintendent or Chief Superintendent of police or above. However, under the existing system of the Government, the application has to be made in the form of a statement, that is, in the form of providing information, instead of an affidavit. According to the Government, the applicant is one of their own people. It is only a police officer making an application to another police officer, but not a police officer making an application to a Judge. Under this circumstance, the form of affidavit should not be adopted. Previously, we have made several proposals with the purpose of improving the legislation. But of course we failed in our attempts. They were not passed by the Legislative Council. These include the proposal made by Mr Albert HO that an applicant should not be in the same formation to that of the Chief Superintendent who gives approval. For instance, an inspector of the Organized Crime and Triad Bureau should not submit an application to the Chief Superintendent of this Bureau. We wish that there is a certain distance between the two, so that the role of the approving officer would be more neutral. Unfortunately it was voted down.

We have to ask for the second best option with the purpose of improving the form of application from the subordinate, that is, the applicant. We propose the application should be made in the form of an affidavit since an affidavit has the legal effect of a sworn declaration. Anything involving a sworn declaration has to be clarified, otherwise, the person is making a false oath and has therefore committed a criminal offence. Thus, adopting the form of an affidavit is on a higher level of accountability and seriousness. I am not going into a detailed discussion of the concept of "*ex parte* application" since we have previously debated on it. The Government seems to agree on the concept that advantageous and disadvantageous factors have to be listed in the application, and that the generally called "*ex parte* application" procedure will be included automatically. However, the Government does not seem to be prepared to stipulate this in the Bill to provide a greater assurance. It is only prepared to include it in the Code of Practice which is issued for the purpose of administration. I think there are inadequacies in this practice and I therefore propose an amendment to it.

*Proposed amendment***Clause 17 (see Annex)**

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG and the Secretary for Security to speak on the amendment moved by Mr James TO and their proposed amendments.

MS MARGARET NG (in Cantonese): Chairman, as a matter of fact, it was because I had proposed to amend clause 25 in order to delete "oral application" that I proposed an amendment to clause 17. However, since the amendment regarding the deletion of "oral application" was negated, this amendment is no longer appropriate. Chairman, as there is no existing mechanism whereby I can notify the Chairman beforehand that the amendment is no longer appropriate, I have to make an explanation now. It is no longer necessary for Honourable colleagues to support my amendment. Thank you, Chairman.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government opposes the amendments to clause 17 proposed by Ms Margaret NG and Mr James TO.

Mr James TO has proposed to amend clause 17(2) to the effect that the reference to the word "any" in the clause will be changed to the word "all". The authorities have proposed the same amendment. Mr James TO has also proposed an amendment to subclause (2) to stipulate application "to be made *ex parte*". As I have mentioned before, the authorities oppose this reference.

In respect of the amendment to change the word "statement" to the word "affidavit" proposed by Mr James TO, as the authorities have pointed out in the meetings of the Bills Committee, applications submitted in executive authorities are made in the form of "statement" and not "affidavit". We consider this practice appropriate. In any case, any person who knowingly makes a false statement commits a criminal offence. Thus, the current requirement stipulated in the Bill is appropriate.

The amendment proposed by Ms Margaret NG is related to the deletion of the mechanism of "oral application". Since the Committee has earlier decided to preserve the clause concerning the mechanism of "oral application", the current amendment proposed by the Ms Margaret NG should not be adopted.

The authorities have proposed the amendment to clause 17 concerning the renewal of executive authorization with the purpose of stipulating more clearly that copies of all affidavits provided in previous applications of renewal should be submitted by the relevant applicant to the authorizing authority. We therefore propose to change the word "any" to the word "all".

I hope Members will support the amendment proposed by the authorities and oppose the amendments proposed by 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.

MR RONNY TONG (in Cantonese): I believe the Secretary would also agree that if the relevant application is made to a panel Judge, there will be more safeguards and greater neutrality. But when the application for executive authorization is made to the official of the same department of the applicant, both the level of neutrality and strictness will be lowered. If an affidavit is a requisite on application to a panel Judge, it follows that an affidavit is all the more a requisite for applications to the departments. It is imperative for us to make the application process a stricter, more convincing procedure that meets the standard of justice. This is an important request and I fail to understand why the Government opposes it. Indeed it is not difficult to make an affidavit. On the contrary, it is difficult to tell the truth.

The Secretary said that making a statement was acceptable despite the fact that lying when making a statement also commits a crime. In our last meeting, the authorities admitted that the penalty for lying when giving a statement lagged behind the penalty for lying when giving an affidavit. Since the Bureau has accepted that penalty should be imposed on lying, then why does it not accept that truth should be told when making an affidavit?

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

MS MARGARET NG (in Cantonese): Chairman, based on the reason that we wish officers of disciplined forces will make more cautious decisions during the wiretapping operations in different places, I support the amendment proposed by Mr James TO. It is clear that every time we ask the law-enforcement officers to bear more significant consequences, the authorities will "back off" and refuse to accept the responsibility. Every time we ask for more safeguards, the authorities will refuse to do so. Instead, they ask the public to trust the authorities. Under such circumstances, it is difficult for us to do so.

Though I have no idea of the number of the amendment we are discussing, we are very clear that the position of the authorities on each amendment is very consistent. Each time we ask the law-enforcement officers to accept greater restraints, they refuse to do so. Each time we ask them to bear more significant consequences, they also refuse to do so. They evade critical points and dwell on trifles in all circumstances. Chairman, I would only like to stress this point. I hope Members will support the amendment proposed by Mr James TO.

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

MR JAMES TO (in Cantonese): I would like to respond briefly to the speech of Ms Margaret NG. The mentality and thinking of government officials have always been consistent. And that is, it is best not to legislate. If legislating is inevitable, it has to be stipulated that the Chief Executive will be able to use public interests as a ground for wiretapping. In the future, if the Court rules the operation to be "unjustified" or if someone proposes a Private Bill, hopefully all these will not have any effect. In the event that the Court makes this kind of ruling, then what should be done? An executive order will then be used to "cope" with the situation as a stop-gap measure. In case even an executive order is found to be "unjustified", there is no other option but to legislate. However, if legislation requires that application should be made to a Judge, then that part will be deleted so that application will not be made to a Judge. Instead, the requirement will be changed to executive authorization. Nevertheless, some of the applications still have to be made to a Judge. Then what should be done? Well, certain Judges can simply be selected to do the job. All these follow the

same line of thinking. It is best if power is held in their hands instead of the Court. As for the Court, it would be the best that the authorities will be able to select the Judges, or in some cases, Judges are not required at all. Everything is like that.

All of our current amendments are related to procedural requests of the simplest and lowest level. Unfortunately all have been negated. I believe the public should be clear about the fact.

CHAIRMAN (in Cantonese): If no other Member wishes to speak, I will ask if the Secretary for Security wishes to speak again.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I would like to speak on two points. Firstly, we thank all members of the Bills Committee for giving us various suggestions to which the executive authorities have responded by proposing a number of amendments. Secondly, with respect to the existing two-tier mechanism in the Bill, we consider the adoption of a statement for Type 2 surveillance an appropriate practice.

MS MARGARET NG (in Cantonese): It is his wish that executive authorization can be simpler and less formal. Regarding Type 1 and Type 2 surveillance, we consider Type 2 surveillance too lenient. We think the Government should carry out more Type 1 surveillance but the Government disagrees. With the Government's disagreement, we hope that Type 2 surveillance can be carried out more strictly. If there is greater strictness in authorization to carry out Type 2 surveillance, we will have more faith in the system. Even if many issues are included in executive authorization, we will not consider this procedure of authorization untrustworthy. On the contrary, we will consider it a solemn procedure.

Chairman, we have seen a lot of circumstances under which "the officials are free to burn down houses, while the common people are forbidden even to light lamps". We believe that if all the things we do are proper, being overheard will no longer be a threat. Similarly, if the procedure is strict, why not specify it clearly in the legislation? Unfortunately we have failed to bring this about.

MR LEE CHEUK-YAN (in Cantonese): Chairman, having listened to the debate for a couple of days, I have come to the conclusion that both the executive authorities and we Members are adopting the same approach, that is, to let loose rather to wrong. Only that the executive authorities mean the law-enforcement offices when they say "to let loose rather to wrong" whereas for us, it means the citizens. It is as simple as that. Therefore, to achieve a balance, we indeed hope that people who have powers in hand will exercise greater self-constraint. What we see, however, is that the executive authorities are craving for more power while they are being extremely loose regarding their law-enforcement operations.

I support Mr James TO's amendment, which we have all along been supporting, as well as Ms Margaret NG's amendment. What we hope to achieve is overall balance, not an inclination towards people with powers in hand. Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, there is one point which has just come to my mind, and I am not sure whether anyone has raised it before. According to the Government, because an application is one from the executive authorities to the executive authorities, for example, from an Inspector of police to a Chief Superintendent of police, a statement, rather than an affidavit, will suffice. However, reports are for use in daily routine. For example, the report submitted upon the conclusion of the handling of the Korean farmers during the WTO conference is purely a report of an administrative nature; it is not a report with an affidavit. I would wish Members can take note that what we are talking about is a process for which there is a legal framework and a legal procedure. Only that the issuing authority is prescribed to be an administrative official, or at a higher level a Judge serving on an authorizing panel. Therefore, conceptually, it is a legal procedure, whether the application is made to a Chief Superintendent or to a Judge in a panel.

Both are however executive authorizations, though incidentally one is from a Judge. All long as both are executive authorizations in accordance with a legal procedure, it will be more appropriate to require an affidavit. I wish Members would give some thoughts to this point.

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): Before I put to you the question on Mr James TO's amendment, I will remind Members that if that amendment is agreed, Ms Margaret NG and the Secretary for Security may not move their amendments.

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 LEE Cheuk-yan, Mr Fred LI, Mr James TO, Mr LEUNG Yiu-chung, Ms Emily LAU, Mr Andrew CHENG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG 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, 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, 19 were present, 10 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 negated.

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

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 17.

Proposed amendment

Clause 17 (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.

CLERK (in Cantonese): Clause 17 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 17 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, Mr James TO and the Secretary for Security have separately given notice to move amendments to clause 20.

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 clause 20.

Chairman, clause 20 relates to emergency authorization. The amendment I propose covers two aspects. The first is that the authority for emergency authorization should not be of the rank lower than Superintendent of police. The second is about the form of authorization. Earlier on we proposed to delete oral authorization. However, here emergency authorization can be issued as oral authorization.

Chairman, although the amendment regarding the deletion of oral authorization has been rejected, my amendment still has a special meaning to this provision. As I have pointed out in subclause (2), oral application should be made in person, not through the telephone or other means. Chairman, this is to safeguard the abuse of emergency authorization. With reference to this, I would wish all Members would support my amendment.

Proposed amendment

Clause 20 (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 proposed amendments.

MR JAMES TO (in Cantonese): Chairman, the reason for amending the rank of the applicants from Inspectorate to Superintendent of police is because the factors that are to be considered in relation to clause 20 are rather serious ones, for example, human life, major property, public security and evidence. There are rather serious circumstances to consider.

As these applications are made to the head of department, that is, the Commissioner of Police, it will be more appropriate for these applications to be made by a Superintendent of police to the Commissioner of Police, rather than by someone from the Inspectorate. Firstly, it can be imagined that cases of such a serious nature would generally be supervised by a Superintendent. He would know all the details and he would have conducted the case briefings to

plan the operation concerned. It would therefore be more appropriate to require a Superintendent of police to be responsible. To require a Superintendent to be responsible instead of an Inspector has the merit that he, being already a Superintendent, should be more experienced and should have a better perspective. Accordingly, he should be able to make a more prudent consideration when applying for an emergency authorization.

Furthermore, we all know that, and it was considered a few days ago, these emergency authorizations require subsequent confirmation. In the event that an emergency authorization is not confirmed, the relevant information will have to be destroyed. There is of course the possibility that someone may remember certain materials and write them out afterwards. Then the Government should consider how to deal with this scenario. The whole operation may abort if the case is so serious and urgent and the authorization is not confirmed in the end.

If more careful and prudent consideration is given now, it will help reduce the possibility of Judges refusing to give confirmation in future. In other words, the standard will be raised. To ensure that the law-enforcement agencies will endeavour to ensure quality in vetting applications, I consider it more appropriate to require applications to be submitted by a Superintendents of police.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities have already proposed amendments to clause 20 in response to Ms Margaret NG's proposal.

The Government objects to the amendments of Ms Margaret NG and Mr James TO. Emergency authorizations by nature are not different from other authorizations. It will only be one because of time urgency that an application cannot be made to the panel Judge that an application has to be made to the head of department, to be subsequently confirmed by a panel Judge. The requirements for applications for emergency authorization are prescribed in the Bill. In view of the already clear prescription of the requirements, coupled with the fact that such authorizations will require the personal approval of the head of department, the authorities do not consider it necessary to require such applications to be submitted by officers of the rank not lower than Superintendent of police, which will also be inconsistent with the principle of requiring officers who know the case better to submit an application.

Madam Chairman, I appeal to all Members to vote against the amendments of Ms Margaret NG and Mr James TO, and support the authorities' amendment. Thank you, Madam Chairman.

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

MR RONNY TONG (in Cantonese): Chairman, I do not agree to the statement of the Secretary that applications for emergency authorizations are the same by nature as applications for general authorizations. Under emergency circumstances, it is understandable that there may be insufficient preparation, and that evidence obtained may not be comprehensive. A more stringent mechanism to scrutinize these applications is therefore required.

MS EMILY LAU (in Cantonese): Chairman, I speak to support the amendments of Mr James TO and Ms Margaret NG.

I trust Members supporting the authorities will say that too many hurdles should not be set up in order to avoid setting restrictions one after another. It is exactly that we wish to set up a few restrictions. Why should restrictions be imposed? Chairman, I am really worried. The power to intercept communications and conduct covert surveillance will seriously infringe upon the privacy of the citizens. In two more days, when the Bill is passed, the authorities will be able to wield these powers. As a matter of fact, let us do not cheat ourselves; these powers are being used all the time. But they will be more widely used. Under such circumstances, we hope that each time when these powers are used, the application will be strictly vetted. What is wrong in requiring vetting by a more senior officer? Why would the Secretary say that officers from more senior ranks would not be so familiar with the case? It is exactly because that these officers are not familiar with the case that what they write should be vetted by more senior officers, and they will be asked whether things are done properly and done that way. I am therefore in full support of the proposal. I really do not understand if the authorities would support these amendments, we would all be more confident. It would show that the Government agrees to the fact that certain things would require more stringent vetting, and that they would be approved only after vetting. I am very against vetting and approval in haste in the face of emergency.

I also agree with Ms NG that applications should be made in person. Explanation given in person will bring pressure on the officer, and there will be more questions asked by the officer in charge, unlike that in a simple telephone call. Of the entire provision regarding emergency authorization, there is only one point about which I am in agreement with the authorities and that is, if the authorization cannot be confirmed within 48 hours, the products concerned will have to be destroyed, and they cannot be turned into intelligence. I fully support this point. Other requirements in the provision are, however, not prescribed in the same logic. For example, lapses in procedures under other circumstances will not necessitate destruction of the products, in which case the authorities may safely use the information collected. I am in support of the Government at times, but there is a logic that I follow. And at times, the Government is unable to justify what it has done. Even if the Government may eventually defeat Members' amendments, that will not put our mind at ease. If the Bill is passed, it will entrust the authorities with enormous powers. If these powers are abused, there will certainly be extraordinary reaction from the public. I would hope the authorities would be extremely careful, or to specific clearly the requirements in the Code of Practice — now the authorities have resorted to rely on the Code of Practice, and they insist on not amending the Bill. A message will have to be passed on to the law-enforcement officers that the citizens are watching, and they do care. These powers cannot be abused.

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

MS MIRIAM LAU (in Cantonese): Chairman, there is one point I wish to clarify. Ms Emily LAU said that work in vetting applications must be very stringent. Let us take a look at the provision. It is based on the amendments of Ms Margaret NG and Mr James TO that an applicant must be of the rank of Superintendent of police. The major purpose of which is to deal with emergency applications — those four categories of emergency situations which for example involve death or serious bodily harm or substantial damage to property. We are not talking about vetting and approval. The person responsible for vetting and approval is a head of department. It is our opinion that the person must be very senior in rank in order to be in a position to vet and approve. Now the applicants are required to be of a certain rank, that is, the rank of a Superintendent of police. If the case is handled by an Inspector, and although he is the person most familiar with the case, he will not be allowed to

make an application, not even in a situation of emergency. The application must be made by a Superintendent of police and he may not be familiar with the case. This would be even less desirable. In an emergency situation, the application should be immediately made by an officer in the department who is the most familiar with the case. The person vetting the application must be the head of department, and we very much hope that he will be doing it with care and prudence. However, we are not talking about the procedure of vetting and approval but limiting the applicants to a certain rank. I believe this is an unnecessary restriction.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Is there any Member who has not yet spoken wishes to speak? If no, Mr James TO may speak.

MR JAMES TO (in Cantonese): Having heard the reply of the Secretary, I doubt all the more whether the Secretary really knows well and understands the subject. He may only be reading out from the draft. He was saying that emergency applications are by nature no different from other applications. The only difference being that a Judge cannot be reached in emergency situations. However, we must take note that a case has become an emergency not only because a Judge cannot be reached. It is because of other major factors prescribed under clause 20(1)(a). Therefore, a case does not become an emergency case because a Judge cannot be found. The crux is those factors which need to be considered, that is, those prescribed under clause 20(1)(a) involving death, serious bodily harm, substantial damage to property and public security. These are cases we normally regard as major cases. Generally speaking, these serious cases should already have been assigned to an officer of a relatively high rank, that is, the rank of a Superintendent of police, and not to a small district CID team.

Recently I have had the opportunity to talk on unofficial occasions with some middle ranking officers from staff unions of the disciplined services. In a cocktail party, I talked to a circle of about 10 people. They all came to a point when we talked about this Bill. This is rather interesting. They all belonged to the Inspectorate, except only one who appeared to be a Superintendent. They all said that cases like this should more appropriately be handled by their

superiors. I asked them why general cases would more appropriately have to be handled by their superiors, since emergency cases have already been involving their superiors. They do have good reasoning. Firstly, meeting with a Judge would, honestly speaking, require a certain degree of training, etiquette, seniority and a certain amount of life experience. For general cases, they would have to come to see a High Court Judge, whereas, for emergency cases, they would have to meet with their "big boss", the Commissioner of Police. They feel that it would be more appropriate for the department if the cases are handled by more experienced officers. I do not know whether it is on consideration of flexibility that the requirement of such a low rank is prescribed. It may be possible that when it comes to actual operation, the views of the lower ranking officers would be heard and an officer of a higher rank will take charge of the case. Anyway, they expressed the opinion that it would be more prudent if the affidavit is taken by their superior, that is, a Superintendent of police. In a police station of more than a hundred people, the Divisional Superintendent is the "Division Head". His logic of thinking and his knowledge will most likely be better than the others in the division. Furthermore, he would certainly have cleared all his doubts before he takes the affidavit.

An Inspector may come across an informant who is "handled" (that is, responsible for gathering information from the informant) by another inspector. There would not be exchanges of information between the two Inspectors, as this involves the safety of the informant and his trust. An informant of a Sergeant may not be all the time willing to talk to an Inspector of the same team. For a Superintendent, however, if he is required to take an affidavit, he is in a position to enquire all the detailed information. If he considers that it is an emergency case, he will be able to answer when asked by the Commissioner of Police. If the case is handled by an Inspector, we can imagine that he may have to tell the Commissioner of Police outright that "this information comes from an informant of another team, although the case happens to be under my charge". Of course, the Commissioner may then talk to the informant, but he risks a delay to the handling of the emergency case.

On consideration of the procedure involved, ranking, experience, division of responsibility as well as actual operational requirement, I consider my proposal workable, and it will achieve a balance of internal distribution of work. The Government may say that although a lower rank is prescribed, in actual operation the requirement of each case will be considered on its own merits. Certainly. I have only wanted to offer my views for the Government's consideration.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Mr James TO has talked a lot about the operation of the Police Force. Certainly, he may have many friends in the Force, and may have intimate knowledge on certain matters more than I. However, I wish to tell Mr TO that I believe, both you and I will not know the Force as much as the Commissioner of Police. I would therefore leave the matter of internal deployment and operation to the hands of the Commissioner of Police. I consider the Inspectorate an appropriate rank. Of course, if the Commissioner of Police considers that it would be more appropriate to require a Senior Inspector, or a Chief Inspector or even a Superintendent to handle a case, he may do so as an internal deployment.

MS MARGARET NG (in Cantonese): Chairman, I would wish to respond to Ms Emily LAU and Ms Miriam LAU. Ms Emily LAU said that such work is being done all the time, but it would need to be more stringent, now that a law is being considered.

However, Chairman, this piece of legislation is definitely not targeted at the present situation. At present, interception of communications is approved personally by the Chief Executive. We should consider this: if the Chief Executive is to personally sign the approval, the police will not be sending a small potato to submit the application. They will ask someone who knows what is going on to do that. I also know that before the reunification, the Governor of Hong Kong would sign the approval personally. But now, a head of department can sign. The situation is different.

Then who should make the application? First of all, we would have to consider the subject matter of our discussion. Chairman, what we are discussing is the original Type 1 surveillance and interception of communications. Even the authorities will consider interception of communications a very serious intrusion to privacy. As to Type 1 surveillance, we may take a look at, of course not the amendments that were defeated yesterday, but rather the original provision. The original provision stipulates that it will not be a Type 1 surveillance if a participant is involved. And it will not be Type 1 if there is no

need to break in. That means that this Type 1 surveillance that we are now discussing about is some kind of very serious covert surveillance. If there is a need for such an operation, and as it is a very urgent situation, it will not be a case of small matter and often about there may be loss of life, damage to property or even a kidnap case that we talk so often about. All these are very urgent situations. Can these cases be handled by just a few Inspectors? Certainly not. Many police officers will be busy handling them. It is therefore only a question of who is to make the application. It is naturally reasonable that one who is in command and who is familiar with the case should be sent there.

Chairman, why do we care so much about the subject, and why even to this stage we are still insisting on doing things properly? It is because, as we shall see from the subsequent amendment, if there is an abuse of power, the authorization will be overruled. If the authorization is declared null, all actions carried out under the emergency authorization will become unauthorized. There will be serious consequences. We therefore need to be very careful at this stage, and everything must be done reasonably. Furthermore, the care that we ask for is not something that cannot be done. It is practicable. I believe the Secretary would also consider that it will work. If either of my amendments or Mr James TO's amendments are passed, they would be able to implement the relevant provisions. But why do they not want our amendments to be passed? They wish to have a larger room to manoeuvre. But the larger the room to manoeuvre is, however, the higher the probability of an abuse of power there will be.

Therefore, Chairman, I earnestly appeal to Members once again to support our amendments.

CHAIRMAN (in Cantonese): Is there any other Member or public officer who wishes to speak?

MR LAU KONG-WAH (in Cantonese): Chairman, concerning the serious consequences Ms Margaret NG has just mentioned, the situation now is that the application will be submitted by an Inspector but he has to clear a number of hurdles. It is a matter which must be left to the head of department to decide and he will consider the factor of proportionality. And there is also a need for

confirmation in certain cases. Since there are a few hurdles to clear, the officer will surely not do anything recklessly and he cannot do anything recklessly as well. Therefore, I do not think such so-called serious consequences will necessarily happen.

On the contrary, an emergency authorization is an emergency authorization. When someone is about to release sarin gas in the MTR in 10 minutes, the relevant Inspector will immediately approach his head of department. If he has to get to an officer of even a higher rank under such circumstances where not a second can afford to be lost, the consequence will be unimaginable. In such situations, there may actually be serious consequences.

Therefore, I cannot accept this amendment.

MR JAMES TO (in Cantonese): Chairman, I am sorry to say that if someone is going to release sarin gas in the MTR in 10 minutes, what has to be done immediately is not to apply for an emergency authorization but to mobilize manpower right away.

CHAIRMAN (in Cantonese): Are there any Members or public officers who still wish to speak?

(No Member or public officer indicated a wish to speak)

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, Mr James TO and the Secretary for Security 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 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, 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 LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, 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, 18 against it and one abstained; 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 amendment.

MR JAMES TO (in Cantonese): Just a minute, is it on page 43?

CHAIRMAN (in Cantonese): It is on page 42, you will move the amendment to clause 20.

MR JAMES TO (in Cantonese): It is in the middle of page 42. Chairman, I move the amendment to clause 20.

Proposed amendment

Clause 20 (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 from the functional constituencies and those from the 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 clause 20.

Proposed amendment

Clause 20 (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.

CLERK (in Cantonese): Clause 20 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 20 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): Mr James TO and Ms Margaret NG have separately given notice to move amendments to clause 21.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 21. The provision is to require the head of department, in approving emergency applications, to clearly specify the reasons for approval, in order to provide a basis for future confirmation when required. There will otherwise not be sufficient information, except that provided by the applicant, when the need for confirmation arises. As for the reasons that should be specified, these are discussed in the previous debate. I shall not repeat them.

*Proposed amendment***Clause 21 (see Annex)**

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment moved by Mr James TO as well as her own amendment.

MS MARGARET NG (in Cantonese): Chairman, there is only one difference between my amendment and that of Mr James TO. I have just now proposed some amendments to clause 20, including the required procedure for oral application for emergency authorization. However, since my amendment regarding clause 23 is rejected, this part is no longer applicable. Since there is no difference between my amendment and James TO's amendment, I would appeal to all Members to support James TO's amendment.

I would wish to add that, requiring reasons for approving an authorization to be specified will not cause any inconvenience. Written explanations will in any case be required if an application for authorization is not approved. The amendment is only to adhere to the principle that written reasons must be provided regardless of what the decision regarding an authorization is.

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): Secretary for Security, do you wish to speak?

CHAIRMAN (in Cantonese): I have no choice but to temporarily suspend the meeting. The Secretary for Security has to answer his call of nature. *(Laughter)* I now suspend the meeting.

11.27 am

Meeting suspended.

11.36 am

Committee then resumed.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government objects to Ms Margaret NG's and Mr James TO's amendments to clause 21(3)(a). We consider it inappropriate to require the head of department to specify in writing his reason for the issue or renewal of an authorization. I have already explained our standpoint during the debate regarding clauses 9 and 12. 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): Mr James TO, do you wish to speak again?

(Mr James TO indicated that he did not wish to speak again)

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 and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, 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 Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, 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, 21 were present, four were in favour of the amendment and 17 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): As the amendments of Ms Margaret NG and Mr James TO are identical, I therefore will not call upon Ms Margaret NG to move her amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 21 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 and Ms Margaret NG have separately given notice to move amendments to clause 22.

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 amendment to clause 22. The amendment has been set out in the paper circularized to Members. The amendment accepts the proposal of Ms Margaret NG to clearly prescribe that an application for emergency authorization should be confirmed within 48 hours after the application is submitted. I earnestly request Members to support the Administration's amendment.

Thank you, Madam Chairman.

Proposed amendment

Clause 22 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment 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 amendment, Ms Margaret NG may not move her amendment.

MS MARGARET NG (in Cantonese): Chairman, the amendment that I propose with regard to clause 22 is mainly to specify the effective period of an emergency authorization. The original provision of the Bill provides for the authorizing person to decide upon the time from which the authorization is to come into effect for the authorization to be effective in the ensuing 48 hours. Under the provision of the Bill, for example, if a police officer submits an application for an emergency authorization, the authorizing person may decide the authorization to take effect from next Monday, and be effective for the following 48 hours. I consider this inappropriate. An emergency is an emergency. And an emergency should come into immediate effect. The effective period should therefore commence from the minute the authorization is issued. Chairman, why do we need to do this? This is to prevent abuse of power, to prevent emergency authorizations from becoming temporary applications for permission

to undertake non-urgent or immediate operation. Chairman, this entirely defeats the spirit and principle of emergency authorization.

I therefore earnestly request Members to vote against the Secretary's amendment and support mine. Thank you, Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the amendments.

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

MS MIRIAM LAU (in Cantonese): Chairman, regarding the two amendments, I consider that the Secretary's amendment has looked after the scenarios described by Ms Margaret NG, that is, an emergency authorization should take immediate effect, and not from a future date. Ms Margaret NG quoted an example that an application may be submitted now but the authorization may take effect next month or next week. I think this case is not consistent with the spirit of the system of emergency authorization. It does not comply with the requirements if a head of department issues an emergency authorization to be effective on a future date, because the authorization must be confirmed within 48 hours. This scenario will not occur in the four prescribed emergency situations, including death or serious bodily harm, substantial damage to property, and so on. On account of Members' concern, the Bills Committee has already discussed about the subject. The amendment now adopted by the Secretary has dealt with the concern that an emergency authorization should take immediate effect and that it has to be confirmed within 48 hours after its issue.

I do not quite understand why Ms Margaret NG appeals to Members to vote against the Secretary's amendment. Personally I will support the Secretary's amendment. If his amendment is rejected, I will support Ms Margaret NG's. The contents of the two are in effect the same.

MS MARGARET NG (in Cantonese): Chairman, perhaps some of the papers are outdated. Chairman, may I ask the Secretary to read out his amendment? It is because I suspect that there are some differences.

Nevertheless, Chairman, I find the stance of Ms Miriam LAU very brilliant. Though she cannot tell the difference between the amendments proposed by me and the Secretary, she still called on Members not to support my amendment.

MS MIRIAM LAU (in Cantonese): Chairman, I am looking at the wordings of the amendment, and its meaning is, in fact, clear enough.

Why did the Secretary propose this amendment? It was precisely because Ms Margaret NG and other Members had raised this point of concern during the Bills Committee meetings that the Secretary proposed such an amendment.

The remarks I made earlier were therefore based on this understanding, and reference had also been made to the wordings of the papers laid before me.

CHAIRMAN (in Cantonese): Secretary, do you want to speak again?

SECRETARY FOR SECURITY (in Cantonese): Perhaps let me read out our amendment, where the words "takes effect" were deleted and substituted by "is issued". The original wordings have been deleted. Maybe Ms NG is looking at the old version.

MS MARGARET NG (in Cantonese): I would still call on Honourable Members to support my amendment.

In this Council, Chairman, I always stick to the principle of building up mutual trust between the legislature and the executive authorities. If a Member, however, insists that he or she has more confidence in other people than themselves despite being repeatedly cheated, I do not think he or she is a very reliable Member. Thank you.

MS MIRIAM LAU (in Cantonese): May I ask Ms Margaret NG to explain clearly why she said that Members should support her instead of the Secretary's amendment if both of them will serve the same purpose?

MS MARGARET NG (in Cantonese): Chairman, if both amendments may serve the same purpose, I would usually trust in the Chairman. It is because the Chairman will ask only one of the movers, instead of both, to propose an amendment if the two amendments are exactly the same. Furthermore, if the suggestions proposed by the party who introduces a Bill and the suggestions made by the mover of the amendment concerned are the same, the mover of the amendment — sorry, it should be the party who introduces the Bill — will definitely be allowed to propose the amendment while the other mover will be deprived of such an opportunity. Since both of us are now permitted by the Chairman to propose amendments, our amendments must have some differences in contents. Given that the contents of the two amendments are different, whereas my amendment has gone through numerous discussions, it is certainly the more reliable one. I will, of course, vote for my amendment. From this standpoint, I believe Ms Miriam LAU will understand, no matter she agrees with it or not.

Thank you.

MS EMILY LAU (in Cantonese): Chairman, assuming that both amendments are the same, and I have trust in the Secretary after listening to him, who said that his amendment has taken on board the proposals made by Ms NG and such things have actually been mentioned more than once. It is true as the authorities have adopted some of the proposals of the Bills Committee — there are, of course, proposals which we consider important but the Secretary is unwilling to adopt, while there are some which the authorities have willingly adopted — then, Chairman, if the authorities agree with the amendment proposed by a Member, it should allow the Member concerned to propose it. To show support for the Member's amendment, after it is proposed, the authorities should call on other Members, that is, those Members they have a greater affinity and who are having tea outside the Chamber to lend their support. I think this is the spirit of a parliamentary assembly. Chairman, you should know that I am having rows with the authorities about Article 74 of the Basic Law. Although the authorities consider that Members do not have the right to propose those amendments, they have yet any intention to take the matter to the Court. This is now the case, and it is one of the reasons. The authorities do not want Members to propose any concrete amendments. Even if we succeed in doing so and if it is so honoured that our amendment is adopted by the authorities, it will be taken over and then proposed by the authorities instead. It is because amendments proposed by the

authorities will get passed more easily. It is above all the Basic Law that matters, as the authorities do not want to see us challenging it.

What the authorities have done is too obvious, and indeed very much to be regretted. In the colonial times, we could move various amendments of this kind or even introduce private bills. I once proposed a Bill concerning the election of the Legislative Council by universal suffrage and I was able to do it at that time, and it lost only by one vote in the end. However, after 1997, neither amendment nor Bill was allowed. Therefore, if the amendment proposed by Ms NG is said to be adopted by the authorities which will then be incorporated into the Bill, I think the authorities should not forcibly take it over and propose it by itself instead.

I hope that this principle will not only apply to this Bill, but all other Bills to be introduced in the future. When the authorities are doing this, members of the public will see how much positive efforts Honourable Members have put. If the proposal was endorsed by the Bills Committee when it was put forward — that is, the proposal was endorsed by the Bills Committee when it was proposed by Ms NG — frankly, if even the Secretary expresses his support to it, other Honourable colleagues would rather come to show their support than to have a sip of coffee, so as to enable the proposed amendment to be passed and, in turn, put forward by the Chairman of the Bills Committee. Amendments will be put forward by individual Members only if the Bills Committee fails to reach a consensus.

Nevertheless, the authorities do not want to do so. Given that the proposal has obviously obtained the full support of Members, the authorities should allow Members or the Legislative Council to propose the amendment as a show of respect for Members because the news headlines will then be the number of motions or amendments proposed by the Legislative Council which are passed. Not all motions which can be passed are only proposed by the authorities. Serious consideration has been made by the authorities for the sake of itself, and I think that the authorities should not go too far. Furthermore, if the Secretary really supports the relevant proposal, which will also receive support even if it is proposed by Members, then simply let this Council put forward the proposal. Why is this Council not allowed to get this rare chance to win?

Thank you, Chairman.

CHAIRMAN (in Cantonese): I know that three Members have indicated their wish to speak. At this stage in time, I wish to provide some information to enable Members to have a better understanding. Now, I am going to read out the relevant provision and the two amendments concerned. The relevant provision reads, ".....ceases to have effect upon the expiration of the period specified by the head of the department when issuing the emergency authorization....." Members have no objection to it. There is subsequently an amendment regarding the specified period. Ms Margaret NG's amendment reads, ".....which in any case is not to be longer than the period of 48 hours beginning with the time of the issuance of the authorization", whereas the Secretary's amendment reads, "in any event within 48 hours of the issuance of the emergency authorization". From the wording, the amendment proposed by the Secretary also includes Ms Margaret NG's amendment. According to some general cases in the past, preparations would be made when there are some tens of amendments submitted to this Council for consideration. This time, however, before any ruling was made by me, there were a total of 440 amendments. Perhaps Ms Margaret NG has not been consulted, but in order to play safe, the relevant amendment has been incorporated for her consideration. This is the first point.

The second point is, as far as I know, and the Chairman of the Bills Committee, Ms Miriam LAU, may make further clarifications later on, with respect to the normal operation of a Bills Committee, it is the established practice of the Government to propose an amendment on its own if it has accepted the views of Members or the Bills Committee concerned. Perhaps I may now invite Ms Miriam LAU, Chairman of the Bills Committee, to make a clarification.

MS MIRIAM LAU (in Cantonese): Actually, I rise to give an account of what had happened during the Bills Committee's deliberation on this Bill, so as to clarify with respect to the remarks made by Ms Emily LAU earlier.

During the deliberation of this provision, we dealt with the Committee stage amendments proposed by the Government. There was no such wording in the original version. However, after discussions, the Government accepted the members' suggestions and advised the meeting on the spot that the authorization would be effective immediately upon issuance. The Government had already made this point clear to the Bills Committee and advised that Committee stage amendments would be proposed.

Therefore, when Ms Margaret NG subsequently drafted another provision, I certainly respect her right of doing so. In fact, the Government had clearly informed us in the Bills Committee that the authorities would propose Committee stage amendments to take into account of and take on board members' proposals. Thank you, Chairman.

CHAIRMAN (in Cantonese): Ms Margaret NG and two other Members who have not spoken have indicated their wish to speak. However, I would like to invite Ms Margaret NG to speak first because her speech may make the entire debate clearer.

MS MARGARET NG: Madam Chairman, I am afraid I have to speak in English in view of what I am going to say in a minute. This is a bilingual enactment, so, both the English and the Chinese versions are enacted at the same time. First of all, I have to clarify. I have to state that in fact, up to the last minute, I have not seen the Administration's amendment in writing. As usual, unless we see it in writing, we reserve our position. Towards the last few days of the Bills Committee meetings, that was way after the Bills Committee had made its report to the House Committee, at that stage, Madam Chairman, we were very very busy, heavily engaged with putting our own amendments in order. So, if I have missed a couple of documents, I apologize.

Now, looking at the Secretary for Security's final version, the amendment to sub-clause (1)(a) of clause 22 removes the words "takes effect" and substitutes them with "is issued". May I just read out the result of the amendment: "An emergency authorization is issued at the time specified by the head of the department concerned when issuing the emergency authorization, which in any case is not to be earlier than the time when it is issued;". I defy any ordinary English speaker to understand this sentence readily. It may well be if we have applied our minds to it a long time, we would see what it means. But if you read my amendment, the purport is extremely clear at once. Under sub-section (1)(b) of clause 22, when amended, it says: "An emergency authorization ceases to have effect upon the expiration of the period specified by the head of the department when issuing the emergency authorization, which in any case is not to be longer than the period of 48 hours beginning with the time" — up to now, I am still reading the original version — "of the issuance of the authorization." So, this is very straightforward.

Second, Madam Chairman, it allows for two concepts. Sub-paragraph (a) has to do with the time of taking effect, (b) has to do with the time of ceasing to have effect — when does it count as ceasing to have effect. So, one is about the beginning, and the other is about the end. You can very well issue an emergency authorization to take effect tomorrow morning, it would still be within 48 hours. But as to when it would cease to have effect, it would be 48 hours from this minute. So, my amendment does not do any violation either to the meaning or the language of sub-paragraph (b), while providing additionally that it would cease to have effect within 48 hours of its birth.

So, Madam Chairman, in view of the extremely clear merits of my amendment, I would strongly urge Members to support my amendment rather than the Secretary's amendment, particularly when you take both languages together. Thank you, Madam Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I am also a member of the Bills Committee, and I had witnessed the whole incident. I will not bear false witness.

At that time, Mr YING undertook to make an amendment after listening to members' views. Yet, no one knew what the amendment would be like, right? Ms Margaret NG has already pointed that out and it is, in fact, a matter of logic. Both the "signifier" and the "signified" are consistent, and this is crystal clear no matter how you explain it.

Let us stop arguing. After listening to what Ms Miriam LAU and Ms Emily LAU have said earlier, I have some reflection. Today, we are sitting in this Chamber to see that justice be done. I had once advised the Secretary not to break the ninth commandment, and that is, "Thou shalt not bear false witness". However, "Thou shalt not steal" and "Thou shalt not covet thy neighbour's goods" are also two of the Ten Commandments. Members pointed out that there are loopholes in the Bill proposed by the Government. The Government then undertook to make amendments. However, Members were not informed of the amendments made thereafter, and this can be regarded as taking without asking. He only said that amendment would be made, but how do I know if amendment would be made or not? What if he does not make any amendment afterwards? Actually, according to previous record, the Government breaks its promise over and over again, either deliberately or unintentionally. Maybe it

was too busy as it has to legislate within such a short period of time, which made oversight inevitable. So, how can the Government blame Members who have proposed amendments for not withdrawing their amendments for redrafting? This is precisely an example of "to take without asking is to steal". It is like a person who sees a piece of beautiful jewelry and he wants to own it, and he simply takes it without asking. The Government's act is truly "to take without asking is to steal". It is shameful for "a robber yelling out others to catch another robber". The Government has actually stolen the idea of another person, and yet it has not done enough. Then, how can it convince others? How can the Government ask Members who originally proposed the amendments not to do so? This is common sense.

If the legislative timetable is not so tight, or if the executive authorities show more respect for the originators, it would have consulted Ms Margaret NG anyway. Furthermore, she would be informed that the Government would propose the amendment on her behalf, and asked if there is anything she still feels dissatisfied. If this is the case, there would not be any problem, and we would not be discussing the matter. However, this is not the case. It was unreasonable for the Government to take Members' amendments without making any changes, while criticizing their proposals as being redundant. I respect Ms Margaret NG very much because she has been working very hard to draft the amendments. But I know nothing about it.

As for today, our discussion later on will dwell much on such issues as the co-operation between the legislature and the executive authorities, fighting for the best interests of the public and expeditiously enacting the law. Problems as minor as such still have to look to our parents for a decision. I do not see how the executive-legislature relationship cannot be improved as a result. Therefore, let us search our conscience. If the Government was ready to accept good advice and made the relevant amendments at the outset, would we come to this state of affairs? If the Government decided to legislate at the outset, would we come to this stage? Therefore, I hope that government officials — perhaps it is impossible for them not to say so — will act on their principles and not to break those two of the Ten Commandments, that is, "Thou shalt not covet thy neighbour's goods" and "Thou shalt not steal". I speak in support of Ms Margaret NG, and it is as simple as this.

I think the Secretary has not stated the whole truth. He is, in fact, lying and he has exaggerated the lie.

DR PHILIP WONG (in Cantonese): Chairman, I wish to tell Ms Emily LAU that even if the amendments proposed by the Secretary and Members are exactly the same, they should be proposed by the Secretary, thereby saving the need for a division and hence greatly reducing the chance of being rejected.

CHAIRMAN (in Cantonese): Does any other Member wish to speak? Ms Emily LAU, speaking for the second time.

MS EMILY LAU (in Cantonese): Chairman, of course, I understand what Dr WONG meant to say. However, just as Ms Miriam LAU said earlier, it was the Bills Committee's established practice to let the authorities take over the amendments proposed by Members in the Bills Committee which were endorsed by the authorities. In other words, the amendments will be proposed by the Secretary instead.

I have reiterated on different occasions that I do not agree with such a practice. The Government should propose amendments on its own if it wants to. And if the amendments proposed by the Secretary are supported by Members, they can then be moved in this Council, and there should not be any problem. However, if a Member's amendments for refining the Bill are supported by the majority of Members and endorsed by the authorities, why should they be proposed by the authorities? Chairman, it is necessary to recall Article 74. At that time, some Honourable colleagues did not join this Council yet and there was no Article 74 during the days of the former Legislative Council.

Chairman, what is Article 74 about? Article 74 reads: "Members of the Legislative Council may introduce bills in accordance with the provisions of this Law and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced." This requirement is, in fact, very restrictive. Our governance is even inferior to that of the colonial times because no such restriction was imposed at that time.

The British, who helped drafting the Basic Law, knew that this would undermine the power of the Legislative Council. We can leave that aside. What is more is that, according to the Government's explanation, not only bills

are subject to Article 74, but also the amendments. At that time, many Members of the former Legislative Council did not agree with this approach. We had collected different views, including legal advice, and put them before this Council to show our disagreement. The authorities, however, did not take any further actions, but instead tried to enforce Article 74 by all means. This was because the Government did not want or would not let Members propose amendments that it considered would be in contravention of Article 74. So, the Government would move amendments on Members' behalf under the pretext that their amendments might probably be passed. This is the historical background of this practice. However, I do not agree with it and even strongly oppose it.

Therefore, do not say again that this is our established practice. We have done this before and Members were happy with it because the proposed amendments were supported by all Members. They were, therefore, proposed by the Secretary. Just as Dr WONG has said, amendments proposed by the Government would certainly be passed, while those proposed by individual Members might be negated in voting by division. It would be terrible. However, Legislative Council Members have, in principle, the absolute right to propose amendments and bills, and should not be bound by the authorities. Nevertheless, the credit as seen by the public all goes to the authorities, while amendments proposed by Members are doomed to fail. This is what the authorities want the community to see. Members have proposed hundreds of amendments, but they are all negated. In fact, the majority of the amendments proposed by the authorities are proposed by Members and endorsed by the authorities. Yet, what does the community see? All the amendments are proposed by the Secretary and all of them will get passed, while those proposed by Members will get defeated. Is it outrageous to have rules of the game like these?

Earlier on, Mr LEUNG Kwok-hung said he recalled that during the meeting, the Permanent Secretary Stanley YING undertook to make amendments, and yet, no one knows what the amendments are like. Why is it possible that no one knows about them? Today, we are going to pass the Bill. Chairman, you know that this is the case and so you read out the amendments to us, simply because you know that many Members may not be aware of them. So, if none of us has any knowledge about them, I suggest that we should suspend the meeting so that the relevant information can be printed out and given to us. Why do we need to rush things through? This is not the fault of anyone, but it is due to a very tight schedule. If none of us knows the wording, how can we vote in favour of it? I also have a copy of the paper, but the

wording is different from what the Chairman has read out just now. Maybe there are too many papers — simply take a look at here, this table is covered with papers. Mr LEUNG Kwok-hung should not be saying that no one is aware of what the Permanent Secretary has undertaken to do. We should know the amendments, otherwise, how can we pass them? In fact, there are now many versions. The version which Ms NG has read out is clearer. Perhaps the Secretary may briefly explain them later on. The content of the amendment proposed by the Secretary, which Ms NG has read out just now, is really not very clear. What will happen in the future? Why would this happen? Those who have proposed the amendments should briefly explain them, but it is unacceptable to me that we are going to pass some amendments which nobody knows about at twelve midnight today. It is impossible to have our eyes closed and pass those amendments which nobody knows about.

CHAIRMAN (in Cantonese): Sorry, Ms Margaret NG, please take your seat first. I will invite you again to speak in a minute. Honourable Members, I would like to inform you that CB(3)782/05-06 was issued by the Legislative Council Secretariat on 31 July 2006, informing that the President has given permission for the Secretary for Security, Ms Margaret NG and other Members to move their proposed amendments. The paper concerned is rather thick. I read out the amendments earlier because it was difficult for Members to locate the relevant amendments from that thick paper within a short time. The purpose of reading them out is merely to provide assistance. I do not mean that Members have not received the paper. If Members say that they are not aware of the amendments, I think perhaps it is only that they have not read the paper. It is at the discretion of the Members to read it or not, but the paper was already issued on 31 July.

MS MARGARET NG: Madam Chairman, I am eager to interrupt because I owe the Secretary an apology. When I was in a rush reading the amendment to section 22(1), I misread the place where the amendment was going to be made: it is actually not in paragraph (a) but in paragraph (b). So, the version which I read was actually incorrect. If it occurs at the end of paragraph (b), it would be identical, or the effect of it would be identical with my amendment, in which case I would actually prefer the Secretary for Security's amendment, precisely because it has this advantage of easier to be passed.

Madam Chairman, I thank all Members for their very warm support for my amendment, and I owe the Secretary an apology. I make it duly, and I ask Members to support his amendment, so that we can get the law put in the right shape. Thank you.

CHAIRMAN (in Cantonese): Ms Miriam LAU, do you wish to speak again?

MS MIRIAM LAU (in Cantonese): Originally, I want to respond to the point raised by Ms Margaret NG just now, but as we have already spent 20 minutes discussing this point, I would like to take this opportunity to put on record the recent happenings in the Bills Committee.

Going back to square one, I must highlight the reasons for having this Bills Committee. It aims to allow Members to air opinions so that the Government can refine the bills. This is ongoing process. Be it the discussion of policy, deliberation of provisions or the proposing of CSAs, the purpose is to refine the Bill all the time. With regard to the amendment to clause 22 of the Bill, it was the Government who provided us the first version while Members strived for improvement. The Government then accepted the Members' suggestions whereby the English wording "takes effect" was changed into "is issued". This has actually taken on board Members' views.

The case is, in fact, very simple, and is not like what Mr LEUNG Kwok-hung said earlier. Of course, Mr LEUNG Kwok-hung may not have a very clear picture as he had not spent much time with the Bills Committee. The wording is, in fact, very clear and it is already stated in the meetings. Also, Ms Margaret NG has confirmed earlier that though the wording of the present CSA is different from her proposed amendment, both are identical in meaning. This is the first point I want to say.

Therefore, I hope that the Secretary will speak more on this later on. In fact, many of the views are provided by Members and I think that we, as Members, are duty-bound to do so. The Government has taken on board Members' views and incorporated them into its amendments, and I think there is no problem about this at all as this is what the Government should do.

Another point I want to say is, even if the CSAs are proposed by Members themselves, including Mr James TO and Ms Margaret NG, the Members were given the opportunities to introduce their amendments to the Bills Committee. I remember quite clearly that Mr James TO requested the Government more than once to take whichever amendment it considered useful, right? So, it was unfair for Ms Emily LAU to make such remarks. Actually, Members are also there to help the Government refine the bills. Members may wish to propose CSAs, but just as in this case — I dare not say in other cases — at least Mr James TO has requested the Government time and again in the Bills Committee to take over the useful amendments and regard them as its own CSAs. This is precisely what Dr Philip WONG has said earlier, for the purpose of securing a better chance of getting passed.

I just want to state the fact and put it on record. Thank you, Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, the truth has really become all the more evident after repeated debates.

Ms Emily LAU raised the issue of Article 74 earlier on. Certainly, I have never seen a legislature as witless as this. Yet, the fact is that it is provided for in the Basic Law. Why do motions proposed by the Government get passed more easily? The reason is voting by division is not required. It is, therefore, not the Government is giving alms to us, but simply because the constitutional system is irrational. Why do we need to show our gratitude? There is no need to show gratitude at all.

According to Article 74, if Members of the Legislative Council introduce bills which relate to public expenditure or political structure or the operation of the Government or government policy.....

CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, I can recite the Article 74 of the Basic Law because we have discussed it on countless occasions in this Council.....

MR LEUNG KWOK-HUNG (in Cantonese): But the point is.....

CHAIRMAN (in Cantonese): And there is a very thick report on Legislative Council Members' views on Article 74, and how they can be reflected in our Rules of Procedure. I hope that if you wish to speak, you should speak on the current situation. I believe you should be able to do it.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, it is said by Dr Philip WONG, who has left the Chamber. He said that the Government is well-intentioned. I am not the first one to say this. You can blame me if I am the first one to say this, and I will accept the blame without any complaint. However, he is the one who said that amendments proposed by the Government could get passed more easily. The views given by someone in the Council, if not refuted, will become a fact, right?

CHAIRMAN (in Cantonese): May I urge you not to mention Article 74 again?

MR LEUNG KWOK-HUNG (in Cantonese): OK. This is, in fact, the remark made by Dr Philip WONG. While he regards it as a joke, and it is fine for Members to laugh for this, he is so smart to see where the loophole is. What made us think that the Government is well-intentioned? I cannot see that it is well-intentioned, and never have I seen this.

Furthermore, what I actually do not want to say is that, the Legislative Council endorsed a proposal in 1998 to impose a condition on the amendment of law, where no additional public expenditure should be incurred. This has, in fact, disabled our strongest weapon. Why do I say so? It is because the ruling made by Mrs FAN on this occasion also found its basis in this, rather than in the Basic Law. I have tolerated for too long. The Government has already won everything. However, what good is it if it gains the whole world but loses its own soul? I am saying this because the remarks made by Ms Emily LAU seems to me that she feels very upset about all the credit going to the Government while we only have "discredit" rather than "credit". However, this is exactly the case.

Members may now visit the website of WiseNews to see how many people are saying that Legislative Council Members have destroyed the law and order of Hong Kong; how many people are saying that the amendments proposed by Members to amend this Bill introduced by the Government is tantamount to

showing particular favour to crooks. I will feel sorry to myself if I do not make this speech today. The Government will certainly accept the suggestions readily because the deliberation of the Bill must be completed before 8 August. It is precisely because the Government has set a deadline that we will have to work round-the-clock tonight and have chicken porridge.

I have already tolerated for too long. Why should there be a deadline? The Government should be responsible for its own act. Why should the Legislative Council work round-the-clock and put the health of Mrs FAN at risk? I have never seen a legislature operating in this way? I have not intended to speak originally because I also want the Bill to get passed as soon as possible. However, a man of integrity should not cheat other people with lies by walking away when being criticized. Only he can criticize other people, but we cannot do so.

Here, I want to state again: Can those people who say that Members who propose amendments or speak are "blocking the progress of the world", creating confusion in Hong Kong, and so on, think of the past and search their conscience? Who has failed to legislate in accordance with Article 30 over the past 10 years? Who has shamelessly brought the case to the Court again after losing its case, saying that his Executive Order works? I have not prevented Hong Kong people from enjoying their freedom and privacy of communication as stipulated in Article 30 of the Basic Law. There is someone else out there who prevents Hong Kong people from enjoying all these.

I wish to say again that I will definitely fight back if this happens again. I have already tolerated for too long. Apart from being a legislature, this Chamber still has three other functions: establish deeds of virtue, speak words of wisdom and achieve deeds of merit. Despite that I am unable to achieve deeds of merit as only they can do so, and yet, I can establish deeds of virtue and speak words of wisdom. They — and the Secretary who is sitting over there — have all the favours. Let me repeat once again. Despite reading so many constitutions, I have never read one like the Basic Law which favours the executive authorities entirely. I advise Ms Emily LAU not to feel bad as everything will be alright after making clarifications. They may say they want to have the heaven above, and this is fine. I have to remind him that he is a religious person. So, what good is it if he gains the whole world but loses his own soul?

CHAIRMAN (in Cantonese): Mr Howard YOUNG, please take your seat first.

MR RONNY TONG (in Cantonese): Ms Margaret NG has explained that the two amendments are identical in meaning, so is it necessary to study into the circumstances leading up to this? Is it better to discuss these side-tracking issues on other occasions?

CHAIRMAN (in Cantonese): As far as I am concerned, actually I agree very much with your viewpoint. However, as the Chairman, if a Member wants to respond to the remarks made by another Member during the debate, I cannot rule that his speech as inconsistent with our rules for debate. In fact, what you have said is right. If you take a look at my script, you will see that the problem can be resolved as Ms Margaret NG will not move her amendment if the Secretary's amendment is passed.

MR RONNY TONG (in Cantonese): I also agree very much with the views expressed by Honourable colleagues. However, I still think that we should get on with the work.

CHAIRMAN (in Cantonese): I hope that Honourable colleagues will hear what you have said.

MR HOWARD YOUNG (in Cantonese): Chairman, I also think that not all those who rise to speak in this Chamber today intend to prevent the passage of the Bill, so I speak to bring our discussion back to the amendment to clause 22. I do not think that it is the right moment to discuss about Article 74, nor who will win or lose. As far as this Bill is concerned, I have also spent much time with the Bills Committee, and I was present on the two occasions when the meetings were aborted.

I remember that during the discussion, the Secretary undertook very quickly to incorporate the concept of 48 hours into his amendment. And when the Secretary spoke earlier on, he also said that the amendment was made at the request of Ms Margaret NG. If the Secretary's amendment is negatived, I am

willing to accept Ms Margaret NG's amendment because both of them are identical in meaning and have the same source. I recall that among the amendments passed today — and also yesterday — certain government amendments are, in fact, identical to the amendments proposed by Mr James TO. Therefore, I do not have the feeling that the credit should go to the Government because the amendments are proposed by it. I consider that the credit should go to members of the Bills Committee. Furthermore, apart from the amendment to clause 22, many other amendments proposed by the Government are, in fact, originated from members of the Bills Committee, and their success owes much to the efforts made by Mr James TO and Ms Margaret NG. I therefore think that both the amendments proposed by the Secretary and Ms Margaret NG deserve our support.

MS MARGARET NG (in Cantonese): Since I have read the Secretary's amendment wrongly, I have made an apology to him just now and called on Members to support his amendment. However, what I cannot agree with is that Ms Miriam LAU has created complications by attacking Members who presented reasonable arguments. What I do not agree with in particular is that, she said categorically that many issues had been discussed in the Bills Committee.

Chairman, I do not want to debate on this but I just wish to state some simple facts. We had really conducted clause-by-clause examination in the Bills Committee, with the exception of the deliberation of the Code of Practice. Up till 14 July, we were still conducting clause-by-clause examination of the Bill, and it was the first time I had an opportunity to propose my package of amendments in the Bills Committee. At that time, I told my Honourable colleagues that they were draft amendments only. Chairman, the main purpose of proposing these amendments is to provide an opportunity for both Members and the authorities to make responses, and to see if any of the amendments are acceptable. However, the authorities did not seem to have made any concrete responses to many amendments. Chairman, I am not blaming the authorities because they have a system to follow. The problem is entirely attributable to the tight schedule. Chairman, however, what did we look forward to on 14 July? It was the resumption of Second Reading on 2 August. We had to propose our amendments and a notice in this respect must be given. We gave the relevant notice on 24 July.

Chairman, it is impossible for me to request for a shorter notice period because the Secretariat would have a lot of work to do after a notice was given, so my assistant, staff of my office and I had worked very tensely during the week starting from 17 July. We had actually burned the midnight oil every night in the hope of making the amendments right. Chairman, even though we know that our amendments would have zero chance of getting passed, we still worked as if they could be passed. It involves a very cautious process. If anything goes wrong in the amendments proposed by the Secretary, he will be held accountable, whereas I will be held accountable for anything wrong in the amendments I have proposed. Our work started from 17 July until we gave a notice on 24 July. What did we do after 24 July? We worked nearly eight hours a day for the three days on 27, 28 and 29 July — where four hours were spent on reading the Code of Practice. Under these circumstances, it is not surprising for my colleagues or me to read one page wrongly or miss a certain part. Also, it is not surprising for me to take paragraph (b) as paragraph (a). I therefore beg Members to be most accommodating. Why do I think that these facts should be put down on record? Chairman, I have never expressed views in the light of the effort I made on the matter. All I want is to have my work done correctly so as not to mislead the other Honourable colleagues.

However, given the unique nature of this Bill, I consider it necessary to put on record the actual situation and the tight schedule prevailing at that time. Chairman, I feel great regret that Ms Miriam LAU has attacked Honourable colleagues who supported me. It is because regardless of whether we accept the rules found in the Basic Law or not, these rules have actually created much difficulties for us. As far as this point is concerned, I believe Members will understand and agree.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Apart from Ms Miriam LAU who has now indicated her wish to speak, so have Mr James TO and Ms Emily LAU. Please wait for a second. I appeal for Members' co-operation, which is also made in response to the call of Mr Ronny TONG. Shall our debate on this issue end after these three — now it is the fourth — have spoken? I hope that Members will co-operate. Of course, I do not have the right to stop you from speaking, but I do hope that Members will co-operate. We have been working very hard, all of us, including the staff of the Secretariat.

MS MIRIAM LAU (in Cantonese): I have merely stated what had happened in the Bills Committee. Why would any Member feel regretful? I have no intention of attacking anyone. I will not do so. People who know me should know that I will not attack other people and colleagues.

I just want to talk about the actual situation in the Bills Committee, which was totally different from what was described by Ms Emily LAU. I therefore requested to have it put on record. This was what actually happened at that time. Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, just now Ms Margaret NG described the prevailing situation at that time. I only want to say a few words, and that is, it is hoped that the authorities or the Government will learn from experience. We have introduced quite a number of amendments in the Bills Committee at a very late stage, but perhaps the Government has just learnt about them, so I would not blame Mr YING for failing to give prompt responses. We then rushed through the amendments for submission before the deadline (that is, twelve midnight of the 24th) as no amendment would be accepted after the deadline, and it is very difficult to obtain exceptional approval for this. The situation was therefore made even worse. Why? For example, as far as Mr YING is concerned, the Bureau accepted some of our proposals — after we had submitted the amendments — without informing any of us, so we were totally unaware of it. Since "pulling one hair affects the whole body", the situation thus turned out to be rather messy and duplication arose. This is what had led to the current situation.

As far as I am concerned, I have even invited the Government to accept all my amendments because they can then be passed more easily. This odd phenomenon is, of course, attributable to the Basic Law where such a constitutional arrangement is laid down. My dissatisfaction is, however, related to another matter. I wish that the Government will accept my amendments. If they are accepted by the Government, the other political parties or groups may have to be consulted. And if possible, can the Government inform us once the amendments are accepted? If we were informed, some of amendments might have been discarded when changes were being made. I notice that something was missing in some of my amendments. Why is this so? This has actually nothing to do with the Chairman, nor the Legislative Council Secretariat, but simply because I am not aware of the fact

that certain amendments have been accepted by the Government. Since "pulling one hair affects the whole body", it turned out that something was missing in some of the amendments and this is rather undesirable.

Of course, work was done in great hurry in these few days. And yet, I believe many officials in the Government are highly qualified and experienced, while the two or three staff who work in the offices of Ms Margaret NG and me are, on the contrary, lacking in legal training. They are indeed excellent in achieving such a standard. I would like to take this opportunity, when things are put on record, to thank the staff of my office for working so tirelessly round-the-clock. I could hardly recognize their faces as they all looked so tired. I am very grateful to them. One of them has even fallen ill.

MS EMILY LAU (in Cantonese): Chairman, I spoke earlier after listening to the amendments read out by Ms Margaret NG. If I have wrongly criticized the authorities, I withdraw my remarks as there is some misunderstanding between us.

However, what I must say is, I think that the Legislative Council has the absolutely right to propose amendments that will surely win. A Member said that it was more difficult for amendments proposed by Members to get passed as voting by division is provided for in Article 74. Why are some amendments difficult and why are some easy? Chairman, whoever gets enough votes will win. How can one get enough votes then? There will be enough votes with the support of the authorities, and I think this all too easy to understand. We should not say that it would be better for the Secretary to propose amendments because there will be no need to undergo voting by division, thereby making them easier to get passed. This is not the point. The point is, if the authorities appeal to Members for support, there will be enough votes for the two types of constituencies.

The actual situation as described by Ms Miriam LAU earlier was that, whenever amendments proposed by Members were considered acceptable by the authorities, they would eventually be proposed by the authorities instead. I agree with this approach. However, just as I said on various occasions, if the Government really supports the amendments, it should support them when they are proposed by Members. With the support of the authorities, I believe it will be very easy to have the majority support of members in the Bills Committee. If the amendments proposed by the Chairman of the Bills Committee on its

behalf are supported by the authorities, Members will end up succeed in proposing some amendments which are passed subsequently.

However, it appears that under the existing arrangement Members can never succeed in proposing any amendments which are passed subsequently because amendments that have a higher chance of getting passed are all taken over by the Secretary, while amendments proposed by Members are not supported. Nevertheless, Members are free to propose amendments if they so like it. It is just that for amendments which the Secretary has not given his last word, they will surely be defeated. Why were Members driven to such a "sure-lose" situation? This is what the authorities should take into account. Perhaps it is the wish of the authorities to create an image that all amendments proposed by Members will be defeated, and only those of the authorities have the chance of winning.

I will not accept this actual situation. Members actually want to do something. If we really have the intention to improve the executive-legislature relation, the Government should have adopted another approach so as to achieve a win-win situation. Therefore, I want to reiterate that, in scrutinizing bills in the future, I hope that other Directors of Bureaux will get rid of any reservations they have

CHAIRMAN (in Cantonese): You are repeating yourself again.

MS EMILY LAU (in Cantonese): Fine. Thank you, Chairman.

MR ALBERT CHENG (in Cantonese): Not all Legislative Council Members have joined the Bills Committee to scrutinize this Bill. The Bills Committee has actually made tireless efforts in this regard, and I have to pay my respect to all members of the Bills Committee.

I think all of us are under pressure, pressure of all kinds. The Government wants the Bill to be passed expeditiously. Some people even say that it is therefore better not to hoist signal No. 8 in a typhoon. We are all under pressure because we must ensure that the rights and privacy of our voters and the general public of Hong Kong be safeguarded after the passage of the Bill.

I believe Mr Ronny TONG is a bit tired. I think that he is under immense pressure and he should go out for a walk before returning. I agree very much with the attitude adopted by the Chairman. Chairman, you have done a great job as we are all given a chance to speak our minds freely. I think there is a need to debate. Take me as an example, I am not a member of the Bills Committee, so just as the Chairman has said, we may not be able to finish reading all the papers that are placed in front of us all of a sudden. Some papers have not been read at all.

I wish to remind Mr Ronny TONG that we are all very anxious now. But, with the Chairman's permission, it is of paramount importance that we can speak our minds. Thank you, Chairman.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I have to thank members of the Bills Committee for spending some hundred hours on holding meetings and offering valuable opinions to us, which have now been incorporated in the hundred-odd amendments.

We all understand that the schedule is very tight this time, and with the vast number of documents involved, misreading is not uncommon. I absolutely do not mind. Ms NG does not need to apologize, for quite often, I do misread papers. Once again, I would like to thank members for offering us a lot of opinions.

MR ALBERT CHENG (in Cantonese): Excuse me. I would like to add one point. The point mentioned by Ms Emily LAU earlier is correct. According to the reports in today's newspapers or on the radio, it is stated that all amendments proposed by Members of the democratic camp are voted down. I would like to remind the Government that this is in fact unfavourable for the Government. For the public who does not know the actual case may thus think that all amendments proposed by Members of the democratic camp will not be

passed anyway. I think this will undermine the Government's governing principle of so-called strong governance and its for-the-people and people-based policy objectives. I just want to remind the Secretary of this.

Thank you, Chairman.

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

(No Member or public officer indicated a wish to speak)

CHAIRMAN (in Cantonese): Before I put to you the question on the Secretary for Security's amendment, I will remind Members that if the Secretary for Security's 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.

(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): As the amendment moved by the Secretary for Security has been passed, Ms Margaret NG may not move her amendments to clause 22.

CLERK (in Cantonese): Clause 22 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 22 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, the Secretary for Security and Mr James TO have separately given notice to move amendments to clause 23.

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 clause 23.

Chairman, under clause 22, which we dealt with earlier on, upon the issuance of emergency authorization, as Type 1 surveillance is concerned, so the authorization must be confirmed by a panel Judge, and the same applies to the interception of communications. We consider that the confirmation procedure is of great importance. Without going through a procedure of confirmation, emergency authorization will become a significant loophole.

How can we ensure that the confirmation procedure stipulated in clause 23 will effectively be referred back to the panel Judge? In respect of the 48-hour

requirement, it is absolutely no difficult task to obtain proper confirmation from a panel Judge within 48 hours, this is because application for authorization should be submitted to panel Judges originally, and it is only in times of emergency that such arrangement has to be resorted to. I do not understand why the authorities said that it was impracticable. But this should be able to be done within 48 hours. I think, if this cannot be done, to act as a deterrent, certain serious consequence must be imposed.

The first part of my amendment is mainly an amendment on wording which aims to make the provision clearer. However, the most substantial part of my amendment is on clause 23(3). The original provision of the Bureau stipulates that if no application for confirmation of the authorization is made within 48 hours, all information obtained has to be destroyed. This question was debated at the Bills Committee a number of times and the Bureau was of the view that since such information was collected for use as evidence, the destruction of such evidence as a result of default on confirmation should have the greatest deterrent effect.

However, I do not think so. Particularly because the information collected can be turned into intelligence and may lead people to do other things. If application for emergency authorization is submitted for eavesdropping a certain person, but when application for the confirmation of emergency authorization has not been submitted to panel Judges within 48 hours and causes the destruction of the information collected, or when the authorization has not been exercised and it is regarded as if nothing has ever happened, then, Chairman, this may cause serious problem of abuse of power.

Therefore, we state clearly in subclause (3) that if this has not been done, that is, if this statutory obligation of returning to the panel Judges for the application for confirmation of the emergency authorization within 48 hours has not been fulfilled, this will lead to the following consequence. First, in paragraph (a), it is stated that the emergency authorization shall be void from the start, that is, from the time the emergency authorization is issued. As a result, actions undertaken during the period concerned will lack legal backing, and all consequences arise from this point. Second, in paragraph (b), it is stated more clearly that any interception of communications or Type 1 surveillance carried out under such circumstances shall be regarded as unauthorized. Third, in paragraph (c), it is stated that the head of department concerned shall submit a

report to the Commissioner with the details of the case. Fourth, in paragraph (d), it is stated that any information obtained under the emergency authorization concerned should not be destroyed but shall be sealed and preserved for the sole purpose of the Commissioner's review, so that the Commissioner will know in future what has been illegally intercepted during the period in question.

If an abuse of power is involved to eavesdrop something which should not be eavesdropped or secretly record something that should not be recorded secretly, the Commissioner may rule whether or not such an abuse is deliberate, and decide on the extent of the abuse of power and the degree of damage inflicted on others. The Commissioner may then impose corresponding determination and see how these situations should be dealt with and avoided in future.

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

Therefore, Deputy Chairman, it is most important that the series of profound consequences is stated in subclause (3). We believe a righteous law-enforcement officer will not abuse the emergency authorization, but we also believe that a diligent and responsible law-enforcement officer will absolutely not fear that he may not be able to return to panel Judges for the application for confirmation. As for those law-enforcement officers who are irresponsible and have contempt for the law, the serious consequences set out in paragraphs (a) to (d) will have a very substantial deterrent effect on them. This will not only prevent the occurrence of this type of incidents, but will also help build up public confidence by showing them that these emergency authorizations are to be exercised stringently.

Deputy Chairman, it is most important that I place my trust not on certain persons or organizations but on certain provisions and systems which encourage people to do the right thing and deter others from acting improperly. Moreover, with these express provisions, the public will know that protection is provided and that law-enforcement agencies cannot easily abuse the power concerned.

I implore Members to support my amendment. Thank you, Deputy Chairman.

*Proposed amendment***Clause 23 (see Annex)**

DEPUTY CHAIRMAN (in Cantonese): I now call upon the Secretary for Security and Mr James TO to speak on the amendment moved by Ms Margaret NG as well as their proposed amendments. However, they may not move their amendments at this stage. If the Committee has agreed 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, if no application for confirmation of emergency authorization is made, irrespective of the reason involved (be it because no application has been made or confirmation has not been granted), it is stipulated under the original version of clause 23(3)(a) that destruction of the information so obtained is required. However, I notice that the word "information" is used, in other words, it is referring to information rather than other stuff called product. I think this is a very important point. That is why a phrase is put in a bracket there to expand the concept of information to include databases, that is, the intelligence and record put in, which we have been discussing in the past couple of days. Anything derived from the information concerned will also be destroyed. In other words, it is like as if no action has ever been taken.

Deputy Chairman, you and I did talk about this outside the Chamber. You pointed out that yesterday I said bits and pieces of information might still be found in our memory. Of course, what I said yesterday might give some people a wrong impression that brainwashing might be required. We cannot brainwash people. But since it is now too late to make amendments in this perspective, at least the policy should be explained in the Code of Practice immediately, so that should this really happen, further intelligence, information, summary and any other stuff derived from memory should not be input to the relevant system or put down in any record. I believe these arrangements can be made immediately. These are the remarks I have to add.

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, regarding clause 23 of the Bill, the authorities have put forth two main amendments.

First, in response to Ms Margaret NG's proposal, it is stated clearly that application for confirmation of authorization should be made within 48 hours of the issuance of the emergency authorization or the making of oral authorization. Second, to reflect the proposal made by the Bills Committee and Mr James TO's suggestion in particular, that if no application for confirmation of the emergency authorization or oral authorization is made within 48 hours, or if the application for confirmation is turned down, the head of the department concerned shall destroy the information, including all information obtained in the operation concerned.

We oppose the amendments of Ms Margaret NG and Mr James TO. We consider that the Commissioner, in reviewing the reasons for no application for confirmation of emergency authorization within the required period, does not need to inspect the product concerned. Since no application for confirmation within the required period is really a serious matter, law-enforcement agencies will by all means apply for the confirmation within the required period. Should there be any non-compliance, it should basically be attributed to procedural or objective environment reasons and should have no relation with the particulars of the case. For instance, the officer concerned may have a traffic accident on his way to the office of a panel Judge and thus fails to apply for the confirmation within the required period.

No matter how, it is stipulated in clause 23(3)(b) of the Bill that the head of department concerned shall submit a report, setting out the details of the case, to the Commissioner in respect of any cases in which there is no application for confirmation within the required period. I have proposed another amendment to the effect that the Commissioner shall conduct review of these cases.

For the proposal to make the emergency authorization void from the very moment the authorization is issued, such an approach is inappropriate. Operations carried out in accordance with lawful authorization and in good faith should not subsequently become illegal because no confirmation is obtained. Therefore, even if the emergency authorization has not been confirmed eventually, it is not appropriate to consider the authorization void.

With regard to Mr James TO's proposal on clause 23(2) which is related to *ex parte* applications, I have already explained our position in an earlier discussion on clause 8. I oppose the relevant proposal.

The authorities are also against the amendment proposed by Mr James TO to clause 23(3). At present, it is stipulated clearly in the Bill that if no application is made for the confirmation of the emergency authorization, any information obtained by means of that authorization shall be destroyed. The relevant provisions have already covered all information obtained by the carrying out of the operation concerned, and thus a breakdown setting out the particulars of the relevant information is unnecessary.

Deputy Chairman, I hereby urge Members to oppose Ms NG's and Mr TO's amendments to the Bill and to pass the amendments proposed by the authorities. Thank you, Deputy Chairman.

DEPUTY CHAIRMAN (in Cantonese): Members may now jointly debate the amendments.

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

MR JAMES TO (in Cantonese): This response from the Government is the first time I have ever heard. I have never heard the response of the Government on Ms Margaret NG's amendment to clause 23(3) in the Bills Committee. Ms NG's amendment states that should the emergency authorization fail to be confirmed with 48 hours, the emergency authorization shall be void and of no effect from the time it is issued. Perhaps the schedule at that time was so tight that Mr YING did not have the time to respond. However, after hearing the Secretary's response, I really find it unconvincing. I think it is a problem of logic.

Why? We all understand that all authorization for interception of communications and Type 1 surveillance should originally be made by Judges. It is only out of emergency and the unavailability of Judges that another person, in substitution of Judges to a certain extent, will issue an authorization. That person is the Commissioner of Police or the head of another department. The question is that if the Judge eventually refuses to confirm the emergency authorization, it implies that had the application for that authorization been submitted to the Judge, the Judge would never have issued the authorization from the very beginning.

This concept is of utmost importance. We cannot say that when the authorization is made in good faith — we should remember that if the authorization is made in good faith, the Commissioner of Police should not be held responsible for granting the authorization, neither should he be considered abusing his power. It is unfair, right? All of us should remember that under certain circumstances, it is subject to the reason given by the Commissioner after the final review to decide whether or not the Commissioner of Police has really abused his power in granting authorization? The Commissioner may criticize this. However, if the authorization is made in good faith, at least superficially, it should be left to the Commissioner to find out and decide whether he should be held responsible, and whether the authorization is granted arbitrarily, deliberately or for other reasons.

However, in terms of legal effect, the authorization should originally be granted by Judges and it is only due to the unavailability of Judges that it is granted by another person. If that application is made to the Judge, the Judge will not grant the authorization and the authorization is then said to be invalid and of no effect. This is really incomprehensible. What kind of logic is it? Am I right? Put simply, suppose the head of department concerned is a Judge and a Judge will not grant the authorization in the first place, but now the head of department has granted the authorization, it is thus natural that the authorization is void. The authorities cannot say that the authorization is valid because the head of department has granted it in good faith. It should not be done this way, should it? For the head of department is only a substitution. Had the application for authorization been submitted to a Judge from the outset, the Judge would definitely not have granted the authorization. This is what it means. Why should the Government oppose this sentence? If it is said that the Commissioner of Police will automatically be held responsible, I can still understand it, for that will be further examined by the Commissioner.

Moreover, the Secretary has just explained the reason why many applications cannot be completed within 48 hours. He said that it might not be related to the details of the case, for instance, it might be due to a traffic accident. However, this is only one of the many possibilities and not all possibilities are included. I can only say that there are other possibilities which are related to force majeure, that is, events like traffic accidents which has been mentioned earlier, earthquake, typhoon and so on. I classify these tentatively as force majeure events. However, there is another possibility, that is, the officer

concerned knows clearly that authorization will not be issued even if an application is submitted. But, of course, even if an authorization will not be issued, it must be laid before the Judge, just like a woman must meet her father-in-law no matter how ugly she looks. Another possibility is that the officer who knows the application will not be approved is scared and thinks that it is better not to submit an application, so no application will be made within the period anyway.

Will doing so result in disciplinary action? I do not know. However, it means that possibilities not related to the so-called force majeure do exist, though it does not apply to every case. If that is so, should anyone be held responsible or should the reason be found out? Should investigation be carried out? I am not saying that it must be related or must not be related to certain issues, but force majeure events such as traffic accidents mentioned by the Secretary is not the only possibility, there are still many other possibilities. It may or may not be related to the abuse of power, and it may or may not be related to force majeure. However, no matter under what circumstances, the submission of a report is required and examinations must be conducted. Of course, it does not matter where it is put down, but it is most important not to mislead the public by saying that it is only related to force majeure.

MR RONNY TONG (in Cantonese): Deputy Chairman, as far as I understand it, this system is put in place to alleviate and deal with emergency situation. It is a procedural alternative but not a Type 3 authorization mechanism.

I called this Type 3 authorization mechanism because, as we all know, throughout the discussion in the past two days, we have been discussing Type 1 authorization mechanism, that is, authorization issued by panel Judges, and Type 2 authorization mechanism, that is, the issue of executive authorization. But the above arrangement is not Type 3 authorization. It is only a mechanism that provides procedural alternative for the handling of emergency situation. If this is a procedural contingent mechanism, the decision to issue authorization should be subject to the confirmation of this emergency authorization by panel Judges. Otherwise, this will create room for abusing the arrangement, allowing law-enforcement officers to circumvent the two established authorization mechanisms, that is, authorization by panel Judges or senior officials.

Therefore, under such circumstances, a safeguard mechanism must be put in place to prevent any abuse of the application for emergency authorization. We all know that when it comes to applications for emergency authorization, there may not be adequate preparation or sufficient evidence. In that case, the arrangement is a great temptation to police officers to take the shortcut or abuse it. If it is said that eventually there is no difference, for the authorization will remain valid after the application for emergency authorization, and that only the destruction of the information obtained is required and no one can pursue the case, this will give even greater temptation for abuse. We therefore request that the actual authorization mechanism should be followed to decide the legality of the emergency authorization. Just as Mr James TO has said, an applicant who knows well in advance that his application for authorization will not be approved may apply for emergency authorization in the last minute to get around this. Then after collecting the intelligence, he will not apply for confirmation but will just destroy the information obtained within 24 hours. In that case, heaven does not know what has been done, nor does anyone on earth know, for only they know what is going on. This is possible. Why restrictions regarding the application for confirmation of authorization within 48 hours should be laid down? The objective is to prevent any deliberate attempt not to apply for confirmation. Since the application for confirmation must be initiated by an applicant, an applicant, by deliberately not applying for confirmation of authorization, may successfully escape the ruling of panel Judges that the application is wrong, is an abuse of power or should not be submitted in the first place. It is unacceptable to us that a mechanism be set up to allow an applicant to decide by himself when this power can be abused and when it cannot. Therefore, in respect of emergency authorization, our only demand is to establish a special practice. We consider it a sound practice to preserve the evidence and refer it to the Commissioner for handling, for if anyone considers his or her right being infringed upon and demands investigation in future, the Commissioner can still follow and find out the reasons. Therefore, I think it is absolutely a reasonable request and I hope the authorities will accept this.

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

MR JAMES TO (in Cantonese): Deputy Chairman, Mr Ronny TONG's speech gives me a sudden enlightenment. I finally know what it is all about. I am really stupid, not smart enough. I am still pondering why the Government has

to argue about paragraph (a) proposed by Ms Margaret NG to clause 23(3) and what is so important about being void or otherwise? I now understand it.

If the authorization becomes void, according to the final mechanism, that is, the notification mechanism, the operation carried out will become unauthorized or be regarded as unauthorized. If it is regarded as unauthorized, this may be regarded as a breach and must be liable to compensation. However, according to the existing draft proposed by the Government, which does not include the phrase "shall be void and of no effect" as proposed by Ms Margaret NG, the emergency authorization will, as Mr Ronny TONG has said, become Type 3 authorization. Type 3 authorization, if granted in good faith, should have no problem, and even though it has not been confirmed or failed to be confirmed for whatever reason, there is still no reason that it should be regarded as void. However, it can be imagined that under certain circumstances, the Judge will refuse to issue authorization all the way through, and in that case, the authorization is deemed as void, for it should not have been issued from the outset. If such authorization should not have been issued, why a mechanism has to be put in place to make it temporarily valid? Should the sentence handed down by the Court of Appeal and the Court of First Instance on Mr LEUNG Kwok-hung's case be applied, that is, ruling that it is temporarily valid? Again, this creates Type 3 temporary validity, for something that is obviously void it is turned into temporarily valid. And then, actions infringing upon the rights of the public will be done, but owing to the lack of legality, no compensation will be paid. I do not know whether this will ever happen. I hope the Government understands that if no authorization is issued and if confirmation cannot be obtained, it is then, from the very beginning — *ab initio*, another unfamiliar term which may be Latin or Greek, for all these concepts are supported by long-time legal backing and thinking. Why it should be void right from the very beginning? The reason is simple, for this will make the person concerned be held responsible for other consequences that follow. I am not sure whether or not the Secretary will argue that in such case, law-enforcement officers in fear of the possibility of paying compensation will not dare to apply for emergency authorization, and it will be even worse if a kidnap case occurs.

But this is not the reality. In fact, they have always been placed in such a situation. For instance, if you were tipped off a few months ago that drugs were concealed in a village house, you had to consider whether that piece of information was reliable. If you considered that it was reliable, you have to

smash the door of that village house to break in. If eventually no drug was found inside the house, it would be a big problem. For though it was due to the false information provided, the authorities concerned still had to compensate the owner for his door had already been broken. Sometimes, in cases where firearms are suspected to be concealed in a certain place, the police may even order the Special Duties Unit to break in and conduct a search. But if it is found to be untrue, the authorities concerned will have to pay compensation, for the private residence has already been blown up. The authorities cannot back off just because it fears the possibility of paying compensation. They cannot act this way, for these are basic costs for law enforcement. We do understand these situations. By the same token, sometimes, when prosecutions have to be initiated or when cases have to be brought to the Court, there is the risk of losing the case and having to pay the costs of proceedings, but we cannot be scared off because of this. Certainly, we should always confirm and assess the reliability of such information cautiously, and we have to consider whether the place going to be blown up is the vault of HSBC or just a village house. All these factors have to be considered and are of great importance. Sometimes, we may even have to freeze the property of certain citizens to combat terrorism. For instance, the Central Intelligence Agency (CIA), upon the provision of intelligence, may request the freezing of a certain person's property, but the CIA may suddenly discover that the information is wrong, and several hundred million dollars will then have to be paid as compensation. Nevertheless, you still have to do it. It is a matter of balance. Therefore, the worry of being liable to monetary compensation should not be used as an excuse.

Then, on what other reasons should this amendment be opposed? The above reasons are only my speculations. Are there any other reasons not to accept this amendment which renders the authorization void and of no effect from the very beginning?

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

MS MARGARET NG (in Cantonese): Deputy Chairman, I just like to respond to some views of the Secretary. First, the Secretary said that the information concerned should not be preserved, for even if an examination was to be conducted in future or the Commissioner would examine the case, such information would bear no relation to the severity of the case.

However, as I have pointed out when I first spoke, preserving such information can show whether there is any deliberate abuse of power, the persons being affected and the damage done to them. Thus such information is preserved for very important reasons.

Deputy Chairman, we also heard the Secretary say that law-enforcement officers always feel that they have to undertake all kinds of responsibility once an authorization becomes void. In respect of this point, first, all law-enforcement officers are placed in the same situation. When they try to arrest or search for someone, they will have an arrest warrant or a search warrant, but if they act beyond the scope of such warrant, they will commit a crime and they are liable to prosecution. This is because policemen, like all citizens, should not infringe upon the rights of others. However, if they have a warrant that allows them to do so, they will be protected by the warrant, provided that the warrant is valid and that they act within the scope in law enforcement. Therefore, this protection given for the exercise of power should cease once there is an abuse of power. This is absolutely right and proper.

However, Deputy Chairman, I would like to reiterate a point which I have mentioned during the resumption of the Second Reading debate. It is imperative that the procedure must be stringent, but this is a separate issue. The point is that a senior officer should, at the same time, be responsible for all his subordinate law-enforcement officers. However, despite reading it over and over again, I can only find that front-line officers will after all be held responsible, but not the heads of department, nor the Government as a whole. I think it is improper. Some people may query, if in the course of law enforcement, an officer of the department concerned truthfully and sincerely believes that the authorization is valid and carries out his duties honestly, why should he bear any criminal liability? I think these situations can be dealt with easily. For the Bill has already provided for the exemption of these situations. Therefore, we need not provide protection to law-enforcement officers in this respect, for even if they act illegally, even if they abuse their power, they are protected by the law.

On the other hand, regarding the protection from liability given to law-enforcement officers even if they abuse their power and the lack of compensation protection for innocent victims of the public, how a balance between the two should be struck? In fact, it is easy to strike a balance between the two, only that the authorities are not willing to do so and they would rather

let innocent members of the public whose rights have been infringed upon not receive any compensation. Deputy Chairman, this line is not correctly drawn. The amendment we propose will not undermine the flexibility of law enforcement, nor will it prevent the authorities from fulfilling their duties effectively. This amendment will only provide protection which will prevent the authorities from abusing their power and it will offer protection to citizens suffering from the abuse of power. I implore Members to support my amendment.

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

SECRETARY FOR SECURITY (in Cantonese): I appreciate very much that Mr James TO can notice that under certain circumstances, that is, in case of force majeure events, the compliance of the 48-hour requirement may be really impossible. Of course, Mr James TO has said that this would not always be the case, for sometimes it may be due to an abuse of power. We are also very concerned about whether our colleagues will abuse their power. But no matter how, it is already stated in clause 23(3)(b) that heads of department shall submit to the Commissioner a report with details of the case in respect of cases which confirmation has not been obtained within the required period. I will also propose another amendment to the effect that the Commissioner is required to conduct reviews of such cases. It is exactly because we want to prevent any abuse of power that the office of Commissioner is set up within the system as a whole. The Commissioner is appointed to review and examine such cases, be they applications for emergency authorization or applications submitted to panel Judges, and to decide whether procedures have been fully complied with and whether there is any abuse of power. I think this mechanism is already adequate.

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

MR JAMES TO (in Cantonese): Actually, after all, the difference now lies in subclause (3)(d). That is, should information obtained under the emergency authorization that has not been confirmed be destroyed or be preserved for the

examination of the Commissioner before its destruction? In fact, this is the only difference.

The difference lies in that if the Commissioner can have such information, he will know the course of development of the case and be able to see and deduce whether the case may be related to any deliberate abuse of power. If the Commissioner cannot draw a conclusion solely from such information, he may ask the Commissioner of Police or officers responsible for the investigation of the cases concerned, then such information may form the basis of an investigation.

However, if such information is destroyed, all clues will disappear, and the report of the heads of department concerned as mentioned in paragraph (b) will be the only reference. However, Members must remember that the original stuff will disappear, if the original stuff disappears — it will certainly involve the question of logical sequence, that is, whether or not the information is destroyed after the head of department concerned has completed the report as mentioned in paragraph (b). However, it seems that paragraph (a) which requires the immediate destruction of the information comes earlier. In other words, the information may have been destroyed already. If such information has been destroyed, how can the head of department concerned compile the report? Of course, some information will be included, for instance, the report may indicated that the failure is due to traffic congestion and traffic accidents. But what are the details of the case? Can we confirm what information has been obtained in the end? We cannot, for the information concerned has already been destroyed.

Therefore, if the concept as a whole includes a requirement that reports submitted should include details of the case and setting out what information has been obtained, then the situation will be different. We have been examining this issue for several hours, and it is up to this moment that we discover the sequence of paragraph (a) and then (b) and the sequence of paragraph (b) first and then (a) will construct different scenarios. Therefore, if you ask me whether we are anxious, I can tell you I am really very anxious.

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

(No Member indicated a wish to speak)

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

(Mr James TO indicated that he did not wish to speak again)

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

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

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

(Ms Margaret NG indicated that she did not wish to speak again)

DEPUTY 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.

DEPUTY 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)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

DEPUTY CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes.

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

CHAIRMAN (in Cantonese): Will Members please proceed to vote. Mr LEUNG Kwok-hung, do you intend not to vote?

MR LEUNG KWOK-HUNG (in Cantonese): What?

CHAIRMAN (in Cantonese): Do you intend not to vote?

MR LEUNG KWOK-HUNG (in Cantonese): Sorry.

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, 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 Jeffrey LAM, Mr Andrew LEUNG and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr LEE Cheuk-yan, 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 and Mr Ronny TONG 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, 19 were present, four were in favour of the amendment and 15 against it; while among the Members returned by geographical constituencies through direct elections, 18 were present, 10 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 negated.

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

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 23.

Proposed amendment

Clause 23 (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): As the amendment moved by the Secretary for Security has been passed, Mr James TO may not move his amendment to clause 23, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 23 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 23 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): Mr James TO, Ms Margaret NG and the Secretary for Security have separately given notice to move amendments to clause 24.

Committee now proceeds to a joint debate. I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 24, which is related to the requirement to set out reasons in the decision to confirm emergency authorization. When an amendment of the same nature was processed earlier, the justifications for including the reasons of approval have already been put forth, so I am not going to repeat.

*Proposed amendment***Clause 24 (see Annex)**

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG and the Security for Security to speak on the amendment moved by Mr James TO as well as their own proposed amendments.

MS MARGARET NG (in Cantonese): Chairman, in respect of clause 24, my amendment is slightly different from that of Mr James TO. In fact, it is stated in clause 24 that upon the issue of emergency authorization, law-enforcement officers must apply to panel Judges within 48 hours for the confirmation of the authorization.

Chairman, though my amendment to clause 23 has been voted down, my amendment to clause 24 will not be affected. For under clause 24, a panel Judge is still conferred with apparent power to deal with any possible abuse of power. On the whole, when a panel Judge considers the emergency authorization is proper and that the application submitted is correct, he may grant the confirmation without any worry. However, a panel Judge may bind irregularities upon an independent examination of the justifications for the application, the genuine need for emergency authorization, the cogency of the reasons for not submitting immediate application to a panel Judge for formal authorization and so on. If that is the case, the third paragraph of my amendment will confer apparent power on the Judge, so that he can issue various orders, which include orders to declare the original emergency authorization void, to specify the time the emergency authorization will become void or the adjustment to be made to allow the authorization to remain valid, and he can also order the head of department concerned to preserve the information obtained for the Commissioner to examine.

The major difference between my amendment and that of Mr James TO lies in the last point, for Mr James TO considers that the information concerned should be destroyed. I hope that later, when Mr James TO speaks again, he will express that he understands why such information should not be destroyed but should instead be preserved. I also hope that he will support my amendment. This will then be perfect.

Chairman, in the fifth paragraph, we request that a panel Judge must give his reasons whether or not he grants the confirmation for an emergency authorization. Members are very familiar with this principle. In what way is the original Bill drafted? According to the original provision, whether a panel Judge will deliver his determination depends on whether the valid period of the emergency authorization of the Government has expired. In other words, if the authorization has expired, for instance, if the things the authorities can carry out within the 48 hours of the emergency authorization have already been done, no further action will be taken at all. However, if there is still some time left before the authorization expires, he will deliver his determination. A panel Judge should not base his determination on the valid period of the emergency authorization concerned. Earlier on, Mr Ronny TONG has already made it crystal clear that a panel Judge should deliver a formal determination and go through the case again, and his determination should not be subject to the restriction that the acts to be carried out under the authorization have already been completed. A Judge should not be restricted by the emergency authorization issued earlier, he should have adequate and absolute power, and the power vested with him originally should not be undermined by the emergency authorization issued. It is unreasonable in principle and is not a secure policy, for this will encourage the abuse of power. Thus, such an arrangement should absolutely not be put in place and it is in no way necessary.

Chairman, I therefore implore Members to support my amendment later. Unfortunately, there is a considerable disparity between the amendments from the two of us, and I hope Mr James TO will also support us, so that I can have the opportunity to put forward my amendment. I hope Mr James TO will also accept our views. Thank you, Chairman.

SECRETARY FOR SECURITY (represented by Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, I speak on behalf of the Secretary for Security. In response to Ms Margaret NG's proposal, the authorities have proposed amendment to clause 24 consequential to the amendment to clause 23, stating that the 48-hour period should be counted from the time the authorization is issued.

The Government opposes the other amendments to clause 24 proposed by Ms Margaret NG and Mr James TO.

Regarding the necessity and proportionality of emergency authorization, the threshold applied is the same as that for the other authorization. Therefore, the important point is whether the specific reasons for the authorization are justified. As to whether the procedures concerned are proper, it is not an essential condition. In any case, apart from other safeguards, the emergency authorization will certainly draw the attention of the Commissioner.

During the discussion of clause 23 of the Bill, we have already explained that the authorities oppose the requirement that if no application for confirmation of emergency authorization is made, the department concerned should retain the information obtained in the operation carried out under that authorization. The approach to date back the invalidity of the emergency authorization to the very moment it is issued is also inappropriate.

The authorities also oppose the amendments proposed by Ms NG and Mr TO to clause 24(5), which require a Judge to give reasons for approving the application for the confirmation of emergency authorization. In earlier discussions, we have already explained that we consider such an approach inappropriate.

With regard to the amendment proposed by Mr TO in relation to clause 24(3), we would like to point out that clause 24 of the Bill has stated clearly that panel Judges may order the head of department concerned to arrange for the immediate destruction of all information obtained by interception and Type 1 surveillance conducted. The relevant provisions have already covered all information obtained in all the operations concerned. Therefore, Mr James TO's amendment is unnecessary. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Members may now jointly debate the amendments.

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

MR JAMES TO (in Cantonese): Chairman, after considering the case and as it is pointed out in previous speeches that Ms Margaret NG has mentioned that the

information concerned is preserved for the sole purpose of investigation and examination by the Commissioner, and I consider it a better approach than the immediate destruction of the information. I will therefore support Ms Margaret NG's amendment.

Chairman, I will speak later, of course, if the Secretary for Security I am sorry.

MS MARGARET NG (in Cantonese): Chairman, first of all, whenever it comes to a point of order, I will be very cautious, for it is rather complicated. Once a wrong move is taken, it may bring about some bizarre consequences.

Take this amendment as an example, I am not sure whether my understanding is correct, that is, if Mr James TO's amendment is negated, the Secretary for Security may propose his amendment. Owing to the unfair constitutional advantage which the Secretary for Security enjoys, it is highly likely that his amendment will be passed. This is in fact a foreseeable result. If his amendment is passed, I cannot propose my amendment. Given that, we should, as a strategy, give our support to Mr James TO, for if his amendment is passed, the Secretary for Security will not propose his amendment. I am really not quite familiar with these strategic concepts. Perhaps other Members may put forth their views on this later.

Chairman, I formally respond to the reasons which the Secretary gives in opposing my amendment. He has given two reasons and I very much want to respond to them. First, he bases his argument on the point that emergency authorization is also a formal authorization, so it should be valid and should not be undermined. In fact, Mr Ronny TONG has reminded Members earlier that it cannot be a Type 3 authorization, for there should only be two types of authorization. Type 1 authorization is for very sensitive and intrusive interception of communications, the application of which should be submitted to panel Judges. Type 2 authorization is for covert surveillance of a less intrusive nature, which can be applied for internally from the department concerned. The authorities cannot suddenly create a Type 3 authorization on the excuse of emergency situation. The authorities concerned may use the information obtained by means of this Type 3 authorization during the period concerned, it may also destroy such information after 48 hours by not applying for the confirmation of the authorization from a panel Judge. This is against the rules. How can the law allow the inclusion of a provision which is against the rules?

Chairman, this is unreasonable. Therefore, emergency authorization is only a kind of temporary authorization which is subject to confirmation. Otherwise, this will lead to various consequences and this is only natural.

Second, the Secretary said earlier that authorization was of utmost importance and that procedure was not an essential condition. Chairman, Article 30 of the Basic Law exactly requires that statutory procedures should be put in place. And it is because of these procedures that we have been sitting here today for hours. Procedure is thus very important. How can he say that procedure is not an essential condition? If things are not done according to procedures or procedures are being circumvented and a confirmation cannot be obtained, the parties concerned certainly have to bear the consequence. We have drafted the provision strictly and it will definitely not cause law-enforcement officers to receive any unfair treatment. I now repeat: confirmation of emergency authorization can easily be obtained within 48 hours. For the application does not necessarily have to be submitted by a specific officer. Law-enforcement agencies have such an enormous establishment and they can identify certain officers to submit these applications. I do not believe that no one is available to submit such applications.

Chairman, we therefore do not accept the Secretary's argument. I still hope that Members will support my amendment. In terms of strategy, we shall see whether Mr James TO has got any better options. Otherwise, in the end, Honourable colleagues would rather support Mr James TO's amendment, though some of us may disagree with it.

MR RONNY TONG (in Cantonese): Chairman, this is the first time I disagree with what Ms Margaret NG has said, for I think there is no question of any strategic decision, our amendment will surely not be passed, and we should support Mr James TO's amendment.

The profound difference between us in fact lies in paragraph (c) of subclause (3). A mechanism must be put in place to ensure that emergency authorization will not be abused, nor will it be regarded as a shortcut and an excuse for not submitting normal application. Therefore, it is a must. We should retain this power for panel Judges, so that the decision is made by panel Judges after careful deliberation. I believe the authorities should accept the decision of panel Judges, for right from the very beginning, this concept of panel

Judges is proposed by the authorities, and they are selected and appointed by the authorities, so there is no reason that the authorities will not trust the panel Judges. I thus hope that the authorities will reconsider their stance.

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

MR JAMES TO (in Cantonese): The mechanism as a whole is rather complicated. I can imagine that the following scenario may happen:

Let me cite an extreme example that is frequently mentioned — a kidnap. In the case of a kidnap, certainly, you will at once apply for emergency authorization. Subsequently, you will collect a lot of information, and you may have even conducted interception of communications or covert surveillance and made a lot of deployment, such as following the target to a certain place, and the case may even be solved. In the end, the authorization will naturally be confirmed.

However, there is one interesting scenario, you sense that there is something wrong as you listen to it, for you find that the case is utterly a prank and a complete fabrication. I am talking about a hypothetical situation, an extreme example. Then, you must apply for the confirmation. However, when you apply for the confirmation, theoretically, your application should be based on information you have obtained at the first instance but not at a later stage, for you already know that it is a prank. If you tell the Judge about the information you have obtained later, the Judge will certainly not give the confirmation, for the investigation will no longer continue. The question is: if the Judge does not give the confirmation based on the information obtained at the very beginning, there is no reason that information obtained at a later stage will still be valid, for such a situation is rather contradictory.

In any case, according to clause 24(3)(a)(i) proposed by the Government, if this is simply the case, in the end, I think this will in fact become a Type 3 authorization which may be called temporary authorization instead of emergency authorization. It is of a temporary nature and is thus undesirable. Eventually, the authorities will surely feel nervous, for the number of applications being rejected will be announced in the annual report. However, more importantly,

from the legal perspective, Type 3 authorization has been created in the process. Thus, it cannot be justified purely in the context of legal concepts.

CHAIRMAN (in Cantonese): Does any other Member wish to speak? If not, I will ask the Secretary for Security whether he wishes to speak again.

SECRETARY FOR SECURITY (represented by Secretary for Constitutional Affairs) (in Cantonese): Chairman, we have nothing to add.

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

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 Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, 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, 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, 19 were present, 10 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 negated.

CHAIRMAN (in Cantonese): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman.....

CHAIRMAN (in Cantonese): Ms Margaret NG, you move the amendment to clause 24, it is on page 58 of the script.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 24.

Proposed amendment

Clause 24 (see Annex)

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, 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 Jeffrey LAM, Mr Andrew LEUNG, Mr WONG Ting-kwong and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Ms Audrey EU, 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, 21 were present, four were in favour of the amendment and 17 against it; while among the Members returned by geographical constituencies through direct elections, 17 were present, eight 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): As the amendments moved by Ms Margaret NG have been negatived, I have also given permission for Ms Margaret NG to revise the terms of her amendment to clause 40.

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

SECRETARY FOR SECURITY (represented by Secretary for Constitutional Affairs) (in Cantonese): Chairman, I move the amendment to clause 24.

Proposed amendment

Clause 24 (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.

CLERK (in Cantonese): Clause 24 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 24 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.

CLERK (in Cantonese): Clause 40.

CHAIRMAN (in Cantonese): The Secretary for Security, Ms Margaret NG and Mr James TO have separately given notice to move amendments to clause 40.

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 (represented by Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, I move the amendment to clause 40. The content of the amendment has been set out in papers which have been circularized to Members.

Taking into consideration the proposal of the Bills Committee, the authorities propose the addition of clause 40(1A) to explicitly provide that the Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him and for which no application for confirmation is made within 48 hours of an emergency authorization or an oral application or on the non-compliance with any relevant requirement.

Regarding the amendments proposed by Ms Margaret NG and Mr James TO to clause 40(1A), the content of their amendments is the same as that of the new provision of the authorities, hence the amendments of Ms Margaret NG and Mr James TO are unnecessary.

The authorities oppose Ms Margaret NG's amendment relating to clause 40(3). Under the existing criminal justice system, established mechanisms dealing with criminal offences are already in place. As for issues related to the discipline of civil servants, it is the responsibility of the executive authorities. To address the concerns of Members, the authorities have proposed the addition of provisions to the Bill to provide that in submitting reports to the Commissioner, the relevant department must give specific responses to the questions or opinions put forth by the Commissioner previously, stating the follow-up measures, including any disciplinary actions to be taken in respect of any officer. The Commissioner may state his opinions in respect of the actions taken by the relevant heads of department to the relevant officer, but it is inappropriate to stipulate that the Commissioner shall have the power to require certain departments to conduct an investigation and for the Commissioner to recommend the disciplinary actions to be taken in respect of the results of investigations. Therefore, the Government opposes the Member's amendment related to clause 40(3).

We also oppose Ms Margaret NG's amendment to clause 40(4), for the amendment will extend the investigation power of the Commissioner to organizations other than law-enforcement agencies, and even to public officers beyond the scope of regulation of the Bill. This amendment will substantially expand the terms of reference of the Commissioner, exceeding his basic monitoring function. Moreover, the scope of investigation of the Commissioner will not be restricted and this will become a factor creating great uncertainty. In case a criminal offence is committed, the existing criminal justice system is already adequate in dealing with it. If it involves a disciplinary issue, relevant mechanisms are also in place. If the Commissioner discovers any problem in the discharging of his duties, the Bill has already given him power to obtain the relevant information and report to the Chief Executive, and so on.

I hope the Committee will pass the amendment proposed by the authorities to clause 40(1A) and oppose the amendments of Ms Margaret NG and Mr James TO. Thank you, Madam Chairman.

*Proposed amendment***Clause 40 (see Annex)**

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG and Mr James TO to speak on the amendment moved by the Security for Security as well as their own amendments.

MS MARGARET NG (in Cantonese): Chairman, up to now, this is the first time we talk about the role of the Commissioner.

Chairman, we have looked at the authorization mechanisms. Through two authorization mechanisms which include judicial authorization by the panel Judges and internal authorization by the government departments, many law-enforcement officers will have the right to conduct interception of communications and covert surveillance. However, as I just said, this is entirely a black-box operation in which nobody outside knows what actions and decisions have been made.

Now, the Commissioner is the only outsider who is also an independent person. In accordance with the Bill, the role of the Commissioner will be played by a retired Judge or an incumbent Judge. The Commission will oversee the full picture to see how the law is being implemented and what has happened. He is the only person responsible for this and even the panel Judges do not have such a power. It is because, Chairman, as I said before, the panel Judges will only face the applicants and will not meet or talk to any other people. They will not be permitted to discuss these matters either. So, except the cases they handle, the panel Judges have no knowledge of the others. As for the law-enforcement officers, although they know what is going on in their own departments, they are not the outsiders. So the only outsider who is an independent person with judicial background and can oversee the full picture is the Commissioner.

At this moment, we are talking about the powers of the Commissioner. The authorities just said that the amendment was technical in nature. But I consider it a necessary amendment as I have pointed out in the Bills Committee. Regarding an operation without emergency authorization or confirmation, the

authorities said that the head of the department was required to submit a report to the Commissioner beforehand. As it is required to submit so many reports, the authorities should indicate in the Ordinance how these reports should be submitted to the Commissioner. So, I have proposed this amendment. This part belongs to the Government's amendments and my amendment and Mr James TO's amendment are similar without much difference.

However, the Government opposes this part of my amendment which is very important in my eyes because it will allow the independent Commissioner to have a general power. This power will include two aspects. First, the Commissioner will be empowered to conduct investigation if, on reviewing the operation of the mechanism, he has reasons to believe that someone has breached the provisions of the Ordinance or provided any false information in order to obtain authorization. Chairman, this is reasonable because the Commissioner should be responsible for the whole Bill and should not be subject to any constraint. So, if the Commissioner is not empowered to conduct investigation when a law-enforcement officer has done something wrong, who else will have such knowledge and such a background with so much information in order to investigate those who are involved in a fair manner?

The Secretary has just indicated that if the provision of false information is involved, it can be dealt with in accordance with the criminal procedures. But the problem is: first, who will report it? Second, this is not only a criminal offence. When there is a contravention of the Ordinance, the ordinary citizens or the general public may be hurt. In that case, should the Commissioner not be given such a general power to investigate? Furthermore, it remains a question as to whether this is a criminal offence because basically the provision of false information may not be regarded as a criminal offence as a criminal offence includes many factors. Perhaps it may constitute a criminal offence only when the person concerned is aware that the information is false and he has deliberately provided it. Even though the person involved has really committed a criminal offence and has been prosecuted, who will get any benefit from it? Of course, under the whole system, a person who has provided false information will be penalized in accordance with the criminal procedures. But this is only limited to imposing penalties on this person. Other people will not get any benefit. So, we should lay down a general power allowing this independent outsider who has a judicial background and relevant knowledge to monitor covert surveillance and interception of communications on behalf of all people.

Regarding subclause (4), the Secretary said with confidence that the Commissioner would be able to investigate any person. It would be unbelievable if the Commissioner can investigate any matter in the world. First, we are now talking about a Bill relating to interception of communications and covert surveillance, the powers of the Commissioner should be governed by the Bill. If there is objection, why not raise it? As I have just pointed out, most importantly, not only those who execute the authorization for interception of communications should be monitored, but also those who are responsible for granting authorization. Let us imagine that if the head of a department is required to approve all kinds of paper, he may grant approval to all covert surveillance operations in a careless manner. Or he does not mind what the applicants said and just grants approval easily and casually. How can these situations be monitored? Under the Bill, the Commissioner is the only person who knows all these situations. But he is not given a general power to investigate such irregularities and unlawful practices. Why do we stipulate in the amendment that the Commissioner cannot investigate the panel Judges? Because we think that the Commissioner acts in the capacity of an executive. Under our existing legal system, we will not allow anyone to investigate the Judges in accordance with procedures outside the Basic Law, unless the Judge concerned has committed a criminal offence. If it is a disciplinary matter, it should be dealt with by the Judiciary. However, this is still not an ideal way. Chairman, anyone who grants authorization should be subject to monitoring. However, as the authorities have adopted such an absurd practice of panel Judges, I cannot think of a better way to deal with it. Here I am obliged to protect the independence of the Judiciary.

So, these two powers are very important. If the Commissioner finds that someone has breached the law and committed any unlawful act, a criminal offence may be involved. The Commissioner can refer the case to the Director of Public Prosecutions (DPP) directly. Chairman, this power is not uncommon and has been stipulated in many other ordinances. If any act is committed which is found to have breached the power and is of a criminal nature, the public officer concerned can refer it to the DPP for prosecution. I propose to add these two powers mainly for the protection of people's interests because the Commissioner should have this kind of general power in order to ensure that the system under this Ordinance can be put into practice safely and properly.

Thank you, Chairman.

CHAIRMAN (in Cantonese): Mr James TO.

CHAIRMAN (in Cantonese): Since Mr James TO is not here, I will make the following arrangement. At this stage, we should have a joint debate. But since a Member can speak more than once, I will allow other Members to speak first.

MR RONNY TONG (in Cantonese): Chairman, I was very much astonished at the first sight of the Bill on the first day when it was submitted to the Legislative Council because the fundamental rights of the Hong Kong people under the Basic Law are rights under constitutional protection. If I am told that there will be no remedy or nothing will happen when the rights granted by the constitutional system are violated, it is simply beyond my wildest imagination. Starting from Wednesday, I have reiterated time and again that I have come to realize that the Basic Law is not worth the paper it is written on.

Before the Bill is passed, Article 30 of the Basic Law has stipulated that the Government should apply for exemption in accordance with legal procedures. In other words, when there is a lack of mechanism, the Government can apply for exemption from Court in accordance with the ordinary judicial procedures in order to conduct covert surveillance. However, after the Bill has been passed, all surveillance and interception of communications will become authorized operations and it is not difficult to apply for such authorization because it will only require an *ex parte* application.

As we all know, in particular legal practitioners, if it is an *ex parte* application to the Court, the successful rate is 99.9%. Rarely will *ex parte* applications be turned down by the Judge. Should it be the case, it will be a shame and must be due to inadequacy in preparation on the part of the applicant. In other words, if the Bill is passed, the fundamental rights protected by the Basic Law will go down the drain. I definitely cannot accept it.

So, the amendment proposed by Ms Margaret NG is a fundamental demand in principle. If anyone has violated this legislation or the fundamental rights protected by the Basic Law, the only consequence is that the public officer concerned may receive disciplinary sanctions. This is totally unacceptable. We should bear in mind that under the established procedures, the authorities will never make public the details of the disciplinary sanctions, or who has been

penalized or the level of penalty imposed. We still remember that in the Harbour Fest fiasco, which has happened for so many years and has been pursued by Members in the Legislative Council for so many times, the answer we get every time is "Sorry, no comment". We will never know whether the public servants who have committed mistakes in the Harbour Fest have been penalized. Under such circumstances, the Ordinance will only be a toothless tiger which will serve no deterrent effect to the public officers because they may think that at most they will be rebuked by their superiors and nobody even knows it if they keep their mouths shut. This is unacceptable because what we are discussing is the rights under constitutional protection.

So, Chairman, I think this demand is the most fundamental and it is a matter of principle. The value of the Basic Law depends on how much respect the Government gives to it. If the Government has no respect for the Basic Law, the Basic Law will be worthless. I hope the Government can refute my statement and my views and show the public how much respect it gives to the Basic Law.

MR JAMES TO (in Cantonese): Chairman, I am sorry.

I think this is a touchstone. Chairman, I can remember that about seven or nine months ago, when some government officials came to lobby all political parties and groups, they were holding a piece of paper, saying that a Judge would be responsible for examination in front and a Commissioner would be responsible for monitoring at the back. I remember they made an analogy that someone would be playing the part of forward while someone else would be playing the part of a defender. With double safeguards, the framework would be perfect even better than the Bill I intended to propose in 1997, not to mention that the latter part would be added — because of the charging effect, the latter part was not allowed at that time.

However, after taking a closer look, we asked what power the Commissioner would have or whether the Commissioner would be given adequate power. Unfortunately, we found that there was problem at the first sight. The fact is that the Commissioner will serve the purpose of window dressing and be given limited power. What is this power? It is the power of examination. However, when we asked for the details about the examination power, we were told that it was the power of reading files. Besides, the

Commissioner can also send for people to ask questions. But what will follow afterwards? It will be the right to report. The Commissioner will submit a report to the Chief Executive. What other power does the Commissioner have? No more. To put it simply, it is to write reports and that is the Commissioner's last power.

If you ask me about my views on Ms Margaret NG's amendment, I will say that she has added some teeth so that the Commissioner will become a real tiger with teeth to request an investigation by the departments, apart from engaging in general investigations on his own. But we should bear in mind that the so-called general investigations are only preliminary in nature in my opinion because the Commissioner is only assisted by a dozen or so people. However, the Government is horrified and worried that once preliminary investigation by the Commissioner has commenced, it may lead to some preliminary conclusion or preliminary evidence may be got hold of. By then, other government departments will find themselves in a dilemma as to whether they should conduct an investigation or not, for both options would put them in a difficult situation. In other words, at the present stage, the Government has to eradicate the root and nip it in the bud so that the Commissioner's power is limited to compiling reports.

We should bear in mind that the Commissioner's power will be limited to purely compiling reports without the addition of the new subclause (4) proposed by Ms Margaret NG, which is concerned about the general power to conduct investigation. But what is the content of the report? It will be about the information revealed in the documents. If the Commissioner wishes to take a detailed look into the case by investigation, for instance, it will be much more difficult. Of course, the Commissioner can require any department to investigate in accordance with subclause (3). But I guess that at the end, the power of the Commissioner may even be more restricted than that of The Ombudsman. Why? Because The Ombudsman is always assisted by a large team of people, including legal experts. Worse still, the Commissioner is only assisted by a dozen or so people. If the Commissioner does not even have the power to require investigation by other government departments such as the CAPO — in fact, I have fought for many years in this aspect because the CAPO (that is, the Complaints Against Police Office), in my opinion, is not independent from the police and its credibility is in doubt — if not even subclause (3) is allowed, that is, the Commissioner is not empowered to require or order an investigation, the Commissioner can be said to be a toothless tiger and serve the purpose of window dressing only. What he can do is to compile reports only.

I hope the Government can explain why the Commissioner is not empowered to require investigation by government departments.

Besides, Ms Margaret NG has actually added a prerequisite, and that is a reasonable ground to believe. In other words, the Commissioner has already observed some problems or he is able to invoke the power under the new subclause (4) in order to conduct an in-depth investigation and draw a preliminary conclusion that he has reasonable ground to suspect that the law has been breached. We should bear in mind that this request is different from that submitted to the CAPO. Of course, we cannot compel the CAPO to conduct an investigation because we have not got hold of any solid evidence. However, if we believe and just believe or even suspect that an offence has been committed, we can lodge a complaint. However, in this subclause, the level of proof is so high that a "reasonable ground to believe" is required. So, every word used by Ms Margaret NG is a gem. She has not proposed a very low standard and requested the Commissioner to conduct extensive investigations. No, she has not. Otherwise, she should have proposed that investigation be conducted if there is reasonable ground to suspect. Rather, she has deliberately used the word "believe" instead of "suspect", showing that she has also demanded that the Commissioner should comply with a basic standard before requiring an investigation by government departments.

If the Commissioner is denied of such a humble power, I really do not know what can be done. Let me be bold enough to tell you the truth. It is very simple indeed. The Commissioner is just required to write reports. If the Chief Executive considers an investigation necessary, he will order an investigation and the Commissioner is not required to intervene. But the Chief Executive may not hold such a view. He may think that, "My subordinates have been working hard for the realization of strong governance. They have worked hard to collect intelligence which may not be related to criminal offences but advantageous to election. Should I punish them? Of course, I should do some screening and tell the Commissioner not to conduct any investigation. They have risked their lives for my re-election and the intelligence may be useful in threatening the 800-member Election Committee. How can I compel an investigation by the Commissioner? How can I do this?" Of course, this may not be the reality. I am not saying that the Secretary's subordinates will certainly be abused by the Chief Executive. However, if the Commissioner does not have an independent power to require investigation, such a situation may happen. So, in order to prevent such a situation, legally the Commissioner

should at least be given an independent power to require investigation be conducted. I think the Commissioner should have such a basic power.

MR LEE WING-TAT (in Cantonese): Chairman, it seems that there is a lack of a quorum in the Chamber.

CHAIRMAN (in Cantonese): Fine. 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): We now have a quorum. Members, we now have a joint debate on the amendments. Does any Member wish to speak?

MS AUDREY EU (in Cantonese): Chairman, just now Mr Ronny TONG mentioned that all legal practitioners knew that the successful rate of *ex parte* application made to a Judge was 99.9%. If it was rejected, the applicant should feel ashamed because it will certainly show the inadequacy of preparation by the lawyer concerned.

However, I would like to point out that it is not quite appropriate for him to use such an analogy in respect of this Bill. This shows the inadequacy of this Bill. Generally speaking, an *ex parte* application by a lawyer to the Court with a successful rate of 99.9% refers to those I mentioned just now or may be yesterday, in the debate. For *ex parte* applications, there are specific legal requirements laid down for such applications.

First of all, even though it is an *ex parte* application, the applicant has the legal obligation to submit evidence or condition which is favourable to the other party and unfavourable to the applicant himself. This is a legal obligation. But as we have seen in yesterday's debate, the Government is reluctant to undertake that such a legal obligation would be expressly provided in the Bill so that the law enforcement officers would be required to shoulder such a legal obligation when they lodge such an application to the Judge who should not be regarded as a Judge in the general sense. In other words, the authorities refuse

to expressly provide that the law-enforcement officers are required to submit to the Judge all the relevant information even though it is unfavourable to themselves. Since the Judge cannot be regarded as a Judge, he cannot listen to other party's statement, apart from that of the law-enforcement officers.

There is one more important point. In law, according to the ordinary practice of *ex parte* application, the other party will definitely meet the Judge a week later. After both parties have debated in front of the Judge, the Judge will decide whether the proceedings should go on. However, there is no such procedure in the application stipulated in the Bill although it may infringe upon the privacy of other people. The other party will not be informed and will not have the opportunity to see the evidence adduced by the law-enforcement officers or state his own case in front of the Judge. Even if there is any fraud, deceit or unintended inadvertence on the part of the applicant, the other party basically has no chance of giving an explanation and the Judge has no chance of conducting a review either.

In this morning's debate, we mentioned that as it is concerned about the infringement of privacy, it would be better to seek the assistance from the Privacy Commissioner for Personal Data so that the Judge can be provided assistance in respect of legal matters, protection of privacy or reasonable expectation of privacy. But this is denied and rejected by the Government. Now we have proposed that a relatively independent examination should be conducted by the Commissioner. He is selected and appointed by the Government among incumbent or retired Judges and is therefore a person to be trusted. What is the demand of Ms Margaret NG in her amendment? It is to provide a general power to the Commissioner so that he can require the government departments to investigate into any person whom the panel Judge has reasonable grounds to believe that he has violated the law or has obtained authorization by producing false information. I hope all those in this Chamber and those in front of the television will listen and decide whether or not this is a most reasonable demand. She only requests that the Commissioner should be given power to instruct the government departments to investigate into the officers concerned, instead of requesting the Commissioner to conduct the investigation on his own. She only requests that when the Commissioner, who is selected among incumbent or retired Judges, has reasonable grounds to believe that someone has violated the law or provided false information in order to obtain authorization, the Commissioner can require the departments to conduct investigation. However, this is not allowed. Why? Why is this not

accepted? I really do not understand. I am sure that the general public will not understand why such a reasonable request has been rejected by the Government.

Besides, on giving a general power to the Commissioner to investigate any person apart from the panel Judges as when considered necessary, and submit all the information to the Director of Public Prosecutions after investigation, this is a very reasonable request. We have mentioned time and again that the situation is a black-box operation although the authorities dislike such a phrase. But in fact, this is one-sided, not the same as an *ex parte* application mentioned by the legal profession because the legal protection given by an *ex parte* application is not provided. When the application is submitted under such circumstances and the Commissioner during a review has reasonable grounds to believe that an investigation is necessary, the authorities still reject and deny it. I really hope that the Secretary can explain again to the audience in front of the television why the Government cannot accept such a reasonable request and such a reasonable amendment.

Thank you, Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I have discussed the issue for so long that I feel very tired. So I would like to be relaxed. I think of the name of a historical figure who will only be remembered by people over 50 years old and he was the former mayor of the municipality of Beijing before the downfall of the Gang of Four. His name was WU De, which sounds like "no way" in Cantonese. Now, the government officials or the Chief Executive of the Hong Kong SAR resemble the name of this former Beijing mayor because they always say, "no way". They say "no way" to everything and these words come naturally out of their mouth.

I am a football fan and I also emphasize fair play in the game. How should we encourage fair play? If a footballer has committed a foul or a footballer of the other team has fallen and hurt himself, the ball should be kicked out of the line. I remember a most foul-prone player whose name is Paolo Di CANIO. Once in a football match, he should have a chance to score a goal when the ball was passed from the sideline to him and he was ready for a header. But on seeing that the goalkeeper of the rival team had fallen injured on the ground, he caught the ball immediately instead of putting it into the goal. Then, he told the referee that the goalkeeper was lying on the ground and whistle should be blown, otherwise, the goalkeeper's life would be in danger if it was

late for just 15 seconds. Because of what he did, he has become a hero instead of a most foul-prone player. Later, as a player in the FA Premier League, received the FIFA Fair Play Award. This story shows that when a football player knows that the goalkeeper of the other team has sustained injury, he will not take any advantage of that even though he can. This is sportsmanship. In fact, sportsmanship is a very good spirit which will ensure fair treatment to one's opponents.

As I have just asked, what is the use of it even though you have gained the whole world by unfair means? What we discuss today is the need of a fair system. What is a fair system? When a public authority, whatever its source, is exercised by applying to the authorizer for infringing upon the freedom and privacy of communication of the other party, that party will be treated fairly. Let us look at this football match. Right from the beginning, a player always hits with the elbow or kicks the leg of others and whenever it is at the critical moment, he will say "no way", just like the name of the Beijing mayor. Such an attitude is unacceptable.

Honourable Members, from 11 am yesterday morning to now, we have been following the proceedings of this meeting which are just like the flow of water. From upstream to downstream, there is always someone who tries to block the flow of water. They forget that the flow of water cannot be cut by a knife. The water will become turbulent and charge forward if anyone tries to stop it. This is what the Government is doing. From upstream to downstream, walls and dams are built whenever it is displeased with anything. We can see that at the beginning of the debate yesterday, the Secretary said that he had consulted the judicial sector and it agreed that it was not necessary to give any reasons when the authorities were permitted to conduct interception of communications and covert surveillance and reasons should only be given when the approval was denied.

CHAIRMAN (in Cantonese): We are now discussing the power of the Commissioner. Could you come back to this issue?

MR LEUNG KWOK-HUNG (in Cantonese): OK, I will then go up from downstream. Never mind, it is the same going up from downstream.

The Commissioner is like the goalkeeper who will monitor the unfair system I just pointed out. Now, how is this goalkeeper? He is like a

goalkeeper with his hands and legs all tied up. When the forwards launch an attack, he can just stand there. When the opponents shoot the ball, he is not allowed to move or do anything. He has become the ear of the deaf, as described by a phrase in the Beijing dialect, which is for the purpose of window-dressing only and serve no other purpose but to show that the Government has not let the people of Hong Kong down or rendered the Article 30 a dead letter. It shows that the authorities have set up the Commissioner who will be the goalkeeper even though there is unfairness at the beginning.

However, what is this Commissioner like? He cannot conduct any investigation on his own or conduct a review if any doubt arises. He can only maintain the system unchanged. And this is a system which justifies itself, sings its own praises, regards itself as always in the right and not to be challenged. To put it simply, if the Commissioner considers that there is something improper in dealing with some matters and an investigation is necessary, can he request the Privacy Commissioner for Personal Data to conduct an investigation as Ms Audrey EU has suggested? No. The Commissioner does not have any power of investigation. This makes me think of the IPCC. When the IPCC sees that there is problem in the report submitted by the CAPO, it can reject it and order a thorough investigation by the department concerned. Is it true? The Deputy Chairman of IPCC is also attending this meeting and can be the witness. But this is not a Court. As the IPCC can do so, why is a monitoring organization which is highly regarded and set up on the basis of Article 30 of the Basic Law, rather than some subsidiary legislation of the Police Force, for the protection of the Hong Kong people's privacy, given a power which is even inferior than that of the IPCC?

Frankly speaking, this question is difficult to answer. Secretary Stephen LAM who speaks on behalf of the Secretary for Security, will also find it difficult to answer. However, we should be to the point and should not drag on. In fact, I also hope that the debate can go on faster. But if someone here speaks in an illogical way, I have the responsibility to rectify it.

We can see that the Government, while blowing its own trumpet, is like a blind jockey riding a blind horse at an extremely high speed, claiming to reach the destination on 8 August. Has the Government thought of the amazing difference mentioned above? The power of the Commissioner who is so highly regarded by the Government is in fact inferior than that of the IPCC. Such a discrepancy is worth our discussion although it is impossible to rectify it because

it is something like last night's steamed dumplings, meaning that it is pre-made. All CSAs are laid before us and amendment is not possible.

So, concerning this point, I think I have to recommend the sunset clause to all Members. We are now having this discussion, trying to prove something in our speeches. What is the point? It is to find out a conclusion which could not have been arrived at if not because of exchanges of divergent views and heated debates.

Today, we have found that the power of the IPCC is superior than that of the Commissioner. I know that this is out of proportion. Have you not always mentioned proportionality? Why is it not proportionality but relativity? So, I think if the Commissioner is just like a vase put in the hall of strong governance of the Government, with flowers occasionally put in it and guests will come once in a while to touch them and admire its beauty, it is meaningless.

So, no wonder Ms Margaret NG has proposed the amendment. No wonder Ms Audrey EU has stood up and repeated something which can be understood by a three-year-old child. This assembly is forced to repeat something which can be understood by a three-year-old child. What does this show? It shows that something which can be understood by a three-year-old is not accepted in society and this assembly. I am really sorry for that. It is as simple as that.

When GALILEO was in the Church, the Church as a whole considered what GALILEO said was wrong. Today, our situation is slightly better than GALILEO's because we are only condemned by newspapers that we are anti-China and stirring up troubles in Hong Kong. But we will not be burnt to death.

So, friends of the pan-democratic camp, I would like to read out something from the *Quotations of Chairman Mao* to you: "In times of difficulty, we must not lose sight of our achievements, must see the bright future and must pluck up our courage." We must be confident in order to promote the right way in this assembly. I am prepared to pay the price. I am prepared to pay the price of spending the night at 8 Jackson Road, Central because I am not at peace. When I feel that I am obliged to explain the truth which should have been recognized, I am prepared to devote my efforts in legislation at 8 Jackson Road together with Chairman. Thank you, Chairman.

I now have changed my mind. Chairman, if you like working overnight, I hope you will request Ms Miriam LAU to take the Chair for you more often. You have to take care. But I have already said that the Government is unreasonable, there is no other alternative.

CHAIRMAN (in Cantonese): I think you will get a reply in a moment, please sit down. Ms Margaret NG, do you wish to speak again? Sorry, Ms Margaret NG, please let Mr LEE Wing-tat speak first.

MR LEE WING-TAT (in Cantonese): Chairman, concerning the power of the Commissioner, it is in fact very important because if we look around the world, countries which have authorized their executive departments to wiretap their people or put them under surveillance have established their long-standing practice on the principle of balance of powers and monitoring of powers. Today, being relatively prudent sometimes makes people feel that A pro-government Senior Counsel, Mr Alan HOO, has published a rather long article on *Ming Pao*. I have read it and it touches on the balance of powers. Coming back to this point, on the power of the Commissioner, our starting point is always based on the principle that the people are now delegating their powers to the Government. On the appointment procedure of the Commissioner, although the candidature is limited to incumbent or retired judges, the selection is entirely decided by the Chief Executive. I have looked up the Basic Law for provisions concerning the balance of powers. In fact, some provisions in the Basic Law are really well written. For instance, Article 73(7) has stipulated that the powers of the Legislative Council include the endorsement of the appointment and removal of the Judges of the Court of Final Appeal and the Chief Judge of the High Court. This is stipulated by the Basic Law. Why has the Basic Law stipulated such a provision? This is for the checks and balances of powers.

Of course, we are now debating the powers of the Commissioner. On discussing this issue, if the appointment approach is entirely lopsided — now it is lopsided — Chairman, I have to drag this point in, otherwise, I cannot explain my concept and I do not intend to repeat some viewpoints. If the appointment procedure resembles those in overseas countries where the parliament or congress has the power to approve certain matters, the balance of powers can be seen because many of their meetings are open to the public. However, this is

not the case in our appointment procedure. Rather, the Commissioner is appointed by the Chief Executive alone. Chairman, what I meant is that under such circumstances, to put the powers of the Commissioner under checks and balances has become vital because there is a lack of a process, and that is a process which can give expression to a balance of powers in the appointment procedure.

How can we put the powers of the Commissioner under checks and balances? I have tried to find this out in the Bill but failed much about it. I saw that Ms Audrey EU always put on a smiling face when speaking. It is very nice. But sometimes I think you are most reluctant to wear a smile when speaking because you clearly know that the other party has given an extremely poor argument. I really have to learn this from her. In the past I would have been infuriated. But now I have changed. I would prefer any other concepts to this one because this one is really bad. If there are no checks and balances in the appointment procedure, or a balance is not struck in the powers of the Commissioner, what powers will the Commissioner have? He will not take the initiative to examine the relevant reports. He will be operating in a passive role.

Now, the amendments proposed by Ms Margaret NG or Mr James TO seek to enable the Commissioner to balance a bit the powers of the law-enforcement officers, who will exercise the statutory powers. The Commissioner can pick the irregularities when examining the reports. However, after reading the reports, will he make an announcement or follow the overseas practice of giving an account of the reports or the classified information contained therein to a parliamentary committee or a committee in camera? If I remember it wrong, I hope the Secretary can rectify it. It seems that there is no such a procedure. The Commissioner's report will be submitted to the Chief Executive only. Information which may possibly be submitted to the Legislative Council is limited to some general and overall figures. I really do not know whether any specific details will be included in the report.

If so, the Commissioner will only be a showcase for decoration just like Mr LEUNG Kwok-hung and me. He will be a toothless tiger. In fact, I would rather not have such a Commissioner. Frankly speaking, I really would rather the Government come up with the naked truth that there is no such measure or no intention to adopt such a measure. The Government will not set up such a post and it will amputate all the functional parts in order to make the whole impotent. If the Government tells us that there is a system which has been given power to

exercise judicial monitoring on the executive departments and the law-enforcement agencies, I am sorry, I do not think the current practice can attain such a goal.

If such a goal can be achieved with such limited power — if I remember it correctly, under the Rules of Procedure, the Secretary for Security can withdraw any of his amendments or motions. He can withdraw anything at the final stage. I would rather the Secretary withdraw this amendment. I would rather the Secretary tell us the naked truth that there is no such arrangement, instead of putting up an illusion that there is a system for monitoring the law-enforcement officers who will not act unlawfully even though the Legislative Council has granted them the statutory powers. So what is the use of this? Please look at all sorts of Commissioners in Hong Kong such as The Ombudsman, the Privacy Commissioner for Personal Data, IPCC or colleagues at the IPCC Secretariat who are not civil servants or public officers, I make reference to these organizations because firstly, they are highly transparent and given extensive powers in a reporting process. The Ombudsman can even initiate an investigation and then compile a report.

Of course, sometimes, we can hear that this is not to the liking of the Government. In the opinion of the Government, these Commissioners are making troubles. It is making troubles by conducting so many investigations in the capacity of an Ombudsman appointed by the Government. From the time of the outgoing Mr Andrew SO to the present incumbent Ms TAI, occasional investigations have already displeased the Government. However, precisely because the Government is displeased that it is good. If the independent Commissioner is very much liked by the Government and always keeps silent, the system is a big failure. The National Audit Office on the Mainland and our Audit Commission in Hong Kong have sometimes displeased the Government. Why? Because the Government is stung. Similarly, the Public Accounts Committee of the Legislative Council is disliked by the government departments. But this is a good system. So, when talking about powers, I really hope that the Secretary for Security can give a half-minute to thinking my views.

If the Secretary insists to do so, I would request him to delete the post of the Commissioner in order to save the resources. How can he tell the whole world or the Hong Kong people that this system has been given power in order to facilitate monitoring? Why put up an illusion? The Government may as well not set up the post of the Commissioner. Instead, it can tell everybody the

naked truth that no such an arrangement is in place and this is the Government's practice. After the report has been submitted to the Chief Executive, the Chief Executive is not required to do anything or release all the information to the Legislative Council. In that case, what is the point? Is it just for the sake of telling the people that the Government has done something? Since the foreign countries have such a practice, the Government will follow suit, except that the relevant power is so constrained that it is almost non-existent.

Therefore, I urge the Secretary for the third time to consider and accept my advice. My advice will certainly be good to him because it will not only save the resources, but also save a post and all the troubles. Moreover, Ms Audrey EU will be spared from making criticisms with a smiling face. Thank you, Chairman.

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

MS MARGARET NG (in Cantonese): Chairman, I would like to remind other Members that in this Bill, apart from the Commissioner, there is no other statutory mechanism to review this system. In other places, if the authorities need to conduct covert surveillance or interception of communications, a select committee will be formed to monitor these operations. In these couple of days, I have mentioned that such committees will comprise more than one member and are parliamentary committees. For instance, the Central Intelligence Agency in the United States will be accountable to these committees and subject to their monitoring.

However, for our system of covert surveillance and interception of communications, there is only a Commissioner who has a very nice title, a very long title rather, which is, Commissioner on Interception of Communications and Surveillance. With such a grand title, the Commissioner does not have the general power to investigate that I am proposing. As Ms Audrey EU has said, investigations are not conducted by the Commissioner himself or his subordinates, rather it is conducted by other departments at his request. But he is not given such a general power. It is really bad.

Coming back to this amendment, in fact, among the amendments proposed by the Secretary, Mr James TO and me, the Secretary's amendment is covered by mine and the scope of mine is bigger than the Secretary's. So, the situation

is crystal clear. Members should support my amendment instead of the Secretary's. Thank you.

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

MR JAMES TO (in Cantonese): Chairman, the Government has been following the same line of thought. I have participated in the work of CAPO for more than a decade and the situation is the same. The Government will definitely think of some nice names. Mr Alan LEONG, the Deputy Chairman, is also aware of it and is smiling. The IPCC, that is, the Independent Police Complaints Council, is in the same category. In 1996 when it was proposed that the IPCC be set up, I asked whether the IPCC should be given more active power but was replied that it was not feasible. Should any queries arise, they should be referred to the CAPO. Depending on the investigation results by the CAPO, further investigation might be conducted if problems were found. If the complaint was found to be invalid, you might want to argue with it. But how can you argue with the IPCC? The public thinks that the IPCC is very independent with an independent Commissioner and Committee.

Similarly, members of the public hold the same views because the Government's publicity machine will say that we have the Judges and behind the Judges, there is a Commissioner who will conduct examination and investigation — not investigation, but only examination. But they basically do not know whether investigation will be conducted. They think that examination is equivalent to investigation. The people are very simple-minded, thinking that examination is equivalent to investigation. But examination actually means reading documents and the Commissioner has no investigative power. At the end, the Commissioner can only request the government departments to conduct an investigation. But this is only a request. The Commissioner is actually inferior to that of the IPCC which has power to order investigation.

I really do not understand. If you ask me, I will tell you a miserable truth that the officer-in-charge of the IPCC is not even a Judge. I sympathize with this Commissioner. The IPCC has the power to order the CAPO to conduct investigations. Now the Commissioner cannot even conduct investigations as requested by Ms Margaret NG. Nor can the Commissioner request the authorities to give an account of the details of disciplinary actions taken. Can these not done even by the IPCC?

The public will really be shocked because they think that the Commissioner has got power and this is only too reasonable. But it is not true. Now I tell every citizen clearly that the Commissioner has got no power, not even the power of the IPCC. How can the authorities say that the Judges are very careful and a new piece of legislation has been especially drafted to facilitate their monitoring work? Frankly speaking, it is quite deceptive and misleading.

I hope the Government, in launching its publicity in future, can tell the public that the Commissioner does not even have any investigative power and can only write reports.

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): Before I put to you the question on the Secretary for Security's amendments, I will remind Members that if those amendments are agreed, Ms Margaret NG and Mr James TO may not move their respective 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.

Mr James TIEN, Dr Raymond HO, 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 LEE Cheuk-yan, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, 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, 29 were in favour of the amendment and 16 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 amendments moved by the Secretary for Security have been passed, Ms Margaret NG and Mr James TO may not move their respective amendments, which are inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 40 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 40 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): Members, our progress in examining this Bill has obviously improved during the period since 2.00 pm or so yesterday up to about 2.00 pm or so today, so I will suspend the meeting at about midnight today.

CHAIRMAN (in Cantonese): Ms Margaret NG and Mr James TO have separately given notice to move amendments to clause 32.

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 clause 32. Clause 32 is a very complicated provision and it is about the

application for device retrieval warrant. Under this clause, if it is necessary to retrieve a device authorized to be used for wiretapping and listening, a warrant for its retrieval should be applied.

In my amendment, the phrase *ex parte* is added before "application" in the relevant amendment so that it will become an *ex parte* application. In other words, in each application, both the pros and cons should be stated, in particular, for the issue of a device retrieval warrant which seems to be in order by appearance and is for the retrieval of devices after installation and use. In the application, it should also state whether improper reasons have been involved. At any rate, the reasons should be stated because some matters may be known to the applicant only and even the approving officer is kept in the dark. Moreover, it may also involve the additional power which we will discuss later. So, these should be elaborated clearly.

So, Chairman, I move the amendment to clause 32(1) in order to add the term "*ex parte*". Thank you, Chairman.

Proposed amendment

Clause 32 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO to speak on the amendment moved by Ms Margaret NG as well as his own proposed amendment.

(Mr James TO indicated that he did not wish to speak)

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?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the authorities oppose the amendments proposed by Ms Margaret NG and Mr James TO which seek to define the application for device retrieval warrant as an "*ex parte* application". Since the justifications of the authorities have been mentioned in the discussion on judicial authorization and executive authorization, I am not going to repeat them.

I hope Members will oppose Ms NG's and Mr TO's amendments and support the original provisions of the Bill. Thank you, Madam Chairman.

MS MARGARET NG (in Cantonese): Chairman, we will not be surprised by the Secretary's opposition for the sake of opposition. But I will continue to urge Members to support our amendments. Thank you.

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

(Mr James TO indicated that he did not wish to speak)

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

(No Member indicated a wish to speak)

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

Mrs Sophie LEUNG rose to claim a division.

CHAIRMAN (in Cantonese): Mrs Sophie LEUNG 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 and Dr Fernando CHEUNG 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 LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr LEUNG Kwok-hung 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, 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, 19 were present, nine 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 negated.

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

MR JAMES TO (in Cantonese): Chairman, since the amendments I am going to move are the same as Ms Margaret NG's, can I withdraw them?

CHAIRMAN (in Cantonese): Yes, you can withdraw your amendments right now.

MR JAMES TO (in Cantonese): Fine, I now withdraw my amendments because they are no longer necessary.

CHAIRMAN (in Cantonese): In that case, voting is not required.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 32 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.

CLERK (in Cantonese): Clause 41.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendments to subclauses (2) and (3) of clause 41.

In response to the Bills Committee's proposal, the authorities have moved the amendment to clause 41(2) in order to state it clearly that details of measures contained in the report for the purpose of addressing identified issues submitted to the Commissioner by the head of the department should include details of disciplinary action taken in respect of any officer.

Besides, we propose to move the amendment to subclause (3) of clause 41 so that the Commissioner may refer the findings he has made in the review or the determination in the examination and any other matters he thinks fit to the Chief Executive or the Secretary for Justice or any panel Judge. The amendment is also made in response to the proposal of the Bills Committee.

I hope Members will support the authorities' amendments. Thank you, Madam Chairman.

Proposed amendments

Clause 41 (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 Members present. I declare the amendments passed.

CLERK (in Cantonese): Clause 41 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 41 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): At this stage, Ms Margaret NG should be moving her amendment to clause 14, but since she has to answer the call of nature, I now suspend the meeting for her return.

2.51 pm

Meeting suspended.

2.56 pm

Committee then resumed.

CLERK (in Cantonese): Clause 14.

MS MARGARET NG (in Cantonese): Chairman, sorry, I have underestimated the efficiency of this Council and therefore made a mistake in the calculation of time. Chairman, I move the amendment to clause 14.

Chairman, clause 14 is concerned about the executive authorization for Type 2 surveillance. In that clause, I have added an amendment in the provision in order to stipulate that the application shall be made by an officer of a department in charge of the investigation of the subject of interception or surveillance. In other words, the application should be made by the person who knows the entire investigative process, instead of just any person. Chairman, the purpose is to ensure that the application for Type 2 surveillance is made in a more prudent manner and submitted by a person who has full knowledge of the case. Chairman, this amendment is not totally unfounded because irrespective of the conditions for granting authorization, the affidavits supporting the application or the statements on whatever reasons for submitting the application, all contain true, solid and specific information which is known to the officer-in-charge. I urge Members to support my amendment.

Proposed amendment

Clause 14 (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 opposes the amendment to clause 14 moved by Ms Margaret NG.

The authorities think that it should not and need not stipulate rigidly in the Bill that the person who applies for executive authorization should be an officer of a department in charge of the investigation of the subject of interception or surveillance. Firstly, under different circumstances, there may be more than one investigating officer who is in charge of the interception or surveillance operation and the relevant case. Moreover, depending on the operation of the law-enforcement agency concerned, the officer in charge of the interception and surveillance may not be the one who has the full knowledge of the whole case. The amendment will cause difficulty to the actual operation. In our opinion, the Bill should give room to the law-enforcement agencies to submit applications in a flexible manner according to the above principle.

At any rate, as we have explained to the Bills Committee, the rank of the applicant will not be below a rank equivalent to that of an Inspector of police and the officer concerned should be familiar with the details of the case.

Madam Chairman, I appeal to Members to oppose Ms NG's amendment to clause 14(1) of the Bill. Thank you, Madam Chairman.

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

MS MARGARET NG (in Cantonese): Chairman, the Secretary's reasons for oppose my amendment, as his previous replies, are difficult to understand because he says that there will be more than one person in charge of a case. If so, it will be easier and more convenient. The application can be submitted by

any one of them. Will a person who has not been involved in the case and cannot answer questions about its specific details be requested to submit the application? So, the amendment can actually facilitate the department to submit applications and make everyone accountable. I hope Members will continue to support my amendment. 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 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.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, 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, 27 were present, six were in favour of the amendment, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 19 were present, 10 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): I now put the question to you and that is: That clause 14 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.

CLERK (in Cantonese): Clause 15.

CHAIRMAN (in Cantonese): Mr James TO and Ms Margaret NG have separately given notice to move amendments to clause 15.

Committee now proceeds to a joint debate.

MR JAMES TO (in Cantonese): Chairman, the amendment is concerned about clause 15 in which it is stipulated that executive authorization should be granted with reasons. Why is it necessary to provide reasons in writing? As I have explained this in previous debates, I will not reiterate it.

CHAIRMAN (in Cantonese): Would you please move your amendment.

MR JAMES TO (in Cantonese): Sorry. *(Laughter)* I move the amendment to clause 15.

Proposed amendment

Clause 15 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment moved by Mr James TO as well as her own proposed amendment.

MS MARGARET NG (in Cantonese): Chairman, the content and effect of my amendment is the same as Mr James TO's and I agree with what he has said just now. I would like to add that concerning the internal authorization in particular, self-discipline is required so that they will know the reasons why the authorization is granted. In that case, the procedure will be more solemn and stringent. I urge Members to support Mr James TO's amendment. Thank you.

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?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the Government opposes the amendments to clause 15 proposed by Ms Margaret NG and Mr James TO. I have already explained the reasons during the debate on their similar amendments to other provisions earlier.

I appeal to Members to oppose Ms Margaret NG's and Mr James TO's amendments. Thank you, Madam Chairman.

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

MS MARGARET NG (in Cantonese): Chairman, perhaps the Secretary has forgotten that he should speak on the question of whether reasons ought to be given on internal authorization. But he has never explained why he has insisted not to give any reasons. Since the authorization is given by the departments, I am sure there must be grounds. In that case, why do you not record the grounds? As we said earlier, when the Commissioner reviews the case, he is

able to see the justifications for the authorization and render his views accordingly. Thank you.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I think the Secretary is most unreasonable. For the post of Commissioner to be set up, the Commissioner will not have any substantive investigative power. He cannot even order the department concerned to conduct further investigations. If he needs to get the full fact of the case, he can only rely on the most original materials, and that is, a full record. If you do not record anything in the files, when the Commissioner needs to check the files of a case, he will have nothing to go by. Or you just copy the provisions once and this is the most commonly used tactic by the mainland prosecutors. I think the Secretary should explain why a civil servant or person who has been authorized by the Government and has possessed public power does not make any records. I really find it difficult to understand. This leads me to another point and think of a person you know very well and he is Andrew LO. He said, "I am a parrot. I am a parrot. I am a parrot." This is like the Secretary who always says, "I have nothing to add", "I have already made that point", "I will not repeat that". If the Government has strong justification, the Secretary should argue forcefully for the case.

CHAIRMAN (in Cantonese): Does any other Member wish to speak? Mr James TO, do you wish to speak again?

MR JAMES TO (in Cantonese): The Secretary said that he wished to speak.

CHAIRMAN (in Cantonese): Sorry, Secretary, I have not seen that you have indicated to speak.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, all those who vet and approve the applications are the internal senior officers who will grant authorization if the applications can satisfy one condition and that is, the requirements stipulated in clause 3 of the Bill such as the test of proportionality and necessity. This is precisely the situation of the panel Judges who have to

fulfill the requirements stipulated in clause 3 before an application can be approved as I mentioned in a number of amendments earlier.

MR RONNY TONG (in Cantonese): Chairman, the Secretary does not seem to grasp the subject of the discussion. Certainly, any application has to satisfy these requirements for approval to be given; this is very clear to all of us, and it is clearly stated in the provisions too. But the point is, very often, facts will be needed for verifying when and how these requirements are met. In other words, if it is alleged that a serious crime is about to take place, whereas somebody is suspected to be associated with this serious crime, then certain facts will be needed for substantiating the view so reached. These facts have to be taken into consideration for determining whether or not this particular person is associated with this serious crime and to justify the need for conducting covert surveillance or interception of communications. I hope whether a person will be found to be associated with a serious crime will be determined by meaningful analysis instead of by an arbitrary accusation. In other words, the reasoning must be stated as to why he thinks a person's rights will have to be infringed upon. It is precisely these reasons that I want from him to put in writing.

If the reasons are not stated, it will be hard for us to know, first whether mistakes would have been made by him; and second, whether he has misinterpreted the evidence or the law. These are things that could happen even to Judges. In fact, it happens every day. Notwithstanding that they are veteran Judges or Inspectors, human beings are susceptible to making mistakes after all. Furthermore, these requirements do not aim to protect the Inspectors or the panel Judges, instead, they aim to protect citizens who may basically be innocent by allowing them to trace back and seek justice in the future. Therefore, it is not up to the Government to decide that no reasons need to be given. This is something we fight for the people of Hong Kong.

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

MR JAMES TO (in Cantonese): Chairman, as a matter of fact, I have been pondering over the past few days. I have pondered about many things; something new has come my mind and I have never talked about it before. *(Laughter)* This is also something which had never been talked about in those hundred-odd hours.

I am beginning to have this worry. In fact, the Bill we are currently enacting intends to complement Article 30 of the Basic Law, which states that is because the current interception of communications and covert surveillance cannot fill up the so-called legal vacuum of Article 30. The Secretary is merely filling up the legal vacuum with respect to the use of devices. Please do keep in mind that it only covers covert surveillance with the use of devices. As regards interception of communications without the use of devices, Members have had discussion on this and so I will not repeat.

However, according to the existing contents of the Bill, there are Type 1 surveillance and Type 2 surveillance. Type 2 surveillance only requires what we call an executive authorization, for which no reasons, including both written permissions or even oral permissions are given by the authorizing authority. This being the case, can it satisfy the stipulation of Article 30, that it is not a wilful infringement? There needs to be legal procedures. Although the Secretary has already delineated part of the legal procedures, such as the definition of a serious crime — of course, the fact that I disagree with the definition is another matter, but at least there is a definition in terms of seven years or three years, complete with the tests of proportionality, necessity and so on. However, it turns out that no objective evidence or documentary record will exist to substantiate the decision-making process. If it should be subject to examination or challenge in the future, not a single reason can be cited as a justification, nothing at all. Given the circumstances, even if the first two conditions are met, in the absence of the third condition, does it comply with Article 30, that it will not constitute a wilful infringement? From this legal point of view, I am slightly worried. I am not extremely worried, but slightly worried. I hope the Government will think it over again. If my remarks will prove to be correct one day, and if somebody would apply for judicial review again based on this reasoning, and if it will have no objective procedures simply because the reasons are not written down, that would truly be regrettable to me.

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, if no corpse is available for a coroner inquest, it would be very hard to proceed, is that right? This is what is called "to bury the evidence by destroying the dead body".

When an authority stems from within a department and not subject to any supervision, when all is required is making an internal application without the need for any written application, how does it differ from burying the evidence by destroying the dead body? A person is dead, but there is no dead body. Maybe one day I can tell you that it could happen this way. "The trial of a clay basin by Judge BAO Zheng" serves as an example — all you need is keep interrogating the clay basin. But the problem is, we do not have that many Judge BAO. After all, Judge BAO was just trying his luck in the clay basin trial. It worked only when the murderer was dumb enough. If the murderer could maintain a portion of his composure, he might have got away with it.

How could this be so "over the top"? Evidence is required for everything in a modern society. Even in writing compositions, we have "5Ws", such as when, where, and why, and so on. Now you destroy the dead body and claim the person is dead. But then what has caused his death? This is not going to be okay. You must understand that when you ask for a disproportionately great authority from the society, one that does not subject to any supervision, actually at the other end of the scale — or proportionality, as the popular catchword goes — the weight is greater responsibility. This is all very clear, right? If you ask me to place my trust with you, then you will have to exercise self-discipline. What is self-discipline? Self-discipline is not something you say you exercise by yourself, it should be seen to be exercised. There should be a prescribed procedure for this self-discipline to be exercised.

The discussion we have today is about a very simple political philosophy, which is, whoever has got the authority, regardless how the authority is obtained, the narrower the base of the mandate, the greater is the need for a mandatory self-regulating procedure that will be instantly evident to people who otherwise will find it hard to monitor you. Otherwise, if you ask for the authority and you say you will be self-regulating, but you fail to tell the people how this self-regulation is carried out, how can this be reasonable? You need to be reasonable. Now, even if the Secretary is being unreasonable today, he still should give us an explanation. As they say on the Mainland, he should give us an explanation.

Sound reasoning can take us anywhere in the world. It does not matter where you are, just state your case and it will be fine. But now the problem is, here in this Chamber, the Secretary does not appear to be one you can reason with. Let me ask the Secretary once again, what good will it bring to you by

insisting on the current practice? What good will it do to you in terms of maintaining your reputation? What good will it bring to people like us who are seeking for justice? If it does no good to either party, now this reminds me of a story, which is "ZHOU Zhu's venture in getting rid of the three major hazards". Apart from getting rid of the remaining two major hazards, you should first and foremost cause a change to yourself.

If the Secretary does not give us any response today, there is not much I can do. I am not the Chairman, and I am not allowed to speak. The Secretary can keep on being unreasonable as he will pass yet another amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, no, it is not what "Long Hair" has described as "burying the evidence by destroying the dead body". In fact, on filing an application for conducting covert surveillance, my colleagues will submit to their superior detailed information, intelligence or factual details, and the superior concerned will come up with a judgement according to the conditions set out in clause 3 subsequent to thorough consideration. As Mr Ronny TONG has said just now, the officer must be satisfied that all the conditions as set out in clause 3 are met before he gives his signature of approval. It does not disappear as in the case of burying the evidence by destroying the dead body, so to speak.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendment, I will remind Members that if Mr James TO's 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 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.

Mr CHIM Pui-chung abstained.

Geographical Constituencies:

Mr LEE Cheuk-yan, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan

LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG 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, 20 against it and one abstained; while among the Members returned by geographical constituencies through direct elections, 19 were present, 11 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, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 15.

Proposed amendment

Clause 15 (see Annex)

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 respectively of the Members present. I declare the amendment negatived.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 15 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): Secretary for Security and Members, according to the script, we should deal with clause 18 next, but staff of the Secretariat have found some omissions in the script, so they have to rectify them before we can deal with clause 18. So, please turn to page 8 of the script to deal with clause 29 first.

CLERK (in Cantonese): Clause 29.

CHAIRMAN (in Cantonese): Ms Margaret NG, the Secretary for Security and Mr James TO have separately given notice to move amendments to clause 29.

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

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 29.

Chairman, all along, we have been discussing authorization for conducting interception of communications and covert surveillance. But what exactly is the power given to the law-enforcement agencies by virtue of this authorization? What does it entitle them to do? Clause 29 provides that an authorization may be given upon application which contains terms that authorize the use of listening devices or recording devices in or on any premises of any person who is made the subject of telecommunications interception or covert surveillance. We have no objection to this, because these are the details that should be stated in an authorization.

However, clause 29 goes beyond this by providing that other incidental authorizations shall be deemed to be granted where it is necessary for the installation of devices or interception of communications. This will result in two things: first, a vast number of people will be implicated. The person with the authorization can conduct a whole lot of other things under the authorization which are hardly traceable; second, this will result in the authorization becoming more or less like a formality, as if it is an authorization with which you can do everything, and this is what we call expediency. Given that this is about an infringement upon a person's human rights, I think this is inappropriate.

Therefore, the amendment I move aims at the addition of two premises, which are subclause (1A) and subclause (1B). Subclause (1A) deals with interception of communications. It specifies that the authorization does not generally authorize the interception of telecommunications of any person who is not the subject of the interception of telecommunications concerned. Subclause (1B) specifies that the person who is made the subject of covert surveillance must be clearly specified, and the authorization given for conducting covert surveillance on person A must not be extended to conducting covert surveillance on person B. Naturally, when a telephone conversation is being listened, the interception cannot be restricted to the subject of interception alone, other people may be subject to interception too. This is perfectly alright, because by nature

it is difficult to restrict the interception to just one party. When a person is made the subject of surveillance, the people around him will be put under surveillance as well. But it does not mean that the surveillance targeted at person A can extend to person B and person B is made the subject of the surveillance as well simply because person B is with person A at the time the surveillance is carried out. This is not going to be fine.

Why should we find it necessary for the addition of these two premises? Let us take a look at the provisions. When a prescribed authorization is given, that is when you have got the authorization to install any devices in or on any premises or property of someone, the authorization also authorizes you to do the same to the premises of other people if necessary. It even authorizes you to gain entry, by force if necessary, onto any premises, even if it means breaking the door. For example, for the sake of intercepting the communications of a specific target by means of listening, you need to install devices in his neighbour's premises. Such acts are deemed to be authorized. What exactly are the things that you are entitled to do by virtue of the authorization? The scope of the authorization has become very broad. Therefore, I move to include some additional provisions in the Bill to the effect that the applicants must specify, in each application, such as in the case of installation of devices, where these devices will be installed. This must be made specific in the written authorization.

Chairman, clause 29 appears to be very lengthy, but many of the contents are repetitive, so we have no other alternative but to repeat them again and again. In fact, our objective is to restrict it from carrying an excessive amount of incidental authority, to make it traceable and to make those who are given the authority accountable when it affects somebody else, particularly if the person affected is an innocent third party. We believe we have the obligation to make this as clear as possible. Thank you, Chairman.

Proposed amendment

Clause 29 (see Annex)

CHAIRMAN (in Cantonese): I now call upon the Secretary for Security and Mr James TO to speak on the amendment moved by Ms Margaret NG as well as their amendments.

MR JAMES TO (in Cantonese): Chairman, clause 29 is quite lengthy indeed. Maybe let me briefly explain the main concepts of the clause. First, subsequent to obtaining the authorization, what can be done? This is what we call the specific scope of the authorization. For example, an authorization may be given to listen to the telephone conversation of a subject, who may possess two separate telephone lines. If authorization is given to listen to any telephone lines he uses, but the numbers of the telephones remain unidentified yet, a remark will be made to the authorization — "any telephone numbers currently in use or will be used by the subject". This is the scope of the authorization.

In other words, if the telephone numbers are known at the time the application is made, the numbers will be stated. But if they remain unidentified yet, the wiretapping can still get underway. Now the problem is, which telephone numbers will he be using? Let us think about that. He may use his mother's telephone number, or he may use his secretary's. He may even use just anybody's telephone number, in which case it would cover the entire population of Hong Kong, or anybody who has contact with this person, possibly including all the telephone numbers of all the people working in his company.

Therefore, I would like to amend it to reasonably expected. In other words, there has to be a justification on the telephone numbers he may use, such as the numbers of his family members or his wife. For example, the intelligence collected from other operations may show that he may use the phone of his wife. Furthermore, maybe the subject is often seen to be accompanied by a number of errand boys and assistants, and at times he will use the phones of the errand boys instead of using his own. These are reasonable, convincing justifications that he may use the phones of other people.

Certainly, certain circumstances have to be excluded. For example, if the subject passes by a bistro cafe just as he finds out the battery of his phone has run out, he may use the phone of the bistro cafe. Now if the phone of a bistro cafe which can be used by just anybody else will be subject to interception, than a single application for interception may cover as many as hundreds of thousand of people, would it not? Or the subject may have come into encounter with a Member of this Council in a cocktail party, on which occasion he happens to have borrowed the phone of the Member for use. Bear in mind that once a telephone number is covered under the scope of listening, the holder of the telephone number will be listened for a period of three months. In this case, the scope will be extremely extensive, causing enormous effects in a very wide scope

of area, which we call collateral damage. This will cause excessive damage to the privacy of other people. Therefore, authorization should only be given for a reasonably expected scope of area.

The second amendment is about incidental permissions given to the following acts subsequent to the obtaining of the authorization, including concealment. What does it mean by concealment? It could mean impersonating other people, setting up a location, or the installation of devices, or maybe the planting of trees for covering up in places where there used to be no trees. Moreover, authorization may be given for intrusion of property or objects and for soliciting any necessary assistance from any person. The scope covered is very broad and utterly boundless. This is how it will affect other people.

Naturally, when a law-enforcement officer installs a listening device or performs certain operations, as good citizens, we are morally obligated to give the maximum extent of co-operation to the police as far as practicable. For example, if the target lives in flat C of the 18th floor, the law-enforcement officers may go to flat B of the 18th floor and ask, "Can you do me a favour? I want to dig open the wall and install a device." Naturally, he has to trust that the one living in flat B of the 18th floor will keep the secret. Bear in mind that the Government has already amended the Official Secrets Ordinance, that to a certain extent, if the person living in flat B of the 18th floor should leak the information, he will be subject to criminal prosecution.

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

However, the problem is, if the installation of the devices requires the wall to be dug open, the placing of trees, removal of frames and so on, will these affect the people concerned? For example, if damage is caused to the person's personal belongings, which may be a piece of antiquity, or a hi-fi set and so on, will the law-enforcement officers be liable to provide any compensation? Do we need a reasonable assessment as to whether or not their actions will affect other people?

Meanwhile, the Judges must be advised that the so-called order they issue will cause the interference with property. What does it mean by causing

interference with property? For example, if you dig open something, does it mean digging open a tiny hole, or digging open the vault of HSBC? There is no restriction on that whatsoever.

As such, specific provisions are included in my amendment to the effect that the following things must be done when assistance is required from the public, whether for installing or concealing something or causing an interference with something and so on. First of all, an initial assessment must be made on any possible damage, otherwise, the panel Judges will be "held responsible" for the damage caused, because if the Judges authorize the digging open of something, when it is dug open, it turns out that the damage caused is worth hundreds of million dollars, then who should be held responsible? The panel Judges will say, you had my authorization. In this regard, at least an assessment has to be made to estimate the possible damage.

Second, when assistance from the public is required, we have to ascertain the degree of assistance so required from the public. Would it require a massive effort? Would it, in colloquial terms, cause "a hell of a mess" to the people? Or in legal terms, will it incur any expenses on the part of the public, which will incur financial losses or additional expenditure on the part of the public for the assistance required? For example, there are a couple of trees here, and you want to have them removed, otherwise, your devices will not be able to aim directly at the target opposite; so you may ask a citizen to have those trees removed. But if there are hundreds of trees there, that will be tough to that person. How is he supposed to move the trees away? There are only two possibilities. One is to do it with the help of the police, and the other possibility is that he may have to spend some money, hire some workers, and have them removed. If you ask a person to move away the trees, and he refuses, so you ask for his assistance. But do you have the right to ask him to spend money to get the job done?

Moreover, are all these intrusive actions necessary within a reasonable scope? As our law-enforcement officers are carrying out their proper business, we should not impose the cost of law enforcement, the expenses, the troubles or the intrusions upon the public. The citizens may have a moral obligation to offer their assistance, but they should not be driven to bankruptcy because of these actions. They should not have their properties damaged, then file a claim for compensation. I believe an initial assessment would be needed prior to

permission and authorization from the Judges, so that the Judges can reasonably balance each factor, or to impose suitable conditions.

Finally, with regard to clause 29(7), it involves a series of powers again, and I hope the procedures will be assessed by the Judges too. Moreover, if a specific address is available, then the place where the intrusion will take place will be known. Why is this so important? Let us say the place may be a consulate where no actions can be carried out; or it may be sensitive premises which the Judges may find problematic if the place is to be intruded or the owner or the occupier of the place are required to offer their assistance. In considering the special nature of some particular premises, the Judges may even find it necessary to impose certain additional conditions.

I believe we should inform the Judge of the identity of the owner, the tenant or the occupier. Naturally, if the persons in question cannot be found, for example, if there are only some deserted huts there where nobody can be found, then naturally nothing much can be done. In this case, the Judges should be so informed; in other cases, the nature of the place should be clearly stated, such as a normal residential building for which nothing special is involved. This will allow the Judges to issue the authorization with peace of mind.

Deputy Chairman, this is about the incidental power I have mentioned in clause 29, for which assessment should be made with respect to possible intrusion caused to third parties, their properties, as well as other possible intrusions, so as to allow the Judges to take into account any damage caused to the third parties when they issue an authorization.

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, the authorities' amendment to clause 29 is to fine-tune the details in response to the suggestions made by the Bills Committee and the amendments of Ms Margaret NG and Mr James TO.

For example, the word "reasonably" has been added in front of the word "necessary" in response to Mr James TO's amendment. This clearly illustrates that whether it is about anything "necessary" or "force", they have to be reasonable. The amendments include specific provision as contained in clause 29(7), which stipulates that any authorization for entry into premises on ground

of covert surveillance will be restricted to Type 1 surveillance only. And we oppose the amendments of Ms Margaret NG and Mr James TO.

Mr James TO suggested the nature of acts of concealment and interference should be specified on the authorization, and assessment reports on the potential risk and damage of the related conducts should be submitted. We believe the existing provisions have clearly provided the conditions for prescribed authorizations or authorization as set out in the terms and condition of a warrant. Applicants will specify the nature of the matter in the application, and the authorizing authority will make a remark on such matters in the authorizing conditions. This will be taken into consideration when the principle of proportionality is examined, and therefore the abovementioned amendment will not be necessary.

By the same token, the authorities are opposed to Mr James TO's amendment to clause 29(5), which requires the submission of an assessment of the implication of assistance.

Given the nature of covert operations, the authorities expect the need for assistance would be limited. Besides, co-operation would be needed from the people concerned to ensure the confidentiality of the operations. Mr James TO's amendment with respect to any expense incurred as a result of the assistance required, such as some minor expenses for the supply of electricity on the premises of the person offering the assistance, may result in the law-enforcement agencies being unable to satisfy the requirements of the provision, even if remedies or compensations will be given subsequent to the operations. As such, we oppose Mr James TO's amendment.

Mr James TO's amendment to clause 29(6) and (7) cause to delete the word "also" and to substitute with "may contain terms that", which will cause the following acts (except for paragraph (c) and (d) of the original clause 29(6)) inoperable unless specified by express terms contained in the authorization. The amendment also requires the submission of assessment on specific details.

Clause 29(6) and (7) set out in detail authorizations that are incidental to the authorization given to the law-enforcement agencies for carrying out interception of communications and covert surveillance. For example, when an authorization is given by the authorizing authority to the law-enforcement

agencies for the use of optical surveillance devices in a premises, it follows naturally that the authorization shall include the installation, use and maintenance of those devices. Clause 29(6) and (7) only serve to lay out the scope in details.

On the other hand, under many circumstances, we cannot foretell the specific details of an operation in the context of clause 29(6) and (7). For example, the entry into adjoining premises or premises providing access to the premises to install the devices is very often inevitable, but the specific details are very much dependent on the actual environment as well as the actual circumstances at the time the operation is carried out, for example, for avoidance of discovery by the target, and so on. As such, it is not possible to submit in advance a detailed report on the risk and damage resulting from the entry onto the premises.

By the same token, detailed assessments on every single particular with specific details of the address, owner and tenant of each and every premises (which requires a land search) will be time-consuming and impracticable. Hence, it cannot necessarily offer greater protection.

Therefore, we oppose Mr James TO's amendment to clause 29(6) and (7) and the corresponding amendment with respect to additional clause 29(6A).

Mr James TO's amendment to clause 29(8) essentially stipulates that with respect to paragraphs (b) to (g) of the original clause 30, any authorization must be given in accordance with the terms and conditions as contained in the prescribed authorization, and that assessment on the risk and damage as a result of the related conducts must be submitted prior to the determination of authorization.

Paragraphs (b) to (g) of clause 30 clearly lay out the necessary and incidental conducts to execute an authorized operation, such as the installation of enhancement equipment for receiving device signals, or the connection to source of electricity, or, the temporary removal of objects such as vases for the installation of the devices and the return of the objects to the premises. These are specific details which cannot be foreseen in many circumstances. Therefore, even if the factor of efficiency is not taken into consideration, Mr James TO's amendment that requires specific details to be stated and assessments submitted prior to the carrying out of the operation will remain impracticable. As such, the authorities oppose this amendment.

We are also opposed to Ms Margaret NG's amendment for the addition of clauses 29(1A) and (1B).

The proposal of Ms Margaret NG for the addition of clause 29(1A) and (1B) stipulates that any application lodged by the law-enforcement agencies will have to specify all the persons covered under the definition. For example, if optical surveillance devices are to be installed on certain private premises, a list must be provided which specifies all the people who might be passing by the site and therefore get video-taped by the devices, otherwise it will be in breach of the authorization by virtue of clause 29(1A) and (1B) of Ms NG. Apparently, this is impracticable. As we explained in the Bills Committee, the law-enforcement agencies cannot foretell all the people who will be affected at the time of the filing of the application. As such, the proposal of Ms Margaret NG will not work.

Ms Margaret NG's another amendment calls for the deletion of clause 29(1)(b)(i) with regard to the authorization for the interception of communications made to or from any telecommunications service but the retention of clause 29(1)(b)(ii) with regard to authorization for the interception of communications made to or from any telecommunications service that the target uses. As we explained in the Bills Committee, clause 29(1)(b)(i), which is the clause Ms Margaret NG proposes to delete, provides for authorization only to specific telephone numbers or email addresses. Contrarily, clause 29(1)(b)(ii) provides for authorization that covers those that are being used or likely to be used by the person specified in the authorization. This is to deal with the situation where the target is frequently changing his telephone number. As such, clause 29(1)(b)(i) should be retained. We oppose Ms Margaret NG's amendment.

Ms Margaret NG also proposed an amendment to clause 29(2)(b) by adding "as the place for installation of the surveillance device". Given the fact that not all surveillance devices are to be installed, for example, undercover agents who conduct surveillance using such devices at the prescribed premises, the amendment will be problematic.

Ms Margaret NG's amendment to clause 29(4) to (7) are similar to Mr James TO's corresponding amendment, for which I have stated the reasons of our opposition in the previous paragraphs.

Deputy Chairman, I call on Members to oppose the amendments of Ms Margaret NG and Mr James TO, and to support the amendment proposed by the authorities. Thank you, Deputy Chairman.

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

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

MR JAMES TO (in Cantonese): Deputy Chairman, I have to make this clear to the citizens of Hong Kong. At first, many people may have thought that the authorization system for conducting wiretapping and covert surveillance has a bearing only to those thousand-odd applications per year, affecting only the subjects for whom the authorizations are given and the public is not affected at all. But when I finished reading clause 29 and clause 30, I was literally shocked. Why? It turns out that as long as you have got an authorization, you can always tell the people that you need to remove an object from here, or you need to dig open a hole there. The law-enforcement officers may ask a person where the electric socket is, because his machinery has to be connected to the power source. The person may ask, "Officer, will I get any compensation if your connection caused an explosion?" The answer is no. No mechanism whatsoever for compensation is in place, and no compensation will be given for any damage. The law-enforcement officers are also authorized to break open, open or destroy anything. If, after he gets into the premises, he reckons the safe in the premises happens to be adjacent to the neighbouring premises, which is the best location to install the listening device, he could demand to break open the safe.

Naturally, people will ask, will it really be that "over the top"? The Secretary said just now, it cannot be done without the co-operation of the people. But keep this in mind, that the law-enforcement officers are the police. They are carrying out their duties by virtue of an order, and this order is passed down by the Judges or the panel Judges in accordance with the law. The legal term for this is "require", which means that the people are "required" to offer their assistance. So please keep this in mind. In the amendments moved earlier by Ms Margaret NG, the departments were demanded to investigate into cases of

dereliction of duty and abuse of power, but the Government refused to accept this demand. But on the other hand, since they have got an order, they could require other people to break open, tear down or break up any objects, or cause the people to spend money for these purposes. They can do whatever is required.

The Government may argue that this will not be the case. Even if it incurs any expense, it will only be a small amount of money, such as the cost of electricity for connection of the devices. But there are minor examples that the Government comes up with. In the case where the law-enforcement officers have to connect to the power source in a premise, while ordinary listening devices may only need a small amount of power, do keep in mind that those enhancement devices, or what we call converters, will require greater power. Second, the law-enforcement officers may have to obtain information through connection to certain information technology systems, which they will transmit to the premises. They may connect the computer of a person to their own e-mail account in order to obtain the information, but if they mess up, they may cause the computer system of that particular person to be infected with computer virus. Now if this particular "person" happens to be the Hongkong and Shanghai Banking Corporation (HSBC), then all the HSBC system across the territory will be brought down. What will happen then? Keep in mind that if this particular "person" happens to be HSBC, when it is the police they are dealing with, can it, being a listed company in Hong Kong, refuse to co-operate with the police? If it is described as unco-operative, then this important banking corporation will be subject to criticisms. Of course, it must not necessarily be HSBC. But my point is, this is what could happen when all these clauses are put together.

If, for example, a person has got three luxurious sedans in his garage. Can the law-enforcement officers demand these cars to be removed? Or maybe they will ask if they could install the devices in one of the cars. The car owner may say, "This is a vintage Rolls Royce. It will break down if you modify this vintage car. This car is only used once a year for festive parades. Now with all these demands for installations and relocation, will I get any compensation if it is damaged?"

Therefore, these matters may have extensive implications beyond our imagination with respect to the degree of influences caused to the public and the number of citizens affected. We would not know if the entire premises will be

torn down, or if entire machines will be brought down. But then, the Secretary may say, "Excuse me, these are not the things we can foretell, so how can we assess it in advance? If you insist on this, you are being difficult with me." But, please keep this in mind — my amendments are about the nature instead of the details — for example, drilling a hole with a diameter of 1 cm three feet down the corner on the left — no, I am not asking for operational details of this kind.

Instead, I am saying if machinery is to be installed, the Judges must be advised of the particulars of the machinery, the possible damage it might cause, the degree of intrusion, and what kinds of concealment will be taken, such as how things will be hidden, and so on. Naturally, they could always bring up some objects to cover up the devices. I cited this example before. There are two steps at the exit of a premise, and there is no other place which is suitable for installation of the devices. The law-enforcement officers reckon the devices are best installed at the steps. So what happens? They require that the two steps be made into one, plaster it up, and have the devices installed there. Unfortunately, people are used to having two steps at this place, would this cause injuries to people, now that there is only one step? This is not unlikely at all. Naturally, the law-enforcement officers will argue, no, they would not want to attract the attention of people who are used to passing through the place either, so at the place where the two steps are merged into one, they will cover it up in the form of works in progress.

But the problem is, if it is not subject to any limitation in the absence of any yardstick for regulation and assessment, I believe this will be very unfair to the public. As I said, it is perfectly alright that law-enforcement officers are offered assistance, but we must not cause "a hell of a mess" to other people, or cause them to confront situations of exceptional gravity.

Besides, incurring a small amount of expenses is not a big deal in itself, and it is fine to supply a small amount of electricity. My amendments state that additional expenses must not be incurred on the part of the public, by this I mean the Government must be willing to provide compensation. If it involves just a small amount of expenses which the person affected is willing to bear, that will be fine. The point is, if it costs a person a huge amount of expenses but no compensation is made, will it be fair? Should millions of Hong Kong citizens be paying to subsidize the law enforcement operations of the Government?

The Secretary may as well answer with all righteousness, "Of course we should. Since the Government is maintaining public safety and public order so that the citizens can live here happily and peacefully, in the event assistance is needed from them, they should as well give the Government a helping hand." What is this? Some kind of law-enforcement tax? Or we may call it a law-enforcement tax for those unfortunately living next to a criminal. How could this happen at all? It would be better if the Secretary can provide a better assessment for the matters I described — just a general, comprehensive assessment, not a detailed assessment. Let me clarify this, I have not said we need a detailed assessment.

Besides, if you will tell the Judges that these are what we can provide in the assessment, and if the Judges should find it okay to give an authorization, so be it. But you cannot say "I do not care, I will just work to the order, whatever it takes." In doing so, I believe the Government may profoundly affect the public and inflict agonies to them at a degree way beyond our imagination. This will be a very great burden. Since this is an order, when something is required by an order issued in accordance with the law, the people will have to comply with what is required by the order, is that right?

What if exemptions will be given by the Government in the end? For example, a Filipino domestic helper is told by the law-enforcement officers at the door, that they want to enter into the premises for the installation of the devices. She says, "No, my employer is not around." But the law-enforcement officers tell her, "Sorry, but this is an order, which you must obey." Naturally, she has to allow the law-enforcement officers to enter the premises and act "like a bull in a china shop" — drilling on the walls, digging up holes, or causing some explosions. True, the Government can give exemption to the domestic helper and relieve her responsibility. They can tell her, "You should not be worried. If your employer presses a charge against you, you are covered by the law with an exemption." But then, she will still end up being dismissed by her employer. Her employer will tell her, "What? Maria, how could you let the police carry out all these works? How could they have made such a mess?" To which she can only reply, "I could not help it. The police told me it was an order, it was the law. It was an order and I had to obey."

I hope when the Government is considering this matter, it will show some compassion and be a little bit fair to the citizens. Stop doing it in the name of

law enforcement, thinking that it can do anything. It is all for the good of the citizens, for protecting their safety. You have got a thief living next door, can I not even drill a tiny hole in your home? What is the problem of spending a tiny sum of money? Why do you have to be fault-finding all the time?

Ladies and Gentlemen, under these circumstances, the Government should discuss and co-operate with the people and be candid to the Judges. If upon consideration, the Judges believe this is not a big deal, approval will be given. At least the Judges will bear the responsibility. Otherwise, there are bound to be problems in the future. These are orders given out by three panel Judges. If accidents should happen, people will say, "What? They have got the order to carry out these works, how could the Judges have cared nothing?" As a matter of fact, the Judges do not have any legal basis to take the matters into their hands. The law does not require the Judges to handle these matters. By then, the people will vent all the grievances on the law-enforcement officers. People will blame them for the mess they have created and wonder how approval would have been given in the first place. How come things like these can be done without any restrictions?

MR LEUNG KWOK-HUNG (in Cantonese): I remember we discussed this matter in the Bills Committee. I recall Mr YING said at that time it might incur just a small amount of loss. I remember the meaning of Mr YING was that the issue could be "sorted out", that they were not going to ill treat the public. Therefore, I did not pay much attention to that thereafter.

But what will happen as a matter of fact? According to the Secretary, if they are to act in accordance with the requirements as stated in the amendments of Mr James TO, the law-enforcement agencies will find it hard to adjust, and they will be unable to carry out their operations, because it would be hard to foretell all the specific details. It is true. But the point is, if specific details cannot be given, is it possible to give a general description? The Secretary seems to regard this as a waste of efforts. This is because it will obstruct the course of law enforcement. But an incident came to my mind, an example even Mr James TO could not have imagined. And it did not take place in Hong Kong. All of the 60 Members of this Council met this person before. I met with him and talked with him face to face. He cut in while I was talking, I told him,

"Stop interrupting in while I am talking." This gentleman was ZHANG Dejiang.

The story begins with KIM Jong-Il's visit to Guangzhou. He demanded to evacuate all visitors in the White Swan Hotel. A friend of mine happened to be staying at the hotel at that time. My friend asked why he should be asked to leave. Three men in suit told him, "Keep your mouth shut, just go. In the end, within an hour, the White Swan Hotel had become the official residency for KIM Jong-Il. It was amazingly efficient. So any metaphor or example is bound to have some variances, that is to say, no two things in the world are exactly the same. But if the example is exaggerated enough, it will give people a vivid impression. In other words, if the order is totally unrestrictive, Guangzhou may have obtained an order for the protection of the safety of KIM Jong-Il, or maybe the Guangzhou authorities had to maintain the public order of Guangzhou and for the prevention of serious crimes, such as the assassination of an Important International Person, which is known as the IIP. Therefore, under these circumstances, they could have applied for such an order, and once the authorization was given, they could say, like the Secretary Mr LEE has said, "How would we possibly know all the details in advance?" When the law-enforcement officers reached the hotel, they found out it did not work because they were dealing with a mob, and asking these people to leave would not work. Even if one of them stayed, he might carry out a suicide bomb attack so these men in suit went about in small groups and kept asking the guests to leave. As a result, all of the visitors left. This is a very good example.

Of course, the White Swan Hotel is run by a patriotic businessman, so he would not claim for compensations. But then, when my friend was asked to leave the hotel on that day, he was completely at a loss. He had just finished his meal when he was asked to leave the hotel all of a sudden.

Why should I cite this example? This is because I know Hong Kong is a different jurisdiction from the Mainland, so things may not be this "over the top" here in Hong Kong. But frankly speaking, in my encounters with the police while they are maintaining law and order (of course, the Government may not have intercepted my communications), the police has been pretty unreasonable too. They would demand "Long Hair" not to speak too much and they would tell him not to approach an area. I told them, "That is where the National Day

celebrations are held. Everybody can go there, why should I be an exception?" The police said, "No, you cannot go there." Things like this happen too.

Therefore, my view is that when authorization is given to the law-enforcing agencies through proper legal procedures, even if the objective is correct, it does not necessarily mean that the means to that end will always be correct. If you say to me even giving a general description will be "hindering" your business, I would question if something improper is involved? But I can tell you this is not the case. Not in this case really, because it is only about the installation of the devices. But please keep in mind the story of the "three pledges" — I believe the Secretary will remember this story too: when LIU Bang was fighting the battle of Han Zhong, he decreed three pledges which instantly convinced all the people to turn to his side. This shows that, this is what he did.

Hey man, the request of Mr James TO is very simple. Just give a general description of how you will go about your business. If a request this simple cannot be met, it will become self-indulging, is that clear? The Secretary is an experienced official with decades of working experience. When his superior tells him, in general terms, what are to be done, he will carry out the instructions accordingly. In circumstances where things are not covered by the instruction, he knows how to exercise discretion, is that right? This is very straight-forward, everybody knows how to go about it.

Let me cite a simple example, Chairman, which is likely to happen. If I will become the target of interception of communications and covert surveillance one day, and since I always move around in and out of the Legislative Council, so here come the law-enforcement officers, asking to install the devices in the toilets, and to install the devices in this Chamber. Mrs FAN will feel offended and in a rage she demands to know why, whether this is an order and whether this must be done. Ladies and Gentlemen, people do not feel the pain until the needle is pierced into their flesh. All the folks here will very likely be affected. The law-enforcement officers might say, we have to monitor "Long Hair". He is cunning. He always creates troubles at the Legislative Council; sometimes he will even sneak out. He always gets near to Mr LAU Kong-wah and speaks. Now this will be very serious, as even Mr LAU will get videotaped. And then I do move around frequently. Luckily I never go to the dining hall, I just never go there, otherwise, this will become a very serious matter to all Members.

Therefore, we have to understand that, for a person with public authority, that is to say, a person with status in the constitutional structure, such as Mrs FAN, I know she will say, "Please stop messing around. I am the boss here, you cannot dig and do whatever you like here." She will tell the colleagues there is no need to co-operate with them. Everything can only proceed with the personal permission from Mrs FAN. If this happens to an ordinary citizen, will he dare to speak to the law-enforcement officers in this manner? I bet not.

Therefore, the problem is, when the law-enforcement officers are given an order with legal power, they are given some enormous power. It is very simple, if you try to stop them, you can be accused of obstructing a police officer in the execution of his duty. If you say no, sorry, the Secretary is shaking his head, so maybe I have given a wrong example. But if any conflict would ensue between the public and the law-enforcement officers, or if the citizens should refuse to let in the officers, will the Secretary apply for another order again? The Secretary is once again shaking his head. If he will apply for another order, these unco-operative people will make it more difficult for the law-enforcement officers to carry out their law-enforcement actions. The Secretary always wishes that the people will be obedient, so that they will not obstruct the business of the Government. This way, they can go about doing their work freely and unobstructed.

If an unco-operative person like me tells the law-enforcement officers, "Do not come in. I know the Secretary Mr Ambrose LEE. He is a good guy. I absolutely do not believe you can get into my place to install the devices." Of course, I can refuse to let them in, but what about other people? So, the problem is, we must not forget even for a minute or for a second that as far as a public authority is concerned (which I have repeated many times), whether it is derived from election or from a more comprehensive mandate, the limitation of the authority must be stated. This is a constitutional principle. By specifying the limits to that authority, the people who vest authority in others will be protected automatically; that is to way, this is the amount of authority you have been vested.

Authority and its limits, from an abstract perspective, can be stated both in terms of quality and quantity. Secretary, you are simply asked to provide a check list, to give us a number, but even this cannot be done, so what is going to happen? I give these remarks today only to fight for the justice of everybody.

As a matter of fact, I must have been a target myself. Let me tell you this, I must have been made a subject. I find many holes on the walls of my home. *(Laughter)* I wonder if you will agree with me — does any Member agree with me? When the wall was dug open, I was not at home. Ladies and Gentlemen, this is no kidding. There are many holes on the walls of my home. Maybe they were left by the construction workers. But if I should have any doubt, maybe I will have to ask the Secretary too.

In fact, this can be very simple. To agree on three pledges, and to reach an agreement by striking hands. This ancient story tells us we must make known to the public the reasonable scope and the limits to the authority, and this will give peace of mind to the people. The more you refuse to do this, the less you can allege people of mistrusting you with a conspiracy theory.

Therefore, summing up the above, Secretary Mr LEE should not be worried that a general description would render operations impossible. In fact, the contrary is true. If all the people of Hong Kong, in defence of their civil rights, will refuse to co-operate with the Government, than the Secretary will be in big trouble. Now since Mr YING is shaking his head too, the charge of obstructing a police officer in the execution of his duty may not be pressed ahead after all. If they have to apply for another order whenever they come up with any obstruction, that will be a very serious matter too. Therefore, whether from the perspective of weighing the pros and cons, logic, or civil rights, Secretary Mr LEE should remain open and listen to our advice.

The Secretary is not present now, maybe he is responding to the call of nature. I hope when he comes back, Mr YING will relate all these to him, so that he will be able to give us a reasonable reply.

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

MR JAMES TO (in Cantonese): Deputy Chairman, since Mr LEUNG Kwok-hung has said this, maybe I would like to give him some brief response too.

As a matter of fact, the focal point is that all these operations are conducted covertly. Precisely because they are covert operations, if the

law-enforcement officers believe it would be perfect if they break up the desk and install the devices, they will sneak into the premises using a master key. They may even remove a door and replace another door of the same colour, with lots of devices or wires installed in it.

But where is the problem? Since all of these are done covertly, only the Judge giving the authorization would know what has been authorized, but keep this in mind it does not contain any terms, which means he has given this authority to the law-enforcement officers too, which is the incidental authority that the panel Judge has given. However, if people are allowed to move or even damage just about anything — of course, we will believe that they will basically go about their business on a need basis — but there is no accountability mechanism. In the end, some objects may be damaged or broken, some objects may have some cracks, or somebody's computer system may have been tampered with, such as it has been broken in by "hackers" or infected by computer viruses. The subject may think he is just unlucky. There is an interesting advertisement from the police, the people in the footage find they have forgotten to lock up the windows.

As it happens, there are such examples from the Government. The panel Judges give them authorization for these operations, maybe when you have discovered the problems, you will still remain ignorant of what have happened. This is because those are done in secret and you will not be informed by anybody. The Government keeps saying they do not want to alert the criminals. However, given that theirs are covert operations, when they damage or break objects, who is there to monitor them? In fact, there is only one person who can do this, and that is the authorizing authority. Since the Government is requesting the authorizing authority for the authority of causing damage and breaking up objects, in other words, he is providing — what do we call that? A blank cheque, which gives them a free hand.

What is the worst is that when the authorizing authority from the panel has given the blank cheque to the Government, who is now given a free hand, and damage is caused, in the end, nobody will be held accountable for the damage caused. After all, shall the Judge be held accountable? That is out of the question. The problem is precisely on the covert nature of such operations. Besides, the owner may never know that the famous painting hanging on the wall has been damaged because of the listening device installed at its back. That may be a famous painting from Vincent van GOGH which is worth hundreds of

million dollars. He will never know why the famous painting would have been damaged. In the end, he may think that it was damaged by people who are at loggerheads with him. He may never ever know the truth. Later on we will cover the topic of retrieval warrant, with which the devices are to be retrieved, but in the end a decision may be made not to retrieve the devices at all. So finally, maybe the owner will not find out his painting is damaged due to the device installed at the back until he puts the painting up for auction — the next thing he knows is that he has just lost hundreds of million dollars.

These are all done in the dark. Besides, many people reckon that wiretapping will be less intrusive by nature. That is not the case. It is all the same. Why? The Government told us in a briefing that they would "play some tricks" in the service room. The service room does not necessarily refer to the telephone exchange of PCCW, it may just be a service room in a building. Due to the covert nature of the operation, if the service room is locked up, they will break open the lock, but they are afraid that in a couple of days the devices will be seen, so they will lock the room up again. When the watchmen see on their beat that the room is locked up, they may not suspect that some naughty kids have tampered with the lock, and they will be completely unaware of that. All that will come to their mind is whether they would need to break open the lock again when emergency maintenance is needed. Nobody will know that someone has done something to it, because everything is done in the dark. They would even arrange it as if somebody has done it mischievously, all for the sake of secrecy.

Nobody knows anything, and there are no traces whatsoever. If anything should happen, do we know that the law-enforcement officers will refuse to admit anything — if the installation of the devices has caused an explosion in the service room, the authorities would not claim any responsibility. Why? Because if they do, it will become evident that there is a target there. Furthermore, the Owners' Corporation will go after the authorities. Therefore, the authorities will not claim any responsibility. First, the Owners' Corporation does not know what has caused the explosion, they may think that they are being unlucky, or they may think that it is caused by people in a certain flat, and they would try to hold somebody responsible. Second, even if the cause of the explosion is known, the authorities will still refuse to admit it, because they may still be hunting down the crooks. So, I am sorry, the authorities will just not claim any responsibility. Or maybe a few years later, when the crooks are all caught, then the authorities may admit that the police was

responsible for the explosion of a service room causing fatalities, the reason being that they were hunting down the criminals at that time.

Even if they refuse to claim any responsibility at all, nobody will know. Why? Maybe the Commissioner of Police will instruct the team responsible for investigating the service room accident to drop the case. This is because it is a criminal offence. What was thought to be an arson case or a criminal explosion case turns out to be caused by the police themselves. However, something important is underway, and hunting down the criminals is an important matter, so they will withhold the results of the investigation from the Owners' Corporation. Therefore, every single citizen may have sustained losses the nature of which would remain unknown to them by virtue of clauses 28 and 29, no, it should be clauses 29 and 30, and they will not get any compensation at all. In other words, they are left in the dark because nobody knows what has happened, although they may be affected immensely.

MS MARGARET NG (in Cantonese): Deputy Chairman, since Mr James TO has said it very clearly, there are many areas that I do not have to repeat now.

However, I believe the response from the Secretary to my amendments is very illogical. The Secretary said they were unable to foretell all the specific details of the operations, and they had to conduct land searches in order to find out these details of these impractical things. And since they must not do these impractical things, they would just do about them casually. Everybody just need to trust them.

Furthermore, this kind of incidental authority can be totally unrestricted. They will be entrusted with infinite authority when it comes to measures for covert surveillance and interception of communications. How can this be possible? Had we not questioned this matter, nobody would have known it is so problematic. Therefore, Deputy Chairman, this is entirely a matter of attitude. When human rights will be infringed upon by the authorities, should they not specify the details as much as possible? Should they not state them clearly in the application for authorization, such as the kind of assistance needed from the people? Besides, they have to respect the property rights of the people as well. Simply because you are hunting down the criminals does not mean that anybody must co-operate with you in your operations, or any property or any premises will have to be intruded or entered into by force. Even for the sake of hunting

down the criminals, they have to respect the people who extend their co-operation or are required to extend their co-operation. This is a matter of attitude.

Deputy Chairman, we are not talking about emergency provisions, or the right to expediency on the part of the Government in coping with emergency. No we are not. What we are talking about is authorization which has been the subject of deliberations all along. Apart from the authorization for conducting interception of communications and covert surveillance, the authorities may further renew the authorization, even repeatedly. Generally speaking, there is literally no restriction as to the duration for which a person will be made the subject of interception of communications and covert surveillance, and that will only depend on how long the authorities want to conduct such activities. This being the case, the authorities are still unwilling to specify the details. Even if the details are not known initially, as the operation carries on, if the authorities still maintain that those details cannot be specified, is this not lassitude? The reason contributing to this lassitude is the lack of other authority to check on you. Therefore, you just claim for all the incidental authority to carry out activities which have been given authorization. If there will be any contravention in the future, that is to say, if any damage will be done to the property or safety of any person, you will have enough authority to cover yourself. Since all the things are considered to have been done with an authorization, the citizens affected will not have any way to seek any redress at all.

Deputy Chairman, we are just trying to seek justice for the public, so that they will be given more protection. We are not asking for the impossible, and the Secretary must not put things into the extreme and come back to allege that this is what we require him to do. Even for private premises or property, what we are asking for is to ascertain the address and the name of the owner or the occupier, that is to say, if ascertainable (that which can be found). Otherwise there will be no need to do so. The major reason why we are raising this is to let the Secretary know that he has got an obligation to ascertain, as much as possible, what people will be affected and to be responsible to these people. Besides, this is not about things that should be done instantly. Instead, it is about something ongoing for a long period of time. The Secretary is not saying he is afraid he might not be able to come up with such detailed information in certain emergency cases. Instead, he is saying that for the sake of wiretapping, they cannot proceed meticulously and exhaustively, therefore they will just do it causally. However, this is unreasonable at any rate.

As such, Deputy Chairman, I call upon Members to support the motions Mr James TO and I have proposed today. This is about seeking justice for the general public, protecting their privacy with respect to private communications, and giving proper respect and compensation to those who have sustained losses as a result of offering assistance to the law-enforcement officers.

Thank you Deputy Chairman.

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

MR JAMES TO (in Cantonese): Deputy Chairman, I think we have reached a state where we are actually accustomed to getting defeated. As such, before I may get defeated again, I hope the Secretary can make some huge concessions in the Code of Practice as far as practicable, and make sure that detailed records are lodged in an incident book or a file for things done with respect to clauses 29 and 30, such as connection to third party power supply, removal of objects that belong to other people, or connection to other people's information system, and so on. Otherwise, when investigation is underway in respect of an explosion in the service room of No. 300 something of Shanghai Street, it would cause a big problem if no records can be found. So what are you going to do about it? It is not going to be fine. The authorities will have to be responsible, right? Otherwise, the people there may be asked to pay damages in the amount of tens of million dollars, and even the Owners' Corporation will have to dissolve; that would be really bad, right? You are responsible for law enforcement, but you have to be responsible for such things too.

I am not saying that the men of the Secretary will always shrink their responsibilities, but there are times when they would never expect an explosion at all. Frankly speaking, to err is human. We all know that people make mistakes. If an explosion did happen, that is really bad, what should we do then? There will be problems if there is no comprehensive record. Therefore, I hope the Secretary can make some huge concessions in the Code of Practice or other related matters, and cause a record to be kept for anything that have been removed and so on. Otherwise, we will not be able to act responsibly and hold anybody responsible.

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

SECRETARY FOR SECURITY (in Cantonese): I thank Mr James TO for giving us his opinions.

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

(Ms Margaret NG indicated that she did not wish to speak again)

DEPUTY 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, Mr James TO and the Secretary for Security may not move their respective amendments.

DEPUTY 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)

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

(Members raised their hands)

Ms Margaret NG rose to claim a division.

DEPUTY CHAIRMAN (in Cantonese): Ms Margaret NG has claimed a division. The division bell will ring for three minutes.

(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, 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 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 and Mr Ronny TONG 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, 18 were present, 10 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): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 29.

Proposed amendment

Clause 29 (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.

Dr Raymond HO, Dr David LI, 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 LEE Cheuk-yan, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Ms LI Fung-ying, 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 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 43 Members present, 25 were in favour of the amendment and 17 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 amendments moved by the Secretary for Security have been passed, Mr James TO may not move his amendments to clause 29, which are inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 29 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 29 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.

CHAIRMAN (in Cantonese): Members, I believe you have just received pages 14a to 14g of Part III of the script which is related to clause 18. Earlier on, there was an omission of the part on the amendment which Mr Albert HO has given a notice to move, and this has now been added to the script.

CLERK (in Cantonese): Clause 18.

CHAIRMAN (in Cantonese): Mr James TO, Ms Margaret NG, the Secretary for Security and Mr Albert HO have separately given notice to move amendments to clause 18.

Committee now proceeds to a joint debate. I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, clause 18 is about matters related to the renewal of an executive authorization. First, I would like to add that the reason for application for renewal must be provided, and I do not need to repeat the arguments I gave previously. Second, in considering the limitation in respect of the total duration for the renewal, the total duration granted in the past must be taken into account. In other words, when an application for renewal is

made, the total duration granted in the past must be taken into consideration. These are the two points that I am raising.

Proposed amendment

Clause 18 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG, the Secretary for Security and Mr Albert HO to speak on the amendment moved by Mr James TO as well as their amendments.

MS MARGARET NG (in Cantonese): Chairman, my amendment is similar to Mr James TO's amendment both in terms of contents and effects.

Principally, internal executive authorizations are susceptible to abuses, for officers will handle the matters routinely, as if everything is understood. Therefore, I am moving this amendment as a reminder that the total duration of operation must be restricted. My amendment provides that the total of duration for a renewal must not exceed two years. Similar to the clarifications we made with regard to the authorization from panel Judges, if the total duration exceeds two years, a new application would be needed. A new application has to be made, and this application can be made even before the duration of two years expires. This is because for a new application, the effective date will be carried forward, and one does not have to wait until the two years have expired before filing a new application. This is allowed under the provision. Chairman, our amendment is therefore very reasonable, and it will not cause any hindrance to the flexibility of the law-enforcement operations of the law-enforcement officers. Thank you.

MR FRED LI (in Cantonese): Chairman, we have added a sentence to clause 12(4), which is the same as the amendment I moved on behalf of Mr Albert HO last time, and that is: in any event not more than a total duration of 12 months (including the period of the previous issue and rewards (if any)). The point is that it should not exceed a period of 12 months.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, currently Part 3 and Part 4 of Schedule 3 of the Bill have provided that additional information is required from applicants as to whether the renewal sought is the first renewal and each occasion on which the authorization has been renewed previously, the value of the information obtained, and the reason why it is necessary to apply for the renewal. In addition, the conditions for renewal of an authorization under clause 3 of the Bill requires that the intrusiveness of the operation has to be taken into account, and that the authorizing authority must take into consideration the abovementioned factors while determining an application for renewal. As such, strictly speaking, there is no need to specify this point again in the Bill.

However, in response to the concerns of Members, the authorities have proposed an amendment to clause 18(2) to accommodate the suggestions from Members by specifying that when considering the renewal of an executive authorization, the authorizing authority must take into consideration the duration of the authorization from the date the authorization was granted for the first time. This is consistent with the amendment made by the authorities to clause 12(2) on a Judge's authorization.

Amendment has also been proposed by the authorities with respect to Part 4 of Schedule 3 with regard to affidavit or statement in relation to application for renewal, which requires that the duration of each previous renewal shall be stated in order to facilitate the consideration of the authorizing officers.

We believe the amendments as proposed by the authorities are presented more clearly. They are consistent with the contents of the Bill, and therefore more desirable. I hope Members will support the amendments of the authorities.

The Government opposes the amendments as proposed by Ms Margaret NG, Mr James TO and Mr Fred LI Ming-wah.

With regard to Ms Margaret NG and what?

CHAIRMAN (in Cantonese): Mr Fred LI Wah-ming.

SECRETARY FOR SECURITY (in Cantonese): Yes, Mr Fred LI Wah-ming. I am sorry. I have got a little bit confused after tens of hours of meeting. With regard to the amendments as proposed by Ms Margaret NG and Mr James TO that require the authorizing authority to provide reasons for granting an authorization in writing, sufficient discussion has been conducted in previous meetings, and we believe it is not necessary to make it mandatory for the authorizing officers to provide the reason for determining an authorization. Therefore, we oppose Ms Margaret NG's amendment.

As regards the amendments from Mr Fred LI Wah-ming and Ms Margaret NG with respect to subclause (4) in relation to the total duration of an authorization, just as we pointed out in the discussion with respect to clause 12, setting up a ceiling for the duration of covert operations will unnecessarily hamper the ability of the law-enforcement agencies in combating organized crimes. We have studied the situations of other common law jurisdictions and no restrictions with respect to the number of times and the total duration of a renewal have been found.

Madam Chairman, I call upon Members to oppose the amendments made by Members with respect to clause 18, and I call upon Members to support the amendments made by the authorities. Thank you, Madam Chairman.

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

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

MR HOWARD YOUNG (in Cantonese): Chairman, we started debating clause 12 about six or seven hours ago. The amendments which Members and the Secretary of Security are proposing just now are similar to those they moved earlier, and I also spoke to indicate our support to the Secretary of Security's amendment. Therefore, I do not repeat my arguments again.

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

MS AUDREY EU (in Cantonese): Chairman, Mr Howard YOUNG thinks this clause is very similar to the previous one, so he insists on taking a similar stance. I have listened to the remarks from the Secretary, which he apparently read from a similar copy. He was telling us that if we pass the amendments of Ms Margaret NG or Mr Fred LI for imposing a limit on the duration of a renewal, it will jeopardize the law-enforcement activities of the law-enforcement officers to the effect that they will not be able to carry out their duties. In fact, we have already explained this very clearly, so when I heard that the Secretary was reading from the same copy, I felt truly disappointed. Ms Margaret NG has actually told the Secretary, and the Secretary has in fact understood, that the discussion is only about renewal. We all know that if an ongoing operation on interception of communications and covert surveillance should, as Mr Fred LI or Ms Margaret NG have said, fail to produce any result after one or two years, further renewal should not be granted indeed. However, this does not mean that the law-enforcement authorities cannot file an application when new evidences or new justifications are available. The law-enforcement officers absolutely can submit a new application. The amendment does not prevent them from doing so. Therefore, it will never jeopardize the law-enforcement activities of the law-enforcement officers or affect them to the extent that they will not be able to combat crimes.

As Mr Howard YOUNG has said just now, this issue has been subject to debate earlier. Yet, I have failed to hear any explanation from the Secretary. In the previous round of debate, Ms Emily LAU remarked that in providing the guideline, which is the so-called Code of Practice, the Secretary agreed if an ongoing operation on surveillance or interception of communications should fail to produce any result, the operation should cease to continue anymore. Therefore, the Secretary is in fact willing to have this stated in the Code of Practice, but he insists on refusing to have it stated in the legislation. We are only asking for the provision to be stated clearly in the law as this is very important and this is an important issue that has a direct bearing on our basic rights and principles. Therefore, we are asking to impose a limit on the duration of a renewal, and that is to say, in the absence of any new information, the duration for which surveillance or interception is carried out should be subject to a limit. Yet, if new information, new evidences or new justifications are available, a new application can always be made. Our request is that simple. I hope the Secretary will not read from the draft once again like he did earlier, and I hope he will truly respond to our questions. Thank you, Chairman.

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

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, I believe what the Secretary has said is true, that maybe other countries do not have a mechanism like this; but do not let me find an example of this from any country. In fact, even the Chief Executive can only serve a maximum of two terms. Nobody will argue that Donald TSANG is not capable of serving one more term as the Chief Executive, and in the case of Mr TUNG, he was not able to serve his term simply because he had suffered from a pain in the legs. But then why the number of terms of the Chief Executive has to be limited? This is because the same position cannot be held by the same person for too long. The requirement to limit the maximum duration is based on a basic principle, that is, to make sure that something long-standing or has become habitual will be subject to regular review. The same is true to elections. The purpose of setting a limit is to ensure that it will be reviewed at regular intervals, in the same way as we dispose of our trashes or clean our houses regularly.

This reminds me of a fairly high-profile case which a friend of mine told me. After the Gang of Four was cracked down, a victim of labour reform was finally released. He was first jailed during the Anti-Rightist Movement, and he had been jailed for several decades since then. Finally, when he was released, he found out that he should not have been jailed for such a long time in the first place — it was almost like a "life sentence". As it happened, the Secretary for the Political and Judiciary Committee responsible for his case had long before given approval for his release; unfortunately, the Secretary passed away shortly after he had placed the approval document at the bottom of his drawer. His drawer and papers were left unattended after his death, and nobody cleared the files for him, so the approval document for the release of the rightist element had been left at the bottom of his drawer unattended. This may seem to be a pathetic joke, but this is what bureaucracy is all about, that nobody will care about clearing up the paper work.

What Mr James TO and Ms Margaret NG are asking for is a review at regular intervals. Even if the authorities should decide to carry on with their surveillance operation indefinitely, before the authorities are given an authorization to carry on with their surveillance, please go through some formalities, get a rubberstamp chop every two years on the papers, or come up

with more reasons to get the rubberstamp chop. But the authorities insist that this must not be done; they simply do not bother, and they argue this is unnecessary. In fact, every bureaucratic system is ridden with diseases. Just as a Chinese book called *Ten Things about Parkinson's Disease* (which is a small book which we can read online) points out, the bureaucrats never care about clearing up the papers. We are setting up a system, and we hope the subject officers will clear it up at regular intervals, otherwise it would be very unfair if something keeps on going simply because a file is missing and nobody is doing anything to clear it up.

Whether this system exists in other overseas countries I dare not dispute. But what stops us from adopting the best system possible while we are enacting a piece of legislation? Put it this way, if we buy a television now, will we still go for the "CRT" TV instead of the LCD TV? Maybe you will argue, "Last year when I visited Shan Wei on the Mainland, my grandma was still watching a tube TV; why don't we try to get a tube TV by all means?" But then, we have to be reasonable. Every time we enact a piece of legislation, it brings up a novel experience. If that is reasonable, who knows if the parliaments of the United Kingdom and the United States would not say, "There is a new system in Hong Kong, let us learn from Hong Kong." Do you understand? The situation is like this. In the process of legislation, how could there be no novel ideas? Legislation requires massive efforts. Apart from manifesting the objectives of the government, it also gives society a chance to have some reflections on this issue through the platform of parliamentary assembly. We have found it very regretful this time that the authorities did not carry out any consultation. I heard voices of opposition from the Hong Kong Bar Association and The Law Society of Hong Kong. Due to the lack of consultation, they can only have their voices heard through their representative Ms Margaret NG here; otherwise, they would not have their voices heard at all.

As such, if you want to convince the public on this issue, you have to be reasonable and rational. I am always accused of being irrational, but when I am being reasonable, there is nobody whom I can reason with, is this not absurd? I am trying to be reasonable, but he is not going to reason with me. As a matter of fact, this is a very time-consuming process. That the legislative process has taken such a long time certainly has something to do with the Government for being unreasonable. Being reasonable will bring about harmony. Being reasonable helps clear up differences, reach a common ground on important points, and part different ways on less important issues. But this is not the case with us now. Currently the norm is antagonism. The Government is basically

antagonistic to criticisms, and it is being unreasonable for the sake of exemplifying its authority. As such, this Council is forced to state our reasons time and again. Therefore, I always try to come up with new ideas and new examples in the hope that I can state my case in a less boring manner.

I hope the Secretary can be open to criticisms and set up a new system for the people of Hong Kong. The authorities keep saying that they need to be a flying dragon in the sky for reaching new heights, is that right? If we set up a new system for the people of Hong Kong, people will find out that a new system for covert surveillance and interception of communications exists in Hong Kong. We will not be merely catching up with the United Kingdom and the United States, but we will be surpassing the United States, and we will be superior to the United States, is that not good? Therefore, I hope the Secretary will be open to criticisms and listen to good advice. Give both yourself and this Council a chance, and do something more reasonable.

MS MARGARET NG (in Cantonese): Chairman, I should clearly point out the differences in the various amendments proposed by me, the Secretary and Mr James TO. The amendment proposed by the Secretary only states that when considering the renewal, the authorizing officer should take into account the total duration. However, it also states that first, its other powers will not be affected; and second, an absence of a two-year limit to the duration. Similarly, the amendment proposed by Mr James TO does not include these provisions. However, the amendment later proposed by Mr Fred LI will add this point to the Bill. And the amendment I propose makes a solid proposal of a two-year limit to the duration. Therefore, I urge Members to support Mr James TO's amendment first. If his amendment is negatived, please make an attempt to support mine. I hope one of the amendments will eventually be passed. Although the possibility of this hope coming true is an unknown, we hope that some progress will be made. Thank you.

MR JAMES TO (in Cantonese): Chairman, some personal feelings I have also prompt me to say a few words in response. Today is the third day of the meeting. No matter how sensible are the amendments proposed by me, Ms Margaret NG and other colleagues, all of them have been negatived. The record of the voting results has now been piling increasingly high on the table. I will keep a copy of this record and cherish it.

The barbaric thing about the Government is that it refuses to respond in any event. A three-no policy is adopted, that is, no reply, no exchange and no reasoning. The Government only aims at having the task finished before 8 August and getting it done. Perhaps due to the television and radio live broadcasts, fortunately, many members of the public have written us letters. And a pack of chocolate given to us not long ago also means some encouragement to us. I wish to tell Ms Margaret NG in passing that in the letters from members of the public, they asked us not to be disheartened in any case and most importantly, to present a clear reasoning of the argument because many of them were actually made aware for the first time of the large amount of loopholes and problems hidden behind this Bill through the radio or television live broadcasts over the past two days. I hope the Government will elucidate as much as possible its arguments in the remaining time because through the radio and television broadcasts, this is actually the first time many members of the public are exposed to this Bill. I think they can judge who is right and who is wrong from our exchanges and reasoning in this debate. Regarding whether a legislation that can strike a balance between human rights and law enforcement will be enacted, the point of equilibrium may be a very delicate one, but do not presume the public will not understand. They can realize whether the amendments proposed by us or those proposed by the Government are right. I hope the Secretary will spend more time later to answer our questions.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I totally agree with Mr James TO that the spirit of the entire legislation is to strike a proper balance between the enforcement of law and the protection of human rights and privacy. We consider this Bill has actually achieved a very good balance.

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendment to clause 18(2), I will remind Members that if that amendment is agreed, Ms Margaret NG and the Secretary for Security may not move their amendments.

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 and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 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, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 22 were present, five were in favour of the amendment and 17 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 18(2).

Proposed amendment

Clause 18 (see Annex)

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 and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 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, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 22 were present, five were in favour of the amendment and 17 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 negated.

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

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 18(2).

Proposed amendment

Clause 18 (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, Mrs Selina CHOW, Miss CHAN Yuen-han, 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 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 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 Audrey EU, Mr LEE Wing-tat, Dr Joseph LEE, Mr Alan LEONG, Mr LEUNG

Kwok-hung, Dr KWOK Ka-ki 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 42 Members present, 26 were in favour of the amendment and 15 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): Before I put to you the question on Mr James TO's amendment to clause 18(3), I will remind Members that if Mr James TO's 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 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 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 18(3).

Proposed amendment

Clause 18 (see Annex)

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 and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 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, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG and Mr LEUNG Kwok-hung voted for the amendment.

Mrs Selina CHOW, 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, 22 were present, five were in favour of the amendment and 17 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 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): Before I put to you the question on Mr James TO's amendments to add subclause (1B) to clause 18, I will remind Members that if the amendments are agreed, Ms Margaret NG and Mr Fred LI may not move their respective amendments.

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 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 18(4).

Proposed amendment

Clause 18 (see Annex)

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 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 amendment negatived.

CHAIRMAN (in Cantonese): Mr Fred LI, you may move your amendment.

MR FRED LI (in Cantonese): Chairman, I move the amendment to clause 18(4).

Proposed amendment

Clause 18 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Mr Fred LI 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 amendment negatived.

CLERK (in Cantonese): Clause 18 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 18 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.

CLERK (in Cantonese): Clause 30.

CHAIRMAN (in Cantonese): Mr James TO, the Secretary for Security and Ms Margaret NG have separately given notice to move amendments to clause 30.

Committee now proceeds to a joint debate. I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 30.

Clause 30 is an incidental power that comes with the authorization. It involves conduct that can be undertaken when carrying out the authorization. There are mainly several types of conduct. And I have just cited some examples to give a detailed illustration, including the breaking open of certain objects, the connection to electricity equipment or system, and the transmission of information by the connection to the information or any other system.

I have given a lot of examples in this regard, hoping to make it clear that if no mechanism is established to assess these damages, I mean the general damages and risks, once these unlimited powers that naturally come with the

authorization are applied to the premises of the public or their lives and properties, serious threats and disasters will be resulted. Therefore, I think this amendment is necessary.

Proposed amendment

Clause 30 (see Annex)

CHAIRMAN (in Cantonese): I now call upon the Secretary for Security and Ms Margaret NG to speak on the amendment moved by Mr James TO and their amendments.

MS MARGARET NG (in Cantonese): Chairman, originally my amendment begins with a phrase "Subject to section 29,". As my amendment to clause 29 was negated, this phrase no longer means anything. However, there is another point and that is, what is the scope of the conduct that can be undertaken under the incidental power? To this end, I propose to add "lawful" to describe such conduct. In other words, the undertaking of any unlawful conduct is prohibited by the incidental power.

Chairman, all the amendments to clause 29 moved by me and Mr James TO were negated. While the power given by clause 29 is already boundless, what is the meaning when the authorities want to add "boundless" on top of "boundless"? Therefore, if the authorities want an addition to these powers, they must specify that only lawful conduct is permitted. Otherwise, it is not permitted.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the amendment to clause 30 is proposed in response to the recommendation of the Bills Committee to ensure all acts set out in the provision are necessary for and incidental to the carrying out of the authorized operation.

The Government opposes the amendments proposed by Mr TO and Ms NG. The amendment to clause 30 proposed by Mr James TO corresponds to his proposed addition of clause 29(8). In the discussion on clause 29, I have already explained the reasons for our opposition.

The amendment to clause 30 proposed by Ms Margaret NG is the addition of a lawful element. We think this amendment will bring ambiguities to the provision. Does this amendment mean such conduct has to be lawful when it is undertaken without authorization, or it becomes lawful after the authorization? If it is the former, in the case where the posing as public officers is needed to gain entry onto certain premises, such conduct is not allowed even if the operation is authorized because this kind of disguise is unlawful. However, if proper authorization is granted, it is only reasonable to allow such disguise to work. On the other hand, disguises which are lawful in nature, such as police officers posing as ordinary customers, are not in breach of the law at all and authorization is not necessary. Therefore, we oppose the amendment.

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

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

MR JAMES TO (in Cantonese): Chairman, I think the issue concerning whether the conduct is lawful or not is of paramount importance. Of course, the Government, in fact, has the responsibility to propose an appropriate legislation to achieve a balance.

However, the Secretary is now saying that ambiguities will arise. For instance, posing as a public officer such as a staff of the Water Supplies Department (WSD) will create complications. Although it is the same government, is the consent of the WSD required for police officers posing as WSD staff? As the superior of the head of the WSD is the Chief Executive, and the superior of the head of the Police Force is also the Chief Executive, in the case where police officers pose as WSD staff — such as to install a water meter on the site because a number of water leakage reports have recently been in the news — it can be assumed that as these law-enforcement operations have got the consent of the Chief Executive, and so they will inevitably get the consent of the WSD? I assume this is the logic behind it. Therefore, there is nothing wrong with police officers posing as WSD staff.

However, how about the posing as a staff of the Town Gas? The head of the Town Gas is not the Chief Executive. Can it work? This is very complicated indeed. Moreover, perhaps it is necessary for someone posing as a Town Gas staff to open a gas meter. As he has to disguise as a skilled worker, he may need to undertake training for a period of time to protect him from giving himself away. On some occasions, it is necessary to come into contact with power switches in order to install a bugging device. If it is unlawful conduct that our Judges are going to authorize, it will pose a serious problem.

The authorities may think these are cases of minor importance. However, if the cases are more serious, such as the officer concerned damages people's possessions — Members should bear in mind that even if people's possessions are damaged, the authorities will not offer any compensation. For example, in an operation, a pot of plant is on the premises. If the officer concerned just moves the plant and causes no damage, it will not constitute any criminal damage. As this is not a case of permanent possession, it will not constitute theft either. Therefore, it is possible that the officer concerned is not in breach of the law. Temporary removal is mentioned here. And I do not know what it means. For example, if the officer concerned drives a car away from the garage, as it is for law-enforcement purpose, he will not take permanent possession of the car. However, there is a crime called "taking conveyance without authority" meaning the theft of cars and that involves the driving away of a car.

Therefore, what kinds of unlawful conduct can still be authorized pursuant to this provision? I will consider it this way. This provision certainly does not authorize the killing of a man, that is, when a law-enforcement officer finds someone in the way during the installation of a bugging device, he kills him to prevent the person from leaking the information. Such conduct, of course, is not authorized. The provision does not authorize such conduct because lives are at stake. However, if someone's possessions, property or even a family heirloom, something which provides for his old age as the "fund for the coffin", is damaged in the course of the installation of a bugging device by an authorized law-enforcement officer, this constitutes criminal damage. And the situation can be very serious.

Will the cases mentioned just now arise in the original clause 30 as the Secretary would like to have it? Is assessment not necessary once authorization is given? Members should bear in mind that as the amendment moved by me not long ago was negated, in other words, assessment is not necessary. Even

if some objects are damaged, or any degree of harm is done, assessment is not necessary. And such conduct is not even necessarily lawful. Under these circumstances, those Judges — not Judges, they should be called panel members. They are the authorizing authority that happen to be Judges. The conduct undertaken by law-enforcement officers, which is authorized by the authorizing authority, will have no limits. And such conduct undertaken by law-enforcement officers is authorized by the authorizing authority when it is ignorant of the basic extent of damage and the loss suffered by the people.

I do not know whether the Secretary considers it the fairest means to every member of the public when the conduct is in breach of the law and causes damages and in the absence of any assessment.

MS AUDREY EU (in Cantonese): Chairman, the Secretary's response has given me a great surprise. Ms Margaret NG has actually pointed out that there is only one point left in her amendment. And it is to the effect that any authorization issued under clause 30 must be on lawful conduct undertaken by officers concerned. If the Secretary has told us in his response made earlier that even if the word "lawful" is not stated, lawful conduct is certainly implied because only lawful conduct, and certainly not unlawful conduct is included, I can understand the Secretary's point after all. What he really means is that he actually accepts Ms Margaret NG's proposal. But he just thinks there is no need to add that to the provision.

However, this is not what he said; this is not his stance at all. His stance is that when the word "lawful" is added, the provision will become obscure because he does not know what it means. He does not know whether lawful means the conduct is lawful or not, or other performance is lawful or not. I got very confused after listening to this. As Members of the Legislative Council, in the process of the passage of this Bill, if the Secretary says that the provision authorizes law-enforcement officers to undertake unlawful or illegal conduct, then would the Secretary tell us clearly, what exactly is the unlawful conduct to be undertaken by law-enforcement officers that the Bill about to be passed by this Council authorizes? The Secretary must give us a clear explanation so that Members including me and those who lend their support to the authorities later know what illegal conduct to be undertaken by law-enforcement officers this provision authorizes.

What are we discussing now regarding this Bill? It is the protection of privacy stipulated in Article 30 of the Basic Law. As the authorities express the need of wiretapping by law-enforcement officers on some occasions and privacy will be infringed upon, therefore, authorization is granted for them to infringe upon privacy and conduct wiretapping. All right, the authorities will be authorized to infringe upon privacy through this legislation. However, the Secretary told us that other than the infringement of privacy, the authorization would further authorize other conduct, that is, authorize law-enforcement officers to undertake illegal conduct other than the infringement on privacy.

Therefore, would the Secretary please tell us what illegal conduct to be undertaken by law-enforcement officers will be supported by my Honourable colleagues of the Legislative Council when they raise their hands to support this provision proposed by the Secretary? I hope the Secretary will give us a specific reply later. Thank you, Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): Chairman, the situation described in this Bill is actually happening in the Legislative Council. When we walk around here, many people who are infrequent visitors to this Council are keeping us under surveillance from outside. However, it is not covert surveillance. They just want to know our whereabouts, how many of us are there, where we sit and whether any of us have left this building and so on. When I went out of this building and took a look, I saw these people everywhere.

The President has given approval for these people to stay, which certainly has allowed them to undertake lawful conduct, such as to see if Mr LEUNG Kwok-hung has left; if he comes back after he has left; where he has gone and if he returns after he has gone into the building opposite. Conduct of this nature undertaken by these people is authorized by the President, that is, Mrs FAN, because she considers such conduct does not matter much and therefore allows them to do so. However, if they approach me one day and ask, "'Long Hair', why do you not go in and vote?" This is unacceptable. Although this cannot be described as an absolute unlawful conduct as stated in the Bill, it is at least impolite. Therefore, even if there are people who authorize these people to keep some Members under surveillance, they cannot act like this. Moreover, they certainly cannot intercept any communications. They have no reason either to take the message slip I pass to Mr Martin LEE or to pose as our staff wearing white shirt and black trousers, then take the message slip and pass it to

the Secretary Mr Ambrose LEE. This will cause a very serious problem. Therefore, the President will definitely not authorize them to intercept communications but only to conduct surveillance. And only open surveillance is authorized, only covert surveillance. Therefore, it is necessary for all these people to wear a name tag to avoid misunderstanding.

Therefore, the Secretary cannot say that under this Bill, once authorization is given, the officers concerned will only undertake lawful action. Perhaps the officer concerned thinks that he should know the contents of the message slip exchanged between me and Mr Martin LEE because it may be of great help to this debate. In a moment of desperation, he intercepts the communication, that is, the message slip exchanged between me and Mr Martin LEE. Under these circumstances, he acts wrongly because the President only allows their presence here to check the whereabouts, the number of the Members and so on.

Therefore, the Secretary, you cannot accuse people of fabricating out of thin air. This is just a matter of concept. Why is the Secretary unable to understand this concept, this logic? It is entirely because he has a guilty conscience. He is afraid that once he accepts the addition of the word "lawful", a so-called ambiguity will be created — I do not mean strangeness¹, I mean the ambiguity produced by two interpretations. Perhaps he wonders what has gone wrong. As long as an authorization is issued, it is definitely lawful. What is the need of adding something unnecessary? In fact, he should not think like that.

On the contrary, we have our cause for concern. They work in the dark. Members have to understand that things hidden in the dark always pose the greatest trouble. Although lawful authorization is granted, unlawful conduct can deliberately be undertaken on grounds of saving time or effort as long as it is thought that the end justifies the means. However, no matter how trivial such unlawful conduct is, it should not be allowed. Therefore, what harm will it do when the proposal of Ms Margaret NG adds the word "lawful" to the clause? How much weight does this word carry? How many ounces? How many grams? Whenever the addition of this word is debated here, we are actually discussing whether certain restrictions should be imposed before the grant of such public authority.

¹ The words "ambiguity" and "strangeness" have the same pronunciation in Cantonese.

In this respect, I cannot help but quote Article 30 of the Basic Law, which provides the most significant premise of the exercise of such public authority, and that is, the protection of the freedom and privacy of communication of Hong Kong residents as provided in Article 30 of the Basic Law. The spirit of this Bill does not aim to legislate to protect law-enforcement agencies to facilitate the execution of their duties. This is not the purpose at all.

Therefore, this is actually an exceptional authority. As human beings accept authoritarian thoughts too readily and without pondering over the results, they are not aware that they have a lot of inherent rights. Therefore, in this respect, a number of law-enforcement officers, including the Secretary, are wondering what has gone wrong. They have enforced the law for several decades with all their heart. They have all along investigated and combated serious crime to protect the public security of Hong Kong. Why should we lay obstacles before them? Let me tell the Secretary: it might look cool to brandish a sword to defend traditional moral values, but it might also turn someone into a tyrant in no time.

Today, after revising this and that, as well as considering this and that, Ms Margaret NG has only proposed to add one word to the clause. And the concept implied by the word is reasonable. What is the Secretary afraid of? At the end of the day, I hope the Secretary will handle this issue more sensibly. Ms Audrey EU has already asked the question. I do not want to waste time because I am afraid the Secretary will later act shamelessly, saying he forgets the question because we have spoken for a long time.

Chairman, I only wish to add one more point. Those keeping us under surveillance are actually working very hard. I see them standing all the time. Can we provide them with some chairs? Although they are not allowed to sit at work, the provision of chairs in the corners may let them sit for a little while. Otherwise, standing for such a long time will really tire someone to death. After chairs are provided, they can choose to sit or not if they feel like it. I hope the Chairman will get this point because they are workers after all. And they have already worked overtime. Not only do they need to stand, but they also need to run around as well. When I walk faster, they have to follow suit. This is really very tiring indeed. Thank you, Chairman.

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

MS MARGARET NG (in Cantonese): Chairman, Ms Audrey EU has actually presented some of the arguments. Regarding the Secretary's response that the inclusion of the concept of lawfulness will create ambiguities, I wish to know, what are the ambiguities? What I mean is conduct that is lawful in itself will remain lawful; and conduct that is unlawful in itself will not become lawful because of clause 30. It is just like that.

Moreover, Chairman, we have just — it must be dozens of hours ago, I cannot remember how long ago it is — stated our reasons why there should be addition to the definition of some of the terms such as "public security", "serious crime", and so on. It is because there is a lack of clarity in the legislation concerned, which makes the people unaware of how their rights are being infringed upon. However, the Secretary does not care much about these ambiguities but he is very concerned about the ambiguities affecting law-enforcement officers now. When members of the public do not understand the legal provisions, they are sometimes really helpless, particularly when the provisions, both in Chinese and English, are drafted in a very complex manner, which are beyond their comprehension. This is something we want to avoid.

However, even if the addition of the word "lawful" will create ambiguities for the authorities, there will be a number of legal officers offering them advice. In fact, are there any ambiguities? Chairman, there are, in fact, no ambiguities. What exactly is authorized by the power conferred by clause 29 that will turn unlawful conduct into lawful? This is the reason why Mr James TO and I were so concerned earlier about amending the clause 29 proposed by the authorities. In fact, it is possible that a lot of unlawful acts may turn lawful under the authorization. The power conferred by clause 29 is great enough. If the authorities think that some unlawful operations will turn lawful under clause 29, why does our proposal of adding the word "lawful" to clause 30 make them feel puzzled? Chairman, the insistence of the authorities on urging Members to oppose the amendments moved by me and Mr James TO is, therefore, totally unreasonable and unconvincing at all.

Regarding the amendment proposed by the Secretary himself, he has just told us that the amendment has already taken Members' views into account, but it is still not to our satisfaction and under our challenge. Chairman, the copy of guidelines we are using today, that is, the copy of guidelines put together by the painstaking effort of our staff, states that the amendment to clause 30(2)

proposed by the Secretary aims to improve the drafting of the Bill, and it is just meant to improve on the language. Of course, improvements on the language are an improvement after all. However, Members must not think that the amendment moved by the Secretary has taken our views into consideration but we are still not satisfied and propose our own amendments. In fact, these are two entirely different issues.

Chairman, I earnestly urge Members to support the amendments proposed by me and Mr James TO. Thank you, Chairman.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, conduct which is lawful does not require authorization. Therefore, it is necessary for us to obtain authorization to undertake other conduct. However, such conduct must be related to the carrying out of the authorization. And as stated in the present amendment, such conduct is necessary for, related and incidental to the carrying out of the authorization. Clause 30 under discussion now concerns the installation and the use of devices. It is not an infringement on people's privacy without any limits.

MS AUDREY EU (in Cantonese): Chairman, I do not know whether the Secretary has forgotten my question or he does not know the answer to it. My question is very clear and straightforward. The speech made by the Secretary a moment ago has obviously implied or suggested that authorization under clauses 30 and 29 is about authorization for unlawful conduct. He has clearly said that authorization and approval for lawful conduct are not necessary. Although conduct without limits is not to be undertaken under the authorization, it is obvious that conduct other than lawful conduct is included. Therefore, I wish the Secretary will clearly tell us — this record is very important, as the Legislative Council is going to vote later, Honourable colleagues lending their support to the Secretary will actually support the authorization of conduct including that which is unlawful — what exactly is such unlawful conduct? I ask the Secretary to state this clearly because it should be noted down in the

records what unlawful conduct is supported by Honourable colleagues who support the Secretary.

Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, I also wish the Secretary to clarify this issue.

Perhaps allow me to help the Secretary understand more easily. He has said that should the conduct be lawful, authorization is simply unnecessary. This is correct in terms of logic. However, even if it is unlawful conduct, it can be further divided into different levels. Some are civil cases in which compensation can be claimed while some are criminal cases. I have no knowledge of clause 30 as in the Secretary's mind now. I have mentioned earlier that if a flower pot is only moved but not damaged or permanently possessed, it will neither constitute theft nor criminal damage. Therefore, this is not a criminal case. However, compensation can still be claimed on grounds of trespass as there is something called tort in civil cases. If a law-enforcement officer damages certain object, it may be a criminal case. Ms Audrey EU and I wish to ask the Secretary to clarify: does the authorization he is now talking about authorize any unlawful conduct of a criminal nature?

CHAIRMAN (in Cantonese): Ms Margaret NG, do you say you wish to hear the Secretary's reply?

MS MARGARET NG (in Cantonese): Yes, I would like to hear the Secretary's reply.

CHAIRMAN (in Cantonese): Secretary, would you respond to that?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, Mr James TO seems to stretch the scope of the issue into infinity, that is, under these circumstances, does it mean the law-enforcement forces are allowed to kill and set fire, as well as to loot and rob? This is definitely not the case. In my

earlier reply, I have given an example, and that is, during a covert surveillance operation, law-enforcement officers often have to pose as certain public officers, and act in different disguises as Mr James TO has mentioned. Such disguise is an unlawful conduct in itself. However, if the officer concerned is authorized to do so, does it mean such unlawful conduct is privileged? This is what I mean. And as mentioned by Members, this clause mainly concerns the installation of devices.

MR JAMES TO (in Cantonese): Chairman, the question lies in what I have said: if the disguise is to pose as public officers, that I can understand, but is it possible if the disguise is to pose as the staff of the Town Gas or the power companies? Moreover, clause 30(d) specifies that law-enforcement officers can break open objects. If the law-enforcement officer breaks open the meter room and damages the lock — it would be acceptable to me if the master key is used and nothing is damaged, otherwise, if something is broken open and smashed — the door and the lock will be damaged. Is it the responsibility of the owners' corporation to bear the costs of law enforcement? However, the owners' corporation will not be told that such action targets at bugging flat C on the 8th floor and compensation will be provided later. Will the authorities tell them? It does not work even if the particular unit is not specified because the people concerned will be alerted. Does the conduct mentioned by the Secretary include breaking open the meter room to identify the telephone line and install the bugging device? If this is the case, it means the conduct undertaken by law-enforcement officers is by itself of a criminal nature and in breach of the law.

MS MARGARET NG (in Cantonese): Chairman, I think Ms Audrey EU is very glad to hear the Secretary say that law-enforcement officers are not authorized either to loot and rob or to kill and set fire but just "to act in different disguises". I wish to ask the Secretary to further clarify: is it clause 29 or clause 30 that authorizes law-enforcement officers "to act in different disguises"? Under what circumstances are these disguises carried out? Apart from these acts in disguise, would the Secretary tell us what other unlawful conduct will be undertaken?

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): Does any other Member wish to speak? If not, Secretary for Security, do you have anything to add?

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

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendments, I will remind Members that if the amendments are agreed, the Secretary for Security 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 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 Howard YOUNG rose to claim a division.

CHAIRMAN (in Cantonese): Mr Howard YOUNG 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 and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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 Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Ms Audrey EU, Mr LEE Wing-tat and Mr LEUNG Kwok-hung voted for the amendment.

Mr James TIEN, Mrs Selina CHOW, 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, 23 were present, four were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 19 were present, eight 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): Secretary for Security, you may move your amendment.

SECRETARY FOR SECURITY (in Cantonese): Chairman, I move the amendment to clause 30.

Proposed amendment

Clause 30 (see Annex)

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.

Mr James TIEN, Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, Miss CHAN Yuen-han, 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 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 Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, 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 45 Members present, 29 were in favour of the amendment and 15 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 amendments moved by Secretary for Security have been passed, Ms Margaret NG may not move her amendments to clause 30, which are inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 30 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 30 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.

CLERK (in Cantonese): Clauses 31 and 37.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to clauses 31 and 37.

These two provisions specify that authorization may be issued subject to certain conditions. What exactly are these conditions? They are, of course, subject to a myriad of changes. Let me give some examples. In order to achieve a balance between privacy and law enforcement, the Judge considers the listening or recording device should be installed in the sitting room instead of the toilet and bedroom. The Judge's decision may be made on the grounds that a balance should be achieved. However, pursuant to these provisions, what consequences will be resulted from non-compliance with this condition to install the device in the toilet or bedroom? My amendment aims at clarifying what these consequences are. In the case of non-compliance with the condition specified by the Judge or the Chief Superintendent of police, the authorization will cease to have effect from the time of non-compliance.

Why have I given this example for elucidation? If it is a condition, in other words, it must be complied with. Once the conduct exceeds the scope of the relevant condition, it is like no authorization is issued. However, if exceeding the scope of the relevant condition bears no consequence — it certainly will not surprise me if the Government opposes my amendment because this is its usual practice — then even if the act is undertaken at the beginning when it is not authorized, no consequence will have to be borne. (This is exactly what the Government says.) Moreover, in the case where the unlawful conduct exceeds the scope of the relevant condition, the Government can neglect the protection provided for by law and have the information destroyed. In fact, this shows that the authorities have left a lot of room for themselves in advance in

every case. No incident of abuse of power will be pursued. And never have they adhered to the rules.

I think as the conditions are specially laid down by the Judge or the Chief Superintendent of police, they must be deemed necessary after the consideration and balance of a number of factors. If non-compliance bears no consequence — Members should bear in mind that the authorization will only cease to have effect from the time of non-compliance and not for the whole period — I think no rules and restrictions are in place to put the authorities under restraint. For instance, there are generally many checkpoints in the law to bind and restrict the authorities. An example is the enthusiasm of the police to have crimes detected usually makes them very aggressive. But excessive aggressiveness may lead to the taking of statements by brutality. And so suspects are beaten up to get a cautioned statement or confession statement. However, what is the final decision of the Judge? In the case where the statement is not voluntarily given, it is inadmissible. In other words, if the police beat the suspects up, even if the beat-up by the police can finally be proven, the statement will be of no use and it is inadmissible.

The above example shows that regulations must be in place to tell people that non-compliance will lead to consequences, or will result in "a waste of effort" that bears no fruits. Only then can non-compliance be avoided. Please allow me to give another not-so-direct example. How has the Inland Revenue Department made people aware of the need to pay the stamp duty for tenancy agreements? The Department specifies that two possible outcomes will arise from the failure to pay the stamp duty. First, once the evasion is found, an amount of ten times of the stamp duty will be recovered; second, in the case where the tenant is in default of rents, the tenancy agreement is inadmissible to recover the rents in arrears if the stamp duty is not paid. In other words, the tenancy agreement completely lacks a legal basis. Therefore, every one can do nothing but comply with the regulation to pay the stamp duty.

Of course, there is always another possibility that the tenant neither owes rents nor breaches rules and poses no other problems. Therefore, there is no question of the admissibility of the tenancy agreement from the beginning to the end. Therefore, it is possible for the landlord to evade paying the stamp duty. However, on many occasions, in the enforcement of the law, at least some conditions must be set, for example, taxes have to be paid, statements have to be voluntarily given and so on. No matter whether it is a civil or criminal case,

some conditions must be set for the purpose of making people bear the consequences. If non-compliance will not cause the authorization to cease to have effect, I really do not understand what exactly this entire legislation seeks to regulate.

Proposed amendments

Clause 31 (see Annex)

Clause 37 (see Annex)

CHAIRMAN (in Cantonese): We will 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?

SECRETARY FOR SECURITY (represented by Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, the Government opposes the amendments to clauses 31 and 37 moved by Mr James TO, which add subclause (2) to the relevant provisions.

Non-compliance with the conditions specified by the authorizing authority regarding a prescribed authorization or a device retrieval warrant does not necessarily affect the other parts of the operation that comply with the conditions. In the case of non-compliance, it should be handled separately from the action that is given proper authorization. It would be proper to adhere to the Bill and the relevant requirements to take appropriate remedial measures against any breaches, such as to report to the Commissioner and let him decide whether to notify the people concerned and so on. The authorization and the warrant

should not cease to have effect because of the breach. Therefore, we consider the proposals of Mr James TO inappropriate.

Madam Chairman, I urge Members to oppose the amendments to clauses 31 and 37 moved by Mr TO. Thank you, Madam Chairman.

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

MR JAMES TO (in Cantonese): Chairman, I think this reply is utterly ridiculous. Why? The Secretary talked about the matter in an offhand manner. In the case of non-compliance, it should be reported to the Commissioner. In the case of non-compliance, it should be handled separately. What is the purpose of reporting the case of non-compliance to the Commissioner? That means the power to decide whether the authorization ceases to have effect is vested in the Commissioner. This is the crux of the matter. The authorizing authority is the panel members who happen to be the group of Judges or the Chief Superintendent of police. The conditions specified by these people must be complied with. However, even non-compliance will not result in the authorization ceasing to have effect as long as the Commissioner specifies under which circumstances the authorization will cease to have effect and under which circumstances it will not. Or this is not what the Secretary means. Under certain circumstances, it is necessary to hit the palm, so to speak. And under some extremely serious circumstances, it is necessary to report to him. It is precisely because the authorization does not cease to have effect that the product can be kept and used as intelligence. I wish to ask, is this fair?

In the case where the Commissioner prohibits recording in the bedroom and toilet, but it is ignored by the officer concerned. However, the Commissioner may still give him an approval. This really makes me very puzzled. The Commissioner not only can approve the use of the information, it can also be used as intelligence. If this really is the case, to put it simply, it provides the greatest loophole and incentive for the front-line officers to breach the conditions carelessly. And in the end, all they need to do is to say sorry. Once the crime is detected, it will then be regarded as making amends for his fault.

If these loopholes are exploited by some of the more aggressive officers who go a bit too far, and who knowingly overstep the rules, our entire system of

law enforcement, discipline, accountability and public credibility will be all gone. It is hard to believe that the response of the Government is to report to the Commissioner in the case of non-compliance. I hope the public will listen carefully. The numerous amendments we have moved aim at imposing restrictions within a reasonable extent on people who do not adhere to the government system, as well as to provide them with the incentive for adherence.

Members please bear in mind that my amendment is talking about the ceasing to have effect and not a criminal charge. It only proposes the ceasing to have effect and not the payment of compensation. However, even this is not allowed. I am really very puzzled. What exactly is the concern of the Government? Is it the payment of compensation? Is it the payment of compensation or some other reasons that make it so concerned?

If the Government considers it is not necessary for non-compliance with such a solemn procedure to bear any consequences whatsoever, I believe, to a certain extent, it actually opens up a loophole for front-line officers, telling them indirectly or directly that it is not necessary to bear any consequences. Even in the case of non-compliance, although it surely has to be reported to the Commissioner, the authorization will not cease to have effect. And the information obtained can still be used and kept as intelligence. Is it what the Government wants?

MR MARTIN LEE (in Cantonese): Chairman, I wish to ask the Secretary, if the authorization will not cease to have effect, will the police officer who does not comply with the condition be awarded with a medal in the future?

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, 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): 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)

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, Dr Joseph LEE, Dr KWOK Ka-ki and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, 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, 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, Mrs Selina CHOW, 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, 23 were present, four were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 22 were present, 11 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 clauses 31 and 37 as amended 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.

CLERK (in Cantonese): Clause 33.

CHAIRMAN (in Cantonese): Mr James TO and Ms Margaret NG have separately given notice to move amendment to clause 33.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, I move the amendment to clause 33. This clause concerns the application of a warrant to retrieve devices such as listening devices that have been installed but have to be retrieved because their exposure may tip off the targets. Of course, the possibilities for the retrieval of devices vary. Either the operation ends or the operation is still in progress, but concern for the exposure of the operation leads to the retrieval of devices beforehand.

I propose to add two provisions, that is, subclauses (1A) and (1B) to clause 33. As it is necessary for the installed device to be hidden and covered up sometimes, it may have to break the walls and even damage an object to have the device properly installed. Therefore, the retrieval of the device will mean a repeat of the same process of causing damage again. Moreover, in the case where damage will result from the retrieval of the device, we consider an assessment of the risk and damage to the premises or object necessary. The assessment should be reported to the Judge, that is, the authorizing authority, before he decides whether or not to have the device retrieved. Members must bear in mind that even the retrieval of the device has to be carried out in a secret manner to avoid being discovered by the occupant. The damage eventually caused, be it big or small, should be assessed by the authorizing authority, that is, the panel member who happens to be a Judge, to see if approval should be granted for the retrieval of the device. In the absence of an assessment of the damage, there will be no grounds for consideration. If a warrant for the retrieval of the device is to be granted, pursuant to clause 36, incidents mentioned above such as the breaking open and removal of an object, the entry

onto any premises by the use of reasonable force, the mandatory provision of assistance and so on will occur. The device retrieval warrant will naturally give rise to the issues stated in clause 36. Regarding the issues resulted from the installation stated in clause 36, I have talked about them earlier. Similarly, the same issues will arise in the retrieval process. Therefore, to avoid doing injustice to the panel members (that is, the Judges), at least they should be allowed to make an assessment before deciding whether to issue the warrant or not. As once the warrant is issued, the necessary authority will be conferred instantly. In the end, if the blame is put on him, it would be very unfair indeed.

Second, subclause (1B) provides that if it is impossible to retrieve the device due to various reasons such as it is damaged or the action is deemed inappropriate, the authorizing authority should order to disable the function of the device. Why is it necessary to impose this regulation? An example is when the use of the listening device or other device ends after three months or a certain period of time, the ultimate course of action is to have it retrieved. However, if this is not possible, the authorities should order to disable its entire function. At least covert operations involving the intrusion on privacy and the interception of communications must end instantly. The first option is to have the device retrieved completely while the second option is to have the function of the device disabled. How to choose between these two options is, of course, up to the authorizing authority.

Moreover, when reason must be given for an approval, this will enable a record to be made for such operations. In addition, as the Government has told us that the merit of such operations is the possibility of the application for a judicial review, therefore, in the case of the absence of anything in writing, it is impossible to conduct a judicial review. Moreover, the Secretary said much earlier that the issue of a warrant had to be in compliance with the requirements specified in clause 3, which means the tests of proportionality, necessity and so on must be met.

However, only two factors are stated in clause 32 for the consideration of the issue of a device retrieval warrant. And these two factors are too brief, without the requirement to meet the test of proportionality or anything else. Please allow me to read it out. Clause 32 states that the application for the issue of a device retrieval warrant can be made if such devices have been installed and is still in or on the premises. Members must bear in mind that no requirement of meeting the tests of proportionality and necessity is specified here like that in

the clause governing the installation of devices. Regarding the requirement to meet the tests of proportionality and necessity, I consider the addition of more reasons in this area may be in excess of the arguments put forward earlier, to which I also disagree. However, there are just two factors in the clause and they are simply unable to provide sufficient reasons. If it is not clearly stipulated, the case will turn to "I believe the device has been installed in a certain place and it is still there. Therefore, approval is given to have the device retrieved." Such a practice does not involve any assessment, objective mechanism and factor of consideration that states that any object will be broken open, or the entry onto the premises will be gained through "acting in different disguises", or walls will be destroyed secretly, in order to have the device retrieved. How serious is the intrusiveness? And does it commensurate with the benefit of the retrieval of the device? A complete lack of the requirement of assessment and the setting out of criteria in the law is really a flaw. If this point is not to be added to this provision, the approval by the authorizing authority will be made without any criteria. I think it is also unfair to the authorizing authority in the execution of its duties.

Proposed amendment

Clause 33 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendment moved by Mr James TO and her amendment.

MS MARGARET NG (in Cantonese): Chairman, clause 33 specifies that in the case of an application to the panel Judge for the issuance of a device retrieval warrant, regardless of the issuance or refusal of a warrant, the panel Judge must give his reasons in writing. Second, regarding the entire procedure, the panel Judge may request or order a hearing to be held and any informant questioned, or determine the application without a hearing. And should a hearing be held, it will be held in private.

Chairman, Members are very familiar with my amendment and the principles and reasons therein. Chairman, I will not waste Members' time anymore. I only urge Members to support my amendment. Thank you, Chairman.

CHAIRMAN (in Cantonese): We will 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?

SECRETARY FOR SECURITY (represented by Secretary for Constitutional Affairs) (in Cantonese): Madam Chairman, the Government opposes the amendments to clause 33 proposed by Mr James TO and Ms Margaret NG.

The amendments to clause 33 proposed by Ms NG and Mr TO are similar to those corresponding provisions they have proposed regarding prescribed authorization, which include the requests for an assessment of the risk and questioning the informants. The authorities oppose the relevant amendments on the same grounds mentioned earlier.

Madam Chairman, I urge Members to oppose the amendments to clause 33 of the Bill proposed by Mr TO and Ms NG. Thank you, Madam Chairman.

MR JAMES TO (in Cantonese): Chairman, although Mr LAM is not the public officer in charge, I believe his colleagues beside him can provide him with assistance.

I wish to clarify one point. It is necessary to provide an extra reason for the application of the installation of devices for covert surveillance, including the test of proportionality or other assessment specified in clause 3. However, there is absolutely no such specification in this provision. If this is the case, what criteria should the Judge adopt? How will he strike a balance? If the provision excludes even the factor of risk assessment, what should the Judge take into consideration?

Moreover, if this is the case, the provision should state that it is based on some unknown reasons. This is because no particular reason is given. When the Judge has approved the application in the first place, does it not mean the application has already completely satisfied the conditions specified in clause 3, so that approval is not to be granted? Given the application has completely satisfied all the conditions, it is not necessary to put it down in writing. It is not necessary to put "completely satisfied" in writing, right? However, the question at present is, there is simply no condition at all. The provision only states that the relevant device is still there after the installation. How can the Judge give an approval on the basis that he believes the device is still there after the installation? This is not a reason at all. Therefore, the authorities must specify that the Judge should consider whether such an action will have an impact on privacy.

This situation is completely different from the one mentioned above. If even these conditions are not specified, it will really have nothing at all. If this is the case, I hope the officers sitting behind the Secretary, particularly Mr WINGFIELD, will listen carefully. There is a chance that it is unable to meet the requirements stated in Article 30 of the Basic Law. The reason is that it is possible to be intrusive during the entire process from the installation to the retrieval of the device. It does not mean that as the installation of the device is less intrusive in nature, so the retrieval process will be likewise less intrusive. Both processes are equally intrusive in nature. If this is so, there are neither criteria nor reasons specified in the provision. However, we have been told that this is not the case in reality. There will be criteria when a judicial review is under way. However, when there is a lack of reasons behind these criteria, what is the use of a judicial review? How can we know the basis of the approval of the authorizing authority? It is simply impossible to have a judicial review. One of the possibilities is that once this is discovered, every application for judicial review will be successful. The second possibility is that the whole framework is actually in contravention of Article 30.

I hope the Secretary will take this as a warning. Today this is put down in the record for future reference. Should the entire legislation be "blown up" or successfully challenged in the future, or at least to the extent of this part of the legislation, I would think it is really a great pity.

MS MARGARET NG (in Cantonese): Chairman, I am greatly surprised to hear the response from the Secretary.

Chairman, our proposals to add some provisions to specify the reasons are amendments of principle which target at the procedures. Chairman, in fact, if the drafting of the Bill is not in such a repetitive manner, it is not necessary for us to repeat so many times and this is due to the similar procedures involved. However, the Bureau cannot offer us similar reasons previously given. For instance, in the process of an application, it is not necessary to provide reasons or for the applicant to be summoned and questioned by the Judge, all of which target at the covert surveillance operation soon to be carried out. However, as the operation is now finished, there is perhaps no need for secrecy and definitely no need for urgency. Therefore, reasons of a mere perfunctory nature given earlier no longer apply. The Secretary should at least explain why he considers it not necessary for the panel Judge to provide reasons for the issuance of a device retrieval warrant when on the contrary, reasons are required for refusal to issue a warrant.

Moreover, some of the rationales or ideas behind also cause me great concern. Does the Secretary think that as the privacy of the target person has been intruded once, that is, during the installation of the device, then the authorities will naturally have the right to intrude a second time? Or will the Secretary regard Article 30 of the Basic Law seriously so that every time when privacy is intruded, no matter if it is during the installation of the listening device or its retrieval after the operation, it is seen as an intrusion and fairness is owed to the person affected? If each case is to be examined on an individual basis and handled seriously, explanation should be given case by case.

Chairman, why have the authorities complicated the matter to such an extent that three provisions are drafted for every step so that there are scores of provisions laid before us now? The only positive reason I can gather is that the legal officers think every step should be handled independently and every factor considered independently. Therefore, great pains have been taken to clearly set out the provisions one by one. However, the Secretary has repeated only one sentence, and that is, it is the same as that mentioned before. Actually he does not need to tell us in so many words. Only the word "ditto" will do. However, this reply is not satisfactory at all.

Chairman, would the Secretary give a reply to the public once again. Does he think that the intrusion on privacy once during the installation of the device will naturally grant the officers a device retrieval warrant? If every operation is regarded as a solemn occasion and matters concerning the intrusion

on privacy are handled in a serious manner, different considerations should be given to different situations and we should be made aware of them. Or is he of the view that as the public will be kept in the dark anyway, so everything can be taken for granted? If this is the case, the enforcement of this Bill after its passage should give us even greater cause for concern.

Thank you, Chairman.

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

MR JAMES TO (in Cantonese): We have retreated ten thousand steps. This is particularly the case because Mr YING is here in this Chamber now, and he may keep following up the Code of Practice. In fact, I have another concern and hope it will be attended to by the authorities, that is, this provision is actually very unclear. For instance, after the issuance of the device retrieval warrant, pursuant to clause 36, it allows the entry onto any premises, putting up different disguises and so on. But clause 35(1) states that it only authorizes the retrieval of the device. However, as the entry onto the premises to have the device retrieved is approved, the officer responsible for the operation may think it is a chance of a lifetime to gain entry into the house of the target. It usually takes a warrant to force into a house, does it not? As he is inside the house to have the device retrieved, he may as well take a look and make a search casually. It does not mean he intends to steal anything. Just in case he spots any information or intelligence, he may as well take a look. And in case he notices someone suspicious, he may put him under surveillance as well.

Of course, if such conduct comes within the area of forbidden surveillance, it may be something wrong in itself. However, if no one notices his presence in the house to carry out surveillance from the time of his entry to his departure, he will not be found out at all. Unless he is so inept and the cat is let out of the bag, we have nothing to say. Otherwise, as long as he is an expert, he will get away with it. I believe the Code of Practice or the internal guidelines must specify that the enforcement of the device retrieval warrant only aims at retrieving the device and not gathering other information in the house of the target. An example is the finding of "category IV disc" brings about a charge against the target for possession of obscene articles which are unsuitable

for children. Will other powers come with the granting of such an approval, hence the interest of law-enforcement officers is aroused in various matters after they enter the premises? Therefore, I think this must be clearly specified in the Code of Practice or rules at other levels. The lack of clear specification in this piece of legislation shows that it is actually inadequate.

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

MS MIRIAM LAU (in Cantonese): The addition of new subclause (1B) to clause 33 moved by Mr James TO proposes that if the Judge refuses to issue the device retrieval warrant, he shall make an order directing the relevant head of department to disable the function of the device. I wish to point out that this arrangement may not be very necessary and may be inappropriate. This is because the application for a device retrieval warrant must be made after the prescribed authorization ceases to have effect. Moreover, in accordance with paragraph 112 of the Code of Practice, once the prescribed authorization is terminated, the relevant head of department must take any reasonable action as soon as possible to deactivate the device. Therefore, it is simply unnecessary for the Judge to approve the retrieval of the device. In accordance with the Code of Practice, it is the responsibility of the relevant head of department to deactivate the device as soon as possible. The English version is to "deactivate the device". As I do not have the Chinese version of the Code of Practice, I do not know the translation. But the meaning should be the same, that is, the device will be deactivated immediately. Therefore, I consider the addition of subclause (1B) proposed by Mr TO is completely unnecessary. Thank you.

MR JAMES TO (in Cantonese): Chairman, my response is very simple. First, the solemnity of an order made by the Judge and an instruction given by the Secretary to his subordinates falls into two different levels. Second, the Code of Practice was not yet released when I proposed this amendment. How did I know whether there is such a requirement in the Code of Practice?

Chairman, the deadline for submission of amendments is the 24th of last month. How did I know at the time whether there would be such requirements in the Code of Practice?

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, 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 Mr James TO's amendments to subclause (3) of clause 33, I will remind Members that if Mr James TO's amendment is agreed, Ms Margaret NG may not move her amendments to subclause (3) of clause 33.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendments to subclause (3) of clause 33 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 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 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 and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 23 were present, three were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 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): Ms Margaret NG, you may move your.....

MS MARGARET NG (in Cantonese): Chairman, sorry, I do not quite get it. Why are there 10 Members in favour and nine Members against? Sorry, I get it now.

CHAIRMAN (in Cantonese): Ms Margaret NG, would you please move the amendment to clause 33(3).

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to clause 33(3).

Proposed amendment

Clause 33 (see Annex)

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment to subclause (3) of clause 33 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 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 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 and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 23 were present, three were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 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): I now

MR JAMES TO (in Cantonese): Chairman, is it possible to have a joint voting of clauses 33(1A) and 33(1B) set out on page 19d?

CHAIRMAN (in Cantonese): Do you wish to have a joint voting?

MR JAMES TO (in Cantonese): Because both amendments are proposed by me.

CHAIRMAN (in Cantonese): I know.

MR JAMES TO (in Cantonese): I originally request for the amendments to be voted separately. But is it possible for me to request for a joint voting now?

CHAIRMAN (in Cantonese): Please sit down. According to the Rules of Procedure, your request should be all right as long as you are not asking to vote separately. I think there will be no objection from Members. Although it is not necessary for us to reach a decision on this, for the sake of democracy, I have to see if there is any objection. If there is no objection from Members, I will accede to the request of Mr James TO as it will save us a bit of time.

I now put the question to you again and that is: That the amendments to add subclauses (1A) and (1B) to clause 33 moved by Mr James TO be passed. Do Members understand? 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 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 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 and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 23 were present, three were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to add subclause (2A) to clause 33.

Proposed amendment

Clause 33 (see Annex)

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 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 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 and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 23 were present, three were in favour of the amendment and 20 against it; while among the Members returned by geographical constituencies through direct elections, 20 were present, 10 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 negated.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 33 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.

CLERK (in Cantonese): Clause 35.

CHAIRMAN (in Cantonese): Mr James TO and the Secretary for Security have separately given notice to move amendments to clause 35.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Chairman, clause 35 is the continuation of the earlier discussion on the device retrieval warrant. The clause specifies the

incidental power including the retrieval of the device, and in the case where some terms are included with the consent of the Judge, "acting in different disguises" is allowed such as the posing as a worker to do decoration works on the premises in order to have the device retrieved. Moreover, if it is necessary, some terms can be included by the authorizing authority to interfere with any property.

As I mentioned before, regarding acting in different disguises and the interference with property, I add in the clause the requirement of an assessment of the damage and the specification of the nature of the so-called "act in different disguises", that is, the conduct of the concealment and interference in general to the authorizing authority before the authorization is granted. As I have already put forward the relevant arguments earlier, I will not repeat them here.

Chairman, I move that clause 35 be amended.

Proposed amendment

Clause 35 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Secretary for Security to speak on the amendment moved by Mr James TO and his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, an amendment to clause 35 is moved in response to the recommendation of Mr TO to add the word "reasonably" before "necessary".

The Government opposes other proposals for clause 35 put forward by Mr TO. These proposals are the same as those for clauses 29(3) and 29(4). We consider the submission of an individual assessment of the risk and damage is not required for every term that authorizes the concealment and interference with properties in the authorization. This practice is inappropriate.

Moreover, in the case where the concealment and interference should be authorized by the terms set out in the prescribed authorization or warrant, the applicant will specify the nature of the relevant matters in the application, and the

authorizing authority will give its instructions in the relevant terms. Therefore, the amendment is unnecessary.

Madam Chairman, I urge Members to oppose the amendment to clause 35 of the Bill moved by Mr TO and pass the amendment proposed by the authorities. Thank you, Madam Chairman.

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

MR JAMES TO (in Cantonese): Chairman, some Members asked me on other occasions, what is the purpose of moving amendment to every provision?

Perhaps allow me to use this public occasion to explain what purposes it serves. This can be divided into different levels. However, I can tell Members that one of the lowest, the lowest level is as there are public records of these debates, should the panel Judges wish to understand the origin and developments of this piece of legislation and Members' concerns, even the Commissioner and the authorizing persons in the panel can have access to these records. When they are reading these records, they will find out that even though my amendment is negated, I have obviously dropped them a hint. When considering the approval of an application, the authorizing authority will give it a thought and ask the applicant, no matter whether he is an inspector or anyone, questions such as how is work to be carried out, whether people's property will be broken, how serious the damage will be and so on. As he has the right to ask, and he is aware of the particular concerns of the representatives of the public (that is, the Members), I believe if he is sensible and reasonable, he will ask a few more questions behind closed door in the dark.

Of course, not every matter will, as the Secretary said, undergo a very detailed assessment. However, the applicant at least has to try his best to provide explanations. Otherwise, approval will not necessarily be granted by the Judge. Therefore, in reply to the question from Honourable colleagues as to why I have put in so much effort and enthusiasm bringing in all the arguments and concerns and even moving amendments, my answer is in my view, all of these are of great importance.

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): Chairman, I have nothing to add.

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendments, I wish to make it clear that if Mr James TO's amendments are agreed, the Secretary for Security may not move his amendments.

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 and Mr CHEUNG Man-kwong 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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

Mr Martin LEE, Mr Fred LI, Mr James TO, Ms Emily LAU, Mr Andrew CHENG, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung and Mr Ronny TONG voted for the amendment.

Mrs Selina CHOW, 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, 21 were present, two were in favour of the amendment and 19 against it; while among the Members returned by geographical constituencies through direct elections, 19 were present, nine 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): Chairman, I move the amendment to clause 35.

Proposed amendment

Clause 35 (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.

CLERK (in Cantonese): Clause 35 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 35 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.

CLERK (in Cantonese): Clause 36.

SECRETARY FOR SECURITY (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 Schedule 4 together with clause 36.

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): Secretary for Security, you have my consent.

SECRETARY FOR SECURITY (in Cantonese): President, I move that Rule 58(7) of the Rules of Procedure be suspended in order that this Committee may consider Schedule 4 together with clause 36.

PRESIDENT (in Cantonese): I now propose the question to you and that is: That Rule 58(7) of the Rules of Procedure be suspended in order that this Committee may consider Schedule 4 together with clause 36.

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 of the Members present. I declare the motion passed.

Council went into Committee.

Committee Stage

CHAIRMAN (in Cantonese): Council is now in Committee.

CLERK (in Cantonese): Schedule 4.

CHAIRMAN (in Cantonese): The Secretary for Security and Mr James TO have separately given notice to move amendments to clause 36 and Schedule 4.

Committee now proceeds to a joint debate. I will first call upon the Secretary for Security to move his amendments.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 36 and Schedule 4 be amended as set out in the paper circularized to Members.

The amendment to clause 36 is proposed by the authorities in response to the recommendation of the Bills Committee to ensure all the conduct as set out in the provision is necessary for and incidental to the carrying out of the authorized operation, and if the use of force is necessary, it must be of a reasonable degree.

The amendment to Schedule 4 is consequential to the amendment made to Schedule 3, which states that other than the name and rank, the post must also be specified for the identification of the applicant.

The Government opposes the amendment proposed by Mr James TO for the same reasons in my earlier response to the amendments to clauses 29(6) and 29(7) moved by Mr James TO. Paragraphs (b) to (e) of clause 36 aim to clearly specify conduct necessary for and incidental to the carrying out of the authorized operation. An example is the temporary removal of an object and its return afterwards, such as a flower pot is returned after its removal to have the device retrieved. As the details of such operation cannot be predicted in many circumstances, the amendment of Mr TO to require specification and assessment beforehand does not work even if the efficiency considerations are put aside. Therefore, the authorities oppose the amendment.

Madam Chairman, I urge Members to oppose the amendment of Mr TO and support the amendment of the authorities. Thank you, Madam Chairman.

Proposed amendment

Clause 36 (see Annex)

Schedule 4 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Mr James TO to speak on the amendment moved by the Secretary for Security and his amendment.

MR JAMES TO (in Cantonese): Chairman, the changes made in the Secretary's amendment, such as replacing the term "force" with "reasonable force" and to

specify the post of the applicant in the affidavit, are all suggestions I made which he later accepted. These changes can also be found in my amendment.

The only difference, as the Secretary has said, lies in the assessment on the risk and damage that may arise. Despite repeated debates on this just now, I want to stress again that this so-called assessment on the risk and damage is not a very detailed and meticulous one but only a kind of general risk assessment. If even such an assessment is lacking and the authorizing authority is allowed to give approvals at its discretion, I would think this is in fact like doing injustice to them.

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause, Schedule 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?

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

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

MR JAMES TO (in Cantonese): 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 the 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 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.

Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, 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 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 LEE

Wing-tat, 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 40 Members present, 28 were in favour of the amendment and 11 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 amendments moved by the Secretary for Security have been passed, Mr James TO may not move his amendments to clause 36 and Schedule 4, which are inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 36 and Schedule 4 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 36 and Schedule 4 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): Clause 38.

CHAIRMAN (in Cantonese): Mr James TO has given notice to move amendments to subclauses (2) and (5) of clause 38. In this regard, Ms Margaret NG has given notice to move amendments to subclauses (2), (5) and (6) of clause 38.

Committee now proceeds to a joint debate. In accordance with the Rules of Procedure, I will first call upon Mr James TO to move his amendments.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to subclauses (2) and (5) of clause 38. They have to do with the appointment and revocation of the appointment of the Commissioner. Now that we are deliberating clause 30 something, in fact, Members know very well that before this, the so-called authorizing authority was called members of the panel at the beginning and such members of the panel appointed by the Chief Executive happen to be Judges and they do not play any role whatsoever in the Legislative Council. The Government said that it had to extend its tentacles into the Courts to find several trust-worthy Judges because security checks are involved.

Now, the candidate for this so-called "defender" position, that is, the person responsible for monitoring is found, and his office is known as the Commissioner. In this regard, the Government also proposes that the office be appointed by the Chief Executive. Members must bear in mind that in this case, such matters will all proceed in secret. Therefore, (perhaps let us put it this way) this Commissioner is the only person — even though his monitoring power is very limited because the amendments proposed by me earlier have been negated — who can monitor the relevant matters on behalf of Hong Kong people with the authorization of the law. However, ultimately, all he can do is just to write reports. Even so, this Commissioner is still the only authority that can do something for the public in secret, however, this person is also appointed by the Chief Executive.

I believe since this Commissioner has to monitor government departments to see if there is any likelihood of abuse of power or dereliction of duty, will things get to such a situation that even the Chief Executive may have played a part in it or has given any instructions? I am not saying this will definitely be the case, however, from the viewpoint of mutual monitoring in a system, I think this Commissioner must have a more independent basis, moreover, he must be independent from the Chief Executive. If the authority making the appointment

is the Chief Executive, the Legislative Council, as the party representing the public, should at least have the power to veto or approve an appointment. Otherwise, the situation will just be like many other similar cases.

Let me give some examples. The Secretary was previously the Commissioner of the Independent Commission Against Corruption (ICAC), so other Honourable colleagues should now see the point. Theoretically, we think that the ICAC is under the command of the Chief Executive because it is under the direct orders of the Chief Executive and that is why it is called Independent Commission Against Corruption. However, just imagine this: if it is really the Chief Executive who gives the orders to the ICAC so that it is turned into the so-called "East Yard" and "West Yard", that is, intelligence agencies of China in the past, in that case, how can we carry out any monitoring? In that case, the situation will be such that what should be investigated will not be investigated, and what should not be investigated will be investigated arbitrarily, so, what can we fall back on? To some extent, the present system relies on the ORC, that is, the Operation Review Committee, the purpose of which is to check all the files in secret to see whether it is justified to open such files, whether they are cases that should be investigated, whether the cases that should be closed, whether the Secretary for Justice also holds the same view, and whether due diligence has been exercised in carrying out investigation on the strength of evidence obtained. However, this Committee is only appointed by the Chief Executive, so, Members should have some idea.

Likewise, if the Chief Executive really turns out to be someone who will abuse his power, since he can direct the ICAC to take actions and at the same time, he can also appoint people he trusts to become members of this Committee, as a result, anything unfavourable to the Chief Executive will not be uncovered. The rationale is the same. Similarly, what we are concerned about now is that investigations into matters involving public security or other crimes, especially those on activities that of a political nature, such as processions or assemblies, it is very likely for the Chief Executive to do such things.

Therefore, we should give independence to the role of the Commissioner. However, the Commissioner will not simply descend from the sky. One way is to let the Judiciary make the appointment. Since he is responsible purely for executive or administrative duties, at one point, I considered that he should be appointed by the Chief Justice of the Court of Final Appeal. However, subsequently I considered that this is also not very appropriate either. The most

appropriate arrangement is to give the Legislative Council the power to endorse the appointment. In fact, such power of endorsement is not without any precedent. There are indeed precedents. To give an example, this Council also plays a part in endorsing the appointments of the Chief Justice and other Judges of the Court of Final Appeal, as well as the Chief Judge of the Court of First Instance. From 1997 to now, this Council has already exercised this power of endorsement several times.

Why do we attach such great importance to the independence of the Commissioner? This is because if the Commissioner can have the approval of the Chief Executive and the legislature also gives its endorsement, he can at least be more independent in nature and can also be accountable to the legislature in a very indirect way. Besides, if he can obtain approval from several authorities, the public will be more reassured and will consider him a highly esteemed person and his integrity, character and ability will also be widely trusted. This is particularly important because he is the sole means of monitoring for members of the public all the activities carried out in the dark.

I think if the Government can make a breakthrough in this regard, the public will have greater confidence in it. However, if the Government wants to oppose this power of endorsement — and Members should bear in mind that this does not involve any confidential information or anything else and it is just an endorsement of the appointment — if the Government is still unwilling to do so, the only conclusion I can draw is that the Government wants to give itself some room for manoeuvring. This means, the situation created by the Chief Executive is such that the people at the forefront is appointed by him and so are those at the back, and the work done by underlings is also directly under his command because pursuant to section 4 of the Police Force Ordinance, the Police Force is directly under his command. In other words, if the Chief Executive is one capable of abusing his power and position and if he wants to take those actions, there will not be any safeguard for members of the public.

Proposed amendment

Clause 38 (see Annex)

CHAIRMAN (in Cantonese): I now call upon Ms Margaret NG to speak on the amendments moved by Mr James TO as well as her own proposed amendments.

MS MARGARET NG (in Cantonese): Chairman, my amendment mainly targets subclause (5). Under the present Bill, the Commissioner is an eligible Judge appointed by the Chief Executive. Eligible Judges include serving Judges or former Judges and they can come from the Court of First Instance, the Court of Appeal or the Court of Final Appeal.

Chairman, the legal profession has strong views on the arrangement of including serving Judges among the potential appointees. If we look at this from two perspectives, firstly, we have already expressed strong dissatisfaction with the appointment of panel Judges because doing so amounts to forcing some Judges of the Court of First Instance to spend a lot of time on work that is inappropriate and incompatible with their capacity as judicial officers and the judicial procedures. As a result, the capacity, the elevated status, image and work of Judges in the Courts will be called into question by the public and their impartial status will be affected.

Chairman, we understand that at present, it seems only the Judiciary can command a high degree of confidence from a wide spectrum of the general public in the SAR. However, is it necessary for the authorities to turn a department most trusted by the public into one that the public will increasingly mistrust on account of this? If the candidate to be appointed is a retired Judge, we will not have any opinion on this. However, the damage caused by appointing a serving Judge will be very great and it will even be greater than appointing a panel Judge. The reason is that a panel Judge will only be aware of the applications for some of the cases.

Chairman, I have said earlier on that according to the present figures, each panel Judge only have to deal with about 20 cases or more each month, however, as one person, he is only dealing with some of the cases whereas nearly all cases will fall within the scope of the cases to be examined by the Commissioner as he will examine the cases he picks by random. Therefore, his relationship with the law-enforcement agencies are in fact even closer and his relationship with the entire executive authorities and even the Chief Executive are even closer and he knows even more. So what will become of his status? He will be mistrusted even more, moreover, in the information provided to us by the Bureau, it is stated that the Commissioner will do his work fulltime and he cannot serve as a Judge in the period concerned.

Chairman, earlier on, when I moved my amendment which provides that panel Judges cannot hear cases at the same time as they work as panel Judges, the

Bureau was opposed to this, saying that this will impose an additional burden on government resources. However, with regard to the Commissioner, even the Government itself thinks that the Commissioner should no longer hear cases because his workload will actually be very heavy. Given the nature of such activities and his close relationship with the executive authorities in such a secretive setting for three years, how can a Commissioner who has completed a three-year term resume duty as an ordinary Judge? Why not ask the Chief Executive to appoint the Secretary for Security as a Judge? We hold such strong views not because we harbour any misgivings about the Secretary for Security himself but that the capacity of a Judge is actually not compatible with that of a Commissioner, as a result, judicial independence and the image of the Judiciary as having an elevated status will be compromised.

Chairman, in overseas countries such as the United Kingdom, when a Judge plays a monitoring role in covert surveillance, he does not have any direct relationship with the executive authorities. In such a system, the ministers are responsible for granting authorizations to the executive authorities. I have also said earlier on that a committee comprising members of the legal profession is responsible for investigation and examination. If the committee finds that there are problems, it will refer the case to a Judge for him to make a ruling as the judicial monitor.

Therefore, the Judge is usually a Justice of Appeal of the Court of Appeal. Although the law in the United Kingdom permits the appointment of serving Judges, the judiciary is not in a position to decide whether an appointment should be approved. However, when the judiciary recommends candidates, it is beyond dispute that a retired Judge will be appointed. If a retired Judge is appointed even in this system involving two separate components in the United Kingdom, it hardly needs saying what our present system, which is so direct and comprehensive, should be like. In addition, this person will hold discussions with various law-enforcement agencies in the executive authorities. He is not the Commissioner of Police or the director of an intelligence bureau. If this person is to revert to the Judiciary to serve as a Judge in the future, this will be absolutely inappropriate.

Chairman, seen even from a practical point of view, this arrangement is also totally impractical. The main reason is that, as we have said in our discussion on panel Judges, when the panel Judges are serving in such capacities, at least, they should not hear any case relating to covert surveillance or the interception of communications that they have approved or approved by any

other person, and they must not hear any criminal cases even. If Members reflect on this, since it is possible that the Commissioner will come across nearly each and every case concerning covert surveillance and the interception of communications, how can it be possible for him not to avoid arousing suspicion in each case? This will be particularly the case for Judges of the Court of Appeal and such a situation is even more inevitable. The number of Judges dealing with cases that come before the Court of Appeal is even smaller and the scope of the cases that they will hear is even broader, so such an arrangement is even more inappropriate for them.

Chairman, no matter in practice or in principle, this is a matter in which there is no alternative and which should not be done. Therefore, we think that the only acceptable course of action is to appoint a retired Judge. We do not wish to see the Judiciary being encroached upon by the executive authorities time and again and its officers being recruited so that the executive authorities can gain credibility for their actions.

Chairman, in fact, I still have another practical reason. At present, it is stipulated in the legislation that the appointment must be a serving Judge and he must be a full-time Judge. This is also the case for panel Judges, who must be full-time Judges, moreover, they should be experienced Judges. Members may consider how many Judges there are in the Court of First Instance at the moment. Are there 20 or 30? There are only very few such Judges. When it comes to the level of the Court of Appeal, the number of Judges is even less. However, the authorities want to recruit all the experienced full-time Judges to work on cases of investigation involving the interception of communications and covert surveillance. However, if there is a shortage of manpower in the Court, what should be done? Temporary Judges will be appointed. Some Judges in the District Courts will be identified to serve in the Court of First Instance temporarily, or the Judges in the Court of First Instance will serve as Justices of Appeal temporarily.

Chairman, if this is not straying from one's proper pursuits, then what is it? The reason for establishing the Judiciary is to hear cases and serve the public. However, the authorities do not allow the best Judges to do their normal line of work in upholding justice and safeguarding the rule of law, instead, they are asked to do investigation work. This is utterly unacceptable. Therefore, Chairman, we think that if the legislation provides that the person shall be a serving Judge, then he must be a full-time officer and it is not possible to treat a

temporary appointee as a full-time Judge. In view of the above reasons, we believe that the appointment of a serving Judge cannot be considered.

Chairman, maybe someone will say, in that case, a serving Judge should not be appointed and the Chief Justice should be requested to always recommend a retired Judge. However, Chairman, for such an important matter, particularly when the situation in this SAR is so special, I believe we have to set these principles down very clearly because such close encounters cannot be found at any other place. Therefore, we must insist on this point.

Secondly, Mr James TO has also proposed an amendment to amend subclauses (2) and (5). Why is it necessary to make such an amendment? This is because subclause (2) states that the Chief Executive shall depend on the recommendation of the Chief Justice for the appointment of the Commissioner. This is applicable to both former and serving Judges, even to retired Judges as well. When we were dealing with the row concerning the Equal Opportunities Commission, we learned that if an appointment involves a retired Judge, the best course of action is to first consult the Chief Justice. Therefore, when making an appointment, it is appropriate to consult the Chief Justice. However, when it comes to subclause (5), if the Commissioner is a retired Judge, the Chief Justice should not give any recommendation on the revocation of appointment because the Commissioner is in fact an administrative officer and he is someone exercising executive power. Therefore, on this point, Mr James TO and I hold the same view and we believe that the Chief Justice should not play any role in this regard. Instead, when the Chief Executive wants to revoke the appointment of the Commissioner, he should cite very clear reasons and set them out in writing. Furthermore, if the reasons are insufficient or improper, the incumbent can apply to the Court for a judicial review if he is removed from office. Only in this way can the impartiality of the position be maintained.

Chairman, from a most practical viewpoint, if the decision to appoint a retired Judge is not made as soon as possible, then a lot of checkpoints and safeguards cannot be established either. However, even if we do not consider this from a practical viewpoint, this matters even more when seen from the viewpoint of principles. We believe that this point must be stated in writing clearly. This position will involve comprehensive, profound and intimate interaction with the executive authorities day after day and will handle sensitive issues relating to covert surveillance, interception of communications and giving

directions to the executive authorities on how to violate the rights of members of the public, hence, it will be the best if the candidate is not a Judge at the same time.

Just imagine, after three years, will he get promoted, transferred or remain in his position without getting promoted? How would other people look at him? How would having served as the Commissioner affect his status among Judges and in the judicial sector and also his chances of promotion? As soon as the above issues are raised, one will find that there are many complicated factors. Therefore, frankly speaking, I am feeling really furious with such a framework proposed by the executive authorities because doing so is being totally insensitive to our judicial independence and this is also not being in the least sensitive to the fundamental principles. Therefore, the legal sector has strong opinions on this proposal.

In view of this, Chairman, I hope that Honourable colleagues will support our amendment to subclause (5), which provides that only retired Judges are the eligible persons who can serve as the Commissioner. Thank you, Chairman.

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

MR RONNY TONG (in Cantonese): Chairman, I have said before that what saddened us most regarding this Bill is its tremendous impact on the judicial system in Hong Kong and the principle of the rule of law.

Chairman, to understand the amendments to clause 38, first of all, we must pay attention to two clauses: first, the power of appointment of the Chief Executive is conferred by subclauses (2) and (3); second, at the same time we must pay attention to subclause (4) which states that the Commissioner shall be entitled to such remuneration and allowances as are determined by the Chief Executive.

Chairman, an internationally-recognized principle of the rule of law is — the internationally-recognized the principle of the rule of law that I am referring to is the rule of law principle confirmed by the European Court of Human Rights, the Courts in the United Kingdom and those in the United States — for an impartial and neutral adjudicator, be it a Judge or adjudicator, whose essential

elements of their appointment are based on three kinds of security, that is, first, the security of tenure; second, the security of pay; and third, the security of retirement.

Chairman, why is it necessary to have these kinds of security? This is just natural. Judges are also human beings. The degree of their neutrality is often affected by their tenure and pay. This Bill of ours precisely involves the two essential elements of tenure and pay, so, it gives people the impression that be it retired Judges or serving Judges, they will all be influenced by the executive authorities.

Chairman, in the original text, the SAR Government has proposed that both serving Judges and retired Judges may be appointed. However, both options are not acceptable. Why? It is because there is absolute security for the tenure and pay of serving Judges and it is free from any influence of the executive authorities. If they are removed and placed in another setting, so that their tenure and pay are under the influence of the executive authorities, not only will this destroy the existing judicial system, but they will also be placed in an unacceptable position. Moreover, although they are serving Judges, both their neutrality and autonomy will be called into question by then.

As regards retired Judges, they will be considered to be even more susceptible to the influence of tenure and pay. Judges are human and retired Judges are more so human. When their tenure and pay are entirely under the control of the executive authorities, their neutrality will definitely be queried. Chairman, the Government has repeatedly stressed that in this Bill the Commissioner is the ultimate gatekeeper for the basic rights of Hong Kong people as stipulated in the Basic Law. This ultimate gatekeeper has to assume an elevated status and a neutral position in order to win the confidence from the community. To place him in a position where both his tenure and pay are under the control of the executive authorities will never serve to establish the neutrality that can inspire public confidence.

Chairman, conversely, our proposal is just to enhance the protection of one of those elements, that is, the security of tenure, in the hope that it will not be so easy for the Chief Executive to give the Commissioner the boot. We must understand that if the Commissioner is doing a good job, he may challenge the operation, decisions and actions of the executive authorities every day. Therefore, the Commissioner is subject to immense pressure. We only hope that adequate protection can be given to the appointment mechanism designed for

him. I would like to ask the SAR Administration in turn why this amendment is unacceptable? Can you give any ground to prove that this proposal is unacceptable? As this proposal will only enhance the credibility of the existing system and the neutrality of the Commissioner, why is it unacceptable?

Chairman, when the authorities cannot answer such obvious and pointed questions, it will only give people the impression that the authorities in fact harbour some sort of selfish motive, hoping to control the Commissioner through tenure and pay. I hope this is not the case. I hope the authorities do not have such a selfish motive. I also do not wish to see the authorities think this way. However, if this is not the case, why is the Secretary reluctant to accept such a fundamental amendment so constructive to the system? At the same time, I also hope Honourable colleagues who intend to vote in support of the authorities' provisions or those who intend vote against the amendments of Ms Margaret NG and Mr James TO to do some soul-searching and introspection: do we need a ultimate gatekeeper who is neutral and credible, or are we going to put him in the position in which he can be controlled by the executive authorities? We only have to ask ourselves: if we really want this system to be a success and this Bill to work, should we support the amendment proposed by Ms Margaret NG?

MR MARTIN LEE (in Cantonese): Madam Chairman, in fact, the Government will certainly not support these two amendments. The reason is very simple and the Government's design is very clear. The Government simply wants to find someone in the judicial sector with high esteem and credibility, who may be a serving Judge, to work for the Government. Obviously, this person will work for the Government. Moreover, regarding his appointment or revocation of appointment, why is the Government so keen on opposing the Legislative Council to let the Council give its endorsement? This is precisely because the way which the Government considers whether this Commissioner is competent or not is the exact opposite of that of the public. If the Commissioner approves any application and approval is given to just about any application, even those that should not have been approved, then, he will surely be reappointed. Conversely, if he deals with the cases very carefully and they will be rejected or disapproved there is any slight irregularity, he will make it very inconvenient for the Government as it cannot carry out bugging on the people it likes to bug. As a result, it will make the police and various departments very dissatisfied with him.

Therefore, regarding this aspect of gate-keeping, we think that it should be the responsibility of the Legislative Council because it is on the side of the public and they share the same perspective. If a Judge does his work carefully — he is not a "Judge" but the "Commissioner" and if he does his work carefully, — the Legislative Council will support him. However, if he always sides with the Government and is absolutely obedient like a civil servant, in that case, the Legislative Council will not give its endorsement. This is why Mr James TO voiced such a view earlier. Although the existing system in Hong Kong does not require that the Government must gain the endorsement of the Legislative Council on the appointment it makes, the appointment of Judges to the Court of Final Appeal does require the Legislative Council's endorsement. Therefore, this proposal can be considered a new measure.

However, is there any other alternative available? If we want to guard this gate and monitor the Government, what alternative is there? Mr James TO and Ms Margaret NG have already done their utmost a number of times and their proposal to let the Privacy Commissioner to guard this gate was not approved, so, who else can guard this gate?

Of course, the Government does not want any gatekeeper at all, therefore, I know that the Government will definitely ask the royalist camp to oppose the amendments of these two Members and support the amendment of the Secretary of Security. In fact, I may just as well drop this sentence. Madam Chairman, it is like this every time. If the royalists want the meeting to end early or the Government wants the meeting to end early, I can also drop this couple of sentences because they are said on every occasion. However, even without stating it, we all know about it. We will all know about it after they have entered the Chamber. If it is an amendment proposed by Mr James TO, vote against it; if it is an amendment proposed by Ms Margaret NG, vote against it; if it is an amendment proposed by the democratic camp, vote against it. However, if it is an amendment proposed by the Secretary, then vote for it. There is no need to state it. In fact, the royalists are by now very well trained. Given that there are so many people guarding over them carefully outside, what is there to be afraid of? This sentence can also be dropped. Do not accuse us of filibustering. We have not done that. They are the ones who filibuster.

Looking at Ms Margaret NG's amendment again, in fact, just as I have said during the resumption of the Second Reading debate, this is precisely a question of the separation of powers. Perhaps let me say a bit more here.

When a Member of the Legislative Council wants to become a Director of Bureau, he has to resign from the position of a Legislative Council Member. Therefore, Members of the DAB may not be very keen on accepting appointments by the Government as they are afraid that they may lose when elections by universal suffrage are held. Similarly, Members of the Legislative Council cannot serve as temporary Judges at the same time, not even during the summer recess. When I was a temporary Judge, I had not yet entered the former Legislative Council. However, after winning in the Legislative Council elections, I can no longer serve as a Judge.

Therefore, Legislative Council Members cannot take up posts such as ministers, Directors of Bureaux or temporary Judges. Conversely, government officials also cannot take up any judicial posts at the same time or serve in the Legislative Council at the same time. That means a Director of Bureau cannot join the Legislative Council. Even when he is here, he cannot cast any vote. He can only speak but he cannot be a Member. As for the Judiciary, a Judge of course cannot join the Legislative Council at the same time. This being so, why can he join the Government at the same time? Why can this tripartite relationship — the entire concept and system of the separation of powers — be destroyed all of a sudden? If a serving Judge is invited to join a government department to deal with government work, in fact, other Judges would avoid him if they meet him, so, please do not condemn him to such a situation. How will Judges regard him? Originally, he was their "buddy" — he was also a Judge, however, he has been transferred to another department to deal with government work. This concept of the separation of powers is actually stated clearly in the Basic Law and it has been fully accepted and affirmed by the Court of Final Appeal on a number of occasions.

Therefore, Madam Chairman, I hope (however, this hope can never come true) that the Government will at least understand this. Frankly speaking, on such matters, I do not pin any hope whatsoever on the Government or the royalist camp. However, Members should at least know that when pressing the button, if they support the Government and oppose the amendments proposed by Mr James TO and Ms Margaret NG, they should know what they are doing. In doing so, they are acting as accomplices, assisting the Government in destroying our concept of the separation of powers, thus seriously undermining our rule of law.

Therefore, we have to at least support Ms Margaret NG's amendment and cannot allow the post of the Commissioner to be taken up by a serving Judge. If

it is a former Judge, at least no such problem will exist. We cannot allow a Judge to work for the Government for some time, then switch to dealing with the Court's duties and hearing cases at other times. Frankly speaking, if a serving Judge is transferred to a government department to work for several years and then he resumes his duties as a Judge and hears a case involving litigations between members of the public and the Government, how can the public possibly feel at ease? Justice must be seen to be done. What is a Judge supposed to do if the Government does this sort of things? I believe the Judge himself will also feel ill at ease with handling such cases.

Therefore, Madam Chairman, I can only hope that Members of the royalist camp who are listening to our speeches in this Chamber or Members who are now watching the television in the Ante-Chamber, that is, those who are not watching other television programmes, can at least understand that later on, when they come in to press the button to oppose the amendments of Mr James TO and Ms Margaret NG, they will know what they are actually doing. Thank you, Madam Chairman.

MS EMILY LAU (in Cantonese): Chairman, I speak in support of Mr James TO's and Ms Margaret NG's amendments to clause 38.

Chairman, I strongly agree with my Honourable colleagues' comments that the authorities' proposal will really affect our Judiciary. In fact, as far as the present design of the entire Bill is concerned, the authorities can say that not many people have voiced their opposition. One of the reasons is that the authorities have told the public that Judges will be responsible for considering these applications, and, if there is any problem, a Judge will serve as the Commissioner.

Chairman, as we all know, among the executive, legislature and judiciary branches, the judiciary enjoys the highest public esteem and there are of course reasons for this. However, I do not wish to see the authorities do anything to affect the judiciary. I can now see, and I also agree with what my Honourable colleagues' comments that it is absolutely possible that such a crisis will occur. When a crisis occurs, what good is it to anyone? I think the authorities are very anxious to find a proposal that can be passed quickly and is acceptable to members of the public. Therefore, the judiciary is exploited for this end.

It is not a problem to let the Court deal with some matters if they are dealt with fairly and justly. Therefore, at that time, many members of the public thought that what the authorities meant was that when applications had to be considered in future, it would be dealt with by the Courts. However, that is not what the authorities will do. Instead, they will find several Judges and another procedure and another name will be adopted. It is totally different from the judicial procedures. Many members of the public may not have followed up this matter very closely and they do not realize that the authorities have suddenly changed direction and the authorization is actually not judicial authorization. Therefore, you people also called it Judge's authorization now.

Therefore, regarding this Commissioner, as has been said many times, his power is in fact not very great. There are a lot of things that we think that he will be capable of doing, however, in fact, he is not. Therefore, we hope that this appointment can be more independent so that people will not consider him a tool of the executive authorities. If only the Chief Executive is given the power of appointment, then please take a look at the Equal Opportunities Commission (EOC). The EOC is now really in shambles. I will be going to the United Nations next week. I will surely relay this matter to the United Nations Committee on the Elimination of Discrimination Against Women. Therefore, choosing a person for appointment is very important. If the wrong person is entrusted, this will really ruin the whole organization. Not every one of our Judges is that sagacious. I believe that if you want to select the candidates from them, it may cause a lot of troubles to many organizations. In that event, we really have to thank the authorities.

Therefore, Mr James TO's proposal to require the Legislative Council to endorse the appointment is a good measure. Chairman, you may have also noticed that recently, there have been a lot of discussions concerning RTHK going to be independent and how a governance committee can be established for it. A lot of people also proposed that the assistance of the Legislative Council could be sought in making nominations. In other words, people believe that in this way, checks and balances can be put in place.

Just now, it has also been mentioned that Article 73(7) of the Basic Law is about the removal of the Judges of the Court of Final Appeal and the Chief Judge of the High Court and we also play a part in such matters. This is nothing extraordinary. Why are such matters included in the Basic Law? The aim is to make people feel that there is some sort of independence in the arrangement

and there are some checks and balances. Therefore, I think that this proposal made by Mr James TO should be considered, otherwise, if all the provisions involve only you people, how can members of the public have confidence and think that this Commissioner will really be very independent in carrying out his examination and approval duties?

Moreover, I also agree with Ms Margaret NG's comment that when he is to leave his office, the Chief Justice should not be requested to give his opinion and the Legislative Council should do so instead. In fact, I also agree with Ms NG's view. Since he has already left the Judiciary, a former Judge who will not revert to the Judiciary and become a Judge again should be identified. This will perhaps reduce the damage caused. Otherwise, if the authorities appoint a Judge to do the job but after several years in the post, and after he has already developed a close relationship with the executive authorities, he returns to the Court, what actually do the authorities want? Just say it frankly please.

Whether it will be passed or not, Members in fact already have the answer in their minds. It is now Friday evening already. All the amendments moved by Members have not been passed. However, be it as it may, this Bill will surely be passed. However, for some matters, if they really happen, I believe all the officials sitting here will not be able shoulder the responsibility for the impact that they will have on Hong Kong, the Judiciary here and the reputation of Hong Kong. In particular, we all know very well that the Judiciary is very important to the stability and prosperity of Hong Kong and its success. I do not want to see it affected or perhaps even ruined by what you people do.

Therefore, I really hope that Members will really think carefully. The authorities would of course call on Members to vote down all Members' amendments so that they will lose completely. However, I hope that in future, when the authorities put things into practice, they would still look for some retired Judges. Ms NG is right in saying that since the number of Judges in the High Court is already so small, if you still want to ask them to take up these positions, at present, they are already experiencing a shortage of manpower, so what on earth do you want our judicial system to become? This is because there is now such a big problem that has to be dealt with, however, the authorities are not dealing with it properly, instead, they poke their fingers into another area and meddle with it even though it has been doing fine. Sooner or later, these areas will fall apart. What good will this do to anyone?

Therefore, Chairman, although we know very well that we will lose, I do not think that we are wasting time now. This is because if we make things clear, it would be the best if they do not happen in future, however, if they do, people will say, "You had been told years ago but you did not listen. Now that something goes wrong, do not say that this is just wisdom in hindsight in other people." In fact, these matters are very simple and obvious. You only have to talk to the judicial sector and the legal profession. I wonder if the Secretary for Justice has thought about it or not. Is it really the case that these problems will never occur? We think that the important things are: first, leave the Judiciary alone. You should not always go there to find your candidates when some matters arise and ask that people from there be provided to help you. The authorities always think that way. Second, the Commissioner appointed must have credibility. He must be independent and the public must find him trustworthy. If even these several requirements cannot be met, this Bill would be really a great failure.

MR LEUNG KWOK-HUNG (in Cantonese): This centralization of power by the Government for the sake of convenience or amassing all powers in its hands does not begin today. I have also said in this Chamber that in the early days after the establishment of the Independent Commission Against Corruption (ICAC), its heads or senior officers were all employed on contract terms and when they left at the end of their terms of office, some money would be paid to them as compensation so that they could go to some far-away places and they were also told never to come back to Hong Kong again.

However, nowadays, after officers of the ICAC finish their terms of service, they can revert back to the Civil Service. Man, in that case, how can they carry out investigations? It is possible that they have investigated their superiors before. When the ICAC has carried out such an excellent reform — it is excellent for the Government, so all along, we do not say anything and we think that there is no problem because we have trust in them. If the ICAC is independent, it should rarely let its officers revert to the Government on completion of their terms of office. However, as far as I can remember, it seems that this is how things are like nowadays, that is, when their terms of offices have ended, they can revert to the Government and continue to work in it. Some of them are now working as Secretaries and others may work in lower-ranking positions. However, in ancient times, there were what was known as nine-provincial procurators and they had the almighty imperial sword, so it was possible to apply a strict and merciless hand. If we now say that after

serving as a Judge and monitoring irregularities in the Government, one can revert to the Civil Service, of course, this will not do.

However, it is exactly what this Judge will do. It is what this Judge will do. This is very simple. Do not tie your shoes in a melon field and adjust your hat under a plum tree to avoid suspicion. This is conventional wisdom, is this not? That is to say, when one passes by a melon field, one should not do certain actions because someone is keeping watch. For example, one should not fiddle with the shoes, that is, to tie the shoe-laces or put on ones shoes, right? When passing by a plum tree, one should not fiddle with one's hat because if one does in the slightest way, one will be accused of stealing plums or melons.

In fact, Judges belong to a different system in the separation of powers. He is now requested to go to a certain side, then go back to the side from which he originally came. I remember I have repeated many times that I do not want to make conjectures about other people's soul, however, the problem is that those people who ask a Judge to go from one side to another are inviting people to make conjectures about his soul because he will become someone belonging to two sides. This is just like the protagonist in a film called "Man on the Brink". I wonder if Members have ever watched it. It is a story about a police undercover agent. However, I am really too old now, so I cannot even remember anything about "Infernal Affairs" and I can only remember this film called "Man on the Brink". The story of the "Infernal Affairs" is that a police officer cannot return to his job as a police officer after working as an undercover agent because the police think that he is a bad guy but the bad guys think that he is a police officer, so in the end, he finds himself in an impasse. Of course, in Hong Kong, a Judge belongs to a privileged class and it is a respected class. He will not find himself in an impasse as that particular police officer does, however, the problem is, after he has served as the Commissioner, he will really be spurned by both sides. Other Judges will think that this person has worked for the Government, so what should they do? However, people in the Government will think that this person has served as a Judge before and if he works in a government department and knows about the things there, what will happen if he works as a Judge again in the future? I think some Honourable colleagues have probably not thought about this aspect.

To put it in the simplest way, if I apply for a judicial review of government actions, if someone who has worked for the Government for six years is

responsible for hearing my case of judicial review, of course, I will object to this, will I not? There is no need to elaborate further. This is a very simple matter and let us use my personal experience as an example. In future, if such a system is established, when a Judge who has worked for the Government in this way deals with judicial reviews, I would say, "Not upon my life. I do not trust this person. He has worked for the Government and now, he is acting as a mediator who hears my dispute with the Government." This is a rationale that is as simple as ABC. When Jesus was tested with a ploy, someone showed him a coin and asked who the king was. He then said, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's.". Jesus was really quick-witted and you are stupid. In this way, he made clear that matters in the kingdom of God should be separated from worldly matters. Jesus is really quick-witted and you are stupid. In this way, he stated that matters of the kingdom of God had to be separated from worldly matters. Man, these people are now the king in their respective domains, however, you have mixed up their identities and you even want to convince everybody else.

This does not matter and we can do such a thing. However, had Ms Margaret NG and Mr James TO not spoken out, you would have been able to have your way. Had they not proposed these amendments, all the people of Hong Kong would think that this Government is great and this bunch of Members of the opposition are being anti-China, stirring troubles in Hong Kong and voicing opposition against everything, saying that it is not good enough even though a Judge will serve as the adjudicator. Today, after Members have spent some time telling the truth, and it is found now that this Government (even if I do not say that you are hiding a malicious intent) can actually be considered to be trying to "help the shoots grow by pulling them up" and doing a bad thing despite its good intention, is that right? Even though I do not call into doubt the Government's soul because I do not have any religious belief, you are still saying all the time that people are making conjectures about your soul. All right, now, we are not going to make conjectures about your soul. We are only saying that according to reason, this is how things should be like, so what do you think? Should you not also reflect on this?

By proposing their amendments here today, Mr James TO and Ms Margaret NG only want to remind you of one thing and that is, you have made a mistake. You have mixed things up. Do you know what the worst possible thing is? It is to mix rice with sand. If sand is added into a bucket of rice,

then this bucket of rice with sand added is given to you and you are required to glean the rice in it, you will be in for some serious trouble because by the time you have gleaned all the rice, you will have been starved to death. What the authorities are doing is to mix rice with sand. After sand is added, the good and the bad will be intermingled. This is how the situation will be like. Of course, in using the word "bad", I am not saying that Judges are bad guys. What I mean is that if you mix two different things together and then want to separate them afterwards, this will not be possible because it will already be too late to come back to it.

If you ask someone to do one thing for you, and that is to be the servant of the executive departments — let us not say slave, only a servant — then he leaves and becomes the person-in-charge again. How can such things possibly happen? Therefore, the problem is in fact very simple. If you wake up a little bit, you will accept this compromise which Ms Margaret NG had no alternative but to propose, that is, since she cannot oppose you, what she can do is to comply with your wish a bit and to go along with your proposal fully. However, can you look for a retired Judge to serve in such a position? Can you not even do so? Are retired Judges very short in supply in Hong Kong? Or do you think that retired Judges are too independent and they have nothing to fear, as a result, you cannot influence him by means of this appointment? You have to offer an explanation. Do retired Judges fail to meet public expectations? Are retired Judges too senile to handle the work? Retired Judges are just sitting around without anything to do. Although one cannot say that they are unemployed, now they cannot make contributions any more. This being so, we should let them make some contributions and this will be mutually beneficial and we can have the best of both worlds. However, our Government is saying that this is no good and we must comply with its wish.

Since the Secretary is a Christian, I will read out a passage of the Bible to you. It is the Book of Jeremiah in the *Old Testament*. I quote, "And seekest thou great things for thyself? Seek them not." I think you also know this passage in the Book of Jeremiah. Do not think that you are doing something great and try to go about it furtively. In this world, what is looking at us from above is not satellites but God. If you try to hold out against all odds and remain unreasonable, and if you are bent on having your way and reject Mr James TO's and Ms Margaret NG's amendments, it is really a sin. You have been talking about your wish to improve the relationship between the executive

and the legislature and strong governance for the people — this sin will be mutual distrust, bias and prejudice. What you are doing today is to make them worse.

Therefore, I think that the Secretary should request the Chief Executive, Mr TSANG, who also has a religious faith, to reconsider the matter. We can suspend the meeting to let you have a five-minute chat on the phone with him to discuss whether you should make any concessions. If you are willing to do so, I can implore the Chairman to do so. However, perhaps we should just forget it. I do not think you will be willing to do so. I can say it again. If you really make a call to Chief Executive TSANG, who is also a Christian, if he hears these words of wisdom from the Book of Jeremiah, he will probably say, "And seekest thou great things for thyself? Seek them not." I will make a request to the Chairman for five minutes to allow you to call him. The Chairman may scold me, however, in order to improve the relationship between the executive and the legislature and in order to make justice prevail, I will do my best. I call on the Secretary to think twice and consider the matter.

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

MR LEE WING-TAT (in Cantonese): Chairman, the purposes that I speak is: first, to state my position; second, to put things down on record. We all know that the appointment of the Commissioner is one of the key issues in this Bill. In fact I have not spoken much during the debates in the Bills Committee. This is only the second time that I speak. Therefore, the Secretary should know that we have no intention to filibuster.

Why do we think that this matter is so important? We have already taken great pains to point out that there should be checks and balances of power. Therefore, the drafters of the Basic Law, including our Central Government, also had the wisdom to state clearly in Article 73(7) of the Basic Law (Article 73(7)) that even the appointment of Judges of the Court of Final Appeal has to be endorsed by the Legislative Council. I believe the Honourable colleagues in this term of the Legislative Council or those in the former Legislative Council before 1997 do not and did not have any intention to create obstacles to such appointments by exercising this power. I also do not think that they want to make use of this power to create obstacles to the exercise of the power to appoint

Judges, or use this as a means to achieve any political design or to any political end by creating embarrassment or problems in the appointment of Judges.

I wonder if the Secretary, the Secretary for Justice or the Government has ever thought about why Article 73(7) is drafted in such a way. This is a way of drafting that is wise. Firstly, to some extent, the concept of the separation of powers is manifested. We all know that the executive is in fact the branch that holds the greatest power in the Government. However, it also knows that its powers should be subject to restrictions. Therefore, the Budget and all legislation shall be passed by the Legislative Council and officials are to be questioned by Members of the Legislative Council and they will be condemned by it when something serious happens.

Our Judges can examine whether acts done by the Government are unconstitutional. In fact, we also know very well about this design and it is not necessary for our Honourable colleagues to keep repeating such matters. This is in fact the "ABC" of political science or government operation. Unless the Secretary, the Secretary for Justice or colleagues in the Government think that this is not important, otherwise, if six or seven Members have voiced opinions of this nature, the Government must really reflect on this. Of course, I think that this debate cannot prevent the passage of amendments which are characterized by the Government's own way of thinking or the veto of Mr James TO's amendment. However, what can the authorities say when they debate with other people?

When we talk about the authority of the Government, there are two points. First, the Government is able to do what it wants to do. In this light, the Government can of course have all that it has tabled to the Legislative Council passed. Second, the Government is able to use its authority and convince others and secure their trust and agreement. This evening, I think the Government has only achieve the first point, that is, to pass the original Bill and veto the proposals made by Mr James TO and Ms Margaret NG. However, I do not believe that in doing so, the Government can convince many members of the public.

Hong Kong is not the only place that has such an experience. As I have said, apart from the Basic Law, it is also stipulated in many countries that the important political appointments should be discussed in their parliaments. I

remember in 1996, when we were still allowed to propose private Bills, we proposed a policy, that is, we hoped that the appointment of chairmen to important organizations should be subject to the approval of the Legislative Council. I remember that at that time, I was working in the Housing Authority (HA). Despite a lengthy debate, in the end, the proposal was not passed.

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

I think that this arrangement is not designed to reduce the powers of an executive-led Government as stated in the Basic Law or change the Government to a legislature-led one. This is not the case at all, rather, this is only a counterbalance to power. Therefore, on hearing the Government say that it would not agree to the amendments proposed by Mr James TO and Ms Margaret NG, we are of course very disappointed. I also hope that later, the Secretary will have the time to answer these questions, for example, how he can convince the public that those appointments have all secured the approval of the general public. Members have to bear in mind that the work done by this Commissioner is related to the exercise of statutory powers by the executive departments. We also must always remember one thing. When it is necessary to check and balance the powers exercised by the Commissioner, if the ultimate superior of the Commissioner, that is the Chief Executive, is a colleague of his in his department, this will make people doubt whether such a move is fair.

Many members of the legal profession are now present, in particular, Secretary for Justice Mr WONG. We often say that justice should not only be done but should be seen to be done. In the past, very few people would talk about this concept, however, thanks to the frequent discussions of this concept by our friends in the legal profession in the past decade, many members of the public now know that justice should not be done but should be manifestly seen to be done. Will the approach adopted by the Government at present make people see that this is done?

Therefore, Deputy Chairman, I hope that my speech can be put on record so that in future, when we debate this issue again, it can be seen that we have in fact insisted on this point. I also hope that the Secretary and the Secretary for

Justice can consider whether what they do can really convince the general public of Hong Kong. Thank you, Deputy Chairman.

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

MS MARGARET NG (in Cantonese): Can the Secretary be invited to comment?

DEPUTY CHAIRMAN (in Cantonese): I will invite the Secretary for Security to speak, however, if other Members wish to speak, I will first invite them to speak. Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Deputy Chairman, according to the proposal in the present Bill, a former permanent Judge of the Court of Final Appeal, a former or serving Justice of Appeal of the Court of Appeal and a former or serving Judge of the Court of the First Instance will be eligible for appointment as the Commissioner.

We learn from the Judiciary that the pool of retired Judges resident in Hong Kong is very limited. The provisions of the present Bill can create a wider pool of candidates and it will not unnecessarily limit the number of candidates. We think that it is appropriate to do so. Therefore, the Government opposes Ms Margaret NG's amendment as it will exclude all serving Judges.

As a matter of fact, there are many instances of serving Judges appointed to statutory positions, including the chairmanship of the Securities and Futures Appeals Tribunal, the Long-term Prisoners Sentences Review Board, the Post Release Supervision Board, and the Electoral Affairs Commission.

In view of the nature of the Commissioner's work and the estimated workload, we expect that a Judge who is appointed as the Commissioner will need to spend considerable time performing the relevant duties. We have consulted the Judiciary on the proposal that a serving Judge appointed as the Commissioner should not be assigned to hear any cases during the term of his

appointment as the Commissioner. The Judiciary has no objection to this proposal. Therefore, we think the conflict that Members are worried about would not occur.

Ms Margaret NG's amendment to clause 38(2), (that is, to amend the term "eligible judge" to "eligible person") is actually in line with her amendment on excluding all serving Judges from the pool of candidates for appointment as the Commissioner. Therefore, we are opposed to it.

The authorities also oppose Ms Margaret NG's amendment to clause 38(5). At present, the Bill provides that the Chief Executive may, on the recommendation of the Chief Justice, revoke the appointment of the Commissioner. This is consistent with the provision that the Chief Executive shall, on the recommendation of the Chief Justice, appoint the Commissioner. Ms Margaret NG's amendment, however, makes it possible for the Chief Executive to revoke the appointment of the Commissioner without the recommendation of the Chief Justice. However, the reasons for the revocation of the appointment must be given and such revocation shall be reviewable by a court of law.

The authorities are of the view that since the Chief Executive shall appoint the Commissioner on the recommendation of the Chief Justice, and based on the same mechanism, he shall also revoke the appointment of the Commissioner on the recommendation of the Chief Justice. Moreover, under the present Bill, there must also be a good cause for the revocation of the appointment of the Commissioner by the Chief Executive. We think that the present arrangement is also in line with other appointment arrangements.

There can be various reasons for revoking the appointment of the Commissioner, including personal reasons relating to the person concerned, so it is not appropriate to mandate that the reasons be stated or recorded.

We believe that since at present, the Chief Executive shall make decision on the revocation of appointment on the recommendation of the Chief Justice, this can already adequately ensure that the decision will be made after the relevant factors are considered. As regards the relevant decision, just as other administrative decisions, it can be subject to judicial review, therefore, there is no need to specify this in the Bill.

The Government also opposes the amendment moved by James TO to clauses 38(2) and (5) to the effect that the appointment or revocation of the appointment of the Commissioner shall be subject to the approval of the Legislative Council. We believe that the views expressed by Ms NG in her amendment are generally applicable. As we have explained to the Bills Committee, according to the Bill, the Chief Executive shall appoint the Commissioner on the recommendation of the Chief Justice. Since the Commissioner is a former or serving Judge at the rank of High Court Judge or above, we believe that the arrangement proposed in the Bill can be considered appropriate. This is also in line with the appointment arrangements for many other statutory positions.

Deputy Chairman, here, I call on Members to oppose the amendments to clause 38 moved by Ms NG and Mr TO and support the authorities' amendment. Thank you, Deputy Chairman.

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

MS MARGARET NG (in Cantonese): Deputy Chairman, first of all, I wish to respond to the number of points raised by the Secretary for Security. First, the Secretary said that the number of Judges eligible to be the candidates was limited. According to my proposal, serving Judges should be excluded. Ms Audrey EU has reminded me that there is no need to exclude them. If the Government wants to select a certain Judge, then that Judge can simply retire and he should not go back and serve as a Judge again. If the Judge concerned believes that this public office matters more than his public office in the Judiciary, he may as well resign. This is something that he can do and this is also the case for many positions.

Secondly, the Secretary cited other examples. Why did he still cite those examples? We have already said in the Bills Committee that, take the Post Release Supervision Board as an example, firstly, the office does not require a Judge to devote a lot of time; secondly, the work of the Post Release Supervision Board is also directly related to the work of a Judge because after a prisoner is released, how these people on whom Judges imposed sentences will turn over a new leaf is also relevant to the work of a Judge; furthermore, this does not have a

great impact on the public and it is not very high-profile office and it does not involve strong ties with the executive.

As regards the Electoral Affairs Commission (EAC), Deputy Chairman, frankly speaking, we have already pointed out a number of times in the Legislative Council that the present arrangement may not be appropriate. Even so, we are just talking about a commission. Even though the Judge concerned is serving full-time in the EAC, he is ultimately working under the public eye and each of his moves, such as whether he has done anything wrong, crossed the line or spoken anything inappropriate, or overstepped his capacity as a Judge, all these can be observed by us in public. However, this Commissioner has to maintain very close ties with the executive authorities in secret and he has to work like this every day. There is no way that the public can monitor him, so how possibly can the two be compared? Perhaps initially, this did not occur to the Government, however, since we have discussed this in the Bills Committee, why does it still insist on its own view and not give any response whatsoever to the reasons given in the Bills Committee?

Deputy Chairman, moreover, in the last part of his speech, the Secretary said that he opposed the proposal I put forward to eliminate the role played by the Chief Justice in revoking the appointment of the Commissioner. In view of my demand to exclude serving Judges, since he has opposed my proposal to exclude serving Judges from the outset, therefore, there is no need to support my amendment. However, in the Secretary's own amendment, both serving Judges and retired Judges can be appointed. If it is a retired Judge, he is just a member of the public who is appointed by the Chief Executive. The Chief Justice has a role to play only in matters relating to the candidate's past service as a Judge. If the Chief Executive appoints a member of the public, why is it necessary for the Chief Justice to play any part in the process?

Deputy Chairman, if we look at the entire Bill, in fact, a system that infringes the public's right and privacy of communication is adopted and then the Judiciary is used as the final guarantee. Ms Emily LAU is someone who is the most directly and closely in touch with the public and she is a lot more in touch with the public than I am. She asked why this Bill could not draw the attention of the public. Maybe some people will say that this is because a Judge is responsible for granting approval in the system and on hearing that it is a Judge, the public feels very much at ease. Therefore, similarly, when the public learns that there are panel Judges, Judge's authorizations and that a Judge will serve as

the Commissioner, they also feel very much at ease. In fact, if the system is a good and stringent one, we will still consider that in the final analysis, those Judges will still be doing work that is appropriate for them. However, if this is a system fraught with flaws and there is such a lot of latitude and law-enforcement officers can have their own say over such a lot of matters, but these matters will be submitted to these Judges for them to provide a guarantee on them, is this fair to the Judiciary?

We can see from many provisions in the Bill that for one thing, a panel Judge is involved in a very small number of cases, for another, he is doing his work in a setting in which he cannot communicate with any other people. As regards the Commissioner, as I have said frequently and there is no need to dwell on this any more, he is in charge of overseeing the whole system, however, his power is very limited. He cannot do more even if he wants to, moreover, he has to report to the Chief Executive. As regards whether he can publicize his reports, this will depend on whether the Chief Executive gives his permission.

Deputy Chairman, now I wish to say that in the entire Bill, what worries me most is in fact the issues relating to the Judiciary. However, it is not easy for the public to understand the issues in this regard because the public still have trust. Since the image of Judges is very positive, therefore, the public feels that Judges are fairly good people. However, in the professional sector, we are able to see even more and this is not what we think. Therefore, I hope that today, we are not just telling the public but also the people responsible for the SAR that we in the profession know that the system has to be protected in order to safeguard the rule of law, then this system can be used to protect people. If a lawyer really wants to protect the rule of law independently, even though in doing so, he may jeopardize his own interests, he still will do it. When he defends his client or contest something in Court, he should place his duty to the Court above all else. This may make the client who pays the fees to the lawyer very unhappy and he may even say that he will avoid hiring the lawyer concerned in future. In view of this, how can we make people in the profession do so? This will require making use of the system because the professional codes spelt out in the system require them to do so.

Similarly, the Judiciary should also protect Judges and we should adopt a system to protect Judges by stipulating what they can do and what they cannot, how the tradition is like, what the internal checks and balances are, what the culture is, what the principles are and how to behave in dealing with the outside

world, and so on. We should use the system to protect people and not the other way round. We must not do anything to damage the Judiciary because doing so will really do great harm to Hong Kong.

Deputy Chairman, of course, I can see that a lot of people sitting here are feeling impatient, thinking why I am blowing things out of proportion. They think that this system is simply fantastic and it is wonderful to include Judges in the system. However, this is not the reality that we can see.

Deputy Chairman, I remember that there was a former Attorney General (at that time, his title was the Attorney General) and this Queen's Counsel was called Mr Michael THOMAS. At that time, his title was known as the Queen's Counsel. When he was the Attorney General, I once read a speech he had given to the legal profession and it was about what an independent legal sector can do for the rule of law. He believed that although this may not be apparent, good lawyers and barristers are in fact the most direct factor in safeguarding the rule of law. It is because not only can they uphold justice by appearing in Court and defending the defendant or by expounding on the jurisprudence, moreover, when it is necessary to pass legislation for any sector or any profession, it is firstly necessary to have lawyers draft the provisions. When a lawyer with professional ethics find that the executive authorities want to propose some provisions that run counter to the principles of law, the rule of law, jurisprudence, or justice and trample on human rights, he will make it clear that he will not draft such laws. If the client wants to do something that requires the co-operation of the lawyer concerned with a view to deceiving the Court, the solicitor or barrister concerned will simply say sorry and declare that he will not do such things. Similarly, if the Government wants to exercise its executive power to do something that runs counter to the rule of law or judicial justice, the members of the legal profession concerned will also make it clear that they will not give a hand in such matters. Therefore, Mr Michael THOMAS said at that time that every stratum of the independent legal profession could perform such a function.

Deputy Chairman, I believe that a competent person can do good but he can also do evil. Today, we want to make up for a bad system with good people and the result will be that we will not have a good system. Under a bad system, there cannot possibly be any good people either. Therefore, today, in conducting a debate here, we are not just discussing issues relating to the Interception of Communications and Surveillance Bill. We think that the

Judges in the system proposed in the Bill will not be able to perform the functions I have mentioned just now single-handedly. Quite the opposite, we will pay the price with the entire Judiciary, as a result, the system will experience fundamental changes and suffer fundamental damages, thus affecting and eroding the Judiciary.

Deputy Chairman, therefore, in the face of such a Bill and in the face of the whole system, no matter how hard I try, I think it is no longer possible to eliminate the most significant problems therein by means of some amendments in the Committee stage. Therefore, I can only request that a "sunset clause" be introduced. Maybe Members are kind-hearted and they may think that this arrangement can arguably be considered a good one. As the Secretary said, in his view, this has probably struck a balance because it can win the trust of the public as well as enable law-enforcement agencies to enforce the law with flexibility. He may think that he has done all that is called for in listening to my speech patiently. This is perhaps true because all of us have reason to believe that we are right and among us, there is hardly anyone who will stand here — sorry, not necessarily "hardly anyone" and I should say "not everyone" — who can throw away their conscience and do things that are harmful to other people. I believe the people here are not people of this kind. However, when we were examining this Bill, it was possible that we could not see other fallouts because we did not have those evil designs in our mind.

Now, since so many people have spoken, I believe it is necessary for us to put in place a "sunset clause" so that on the one hand, law-enforcement agencies can carry out their duties, on the other hand, we will not end up going down a road of no return, that is, after these systems come into operation, we must not go down a road of no return. We will not end up like that.

Deputy Chairman, judicial independence is very precious to our Judiciary. It is really an invaluable treasure. If there is a crack on a jade vase, this will be irreparable. What are we actually striving for? What will we get? If what we get is only enabling the Government to carry out covert surveillance and the interception of communications, we may as well try to find other ways. If we try a little harder, we will come up with one, so please do not drag the Judiciary in like this. If we want to involve the Judiciary and the Judges, we had better think of some other better ways and use the system to provide protection and separation.

Deputy Chairman, I really want to make one last request and ask the executive authorities and the people in power to uphold the rule of law in our SAR. Thank you, Deputy Chairman.

MR LEUNG KWOK-HUNG (in Cantonese): I am also in close touch with the public. However, the impressions that I have got from my encounters with the public is somewhat the opposite of those of Ms Margaret NG. Many members of the public think that the Judge concerned will of course side with the Government. In fact, this is a preconception of many Chinese people because they think such matters are all business of the Government. In China in the past, such matters were in fact not differentiated. The county official was responsible for hearing cases. Man, it means the head of the executive branch and the person responsible for hearing cases was the same person and the roles were not differentiated. Even the runners were hired by him. Therefore, I can see another picture, that is, a lot of people have the impression that the Government is simply enlisting the help of Judges in doing its work. They do have such an impression. Today, a show is being staged here for people to watch. If one says that the Judges are to be chosen by the Chief Executive, then I wonder in what way will the Chief Executive use to make his choice.

Therefore, on this issue, as I have said, this is to make mistakes again, again and yet again, going on and on like this. In order to keep up the appearance of being just and fair, the authorities maintain that the authorizations are judicial authorizations, that is, they first say that the authorization is granted by the Judiciary, however, it then turns out that this is not the real situation, rather, the people concerned are drafted to undertake work that even the authorities have said cannot be regarded as the work of Judges.

In fact, I think that it is right to use Justice Mr WOO Kwok-hing as an example. He is a judge and also the head of the Electoral Affairs Commission. If he makes any mistake, he will be criticized. He has already apologized for the chaos that occurred recently. He can only say, "Sorry, I made a mistake." However, if a Judge works in secret and it is all too clear that he is working for the Government, that is, the Government appoints him to do work that should have been done by the Government, then how can this possibly make people feel that the Judges have any credibility?

In fact, I think that, to be honest and to follow our conscience, Judges are in fact for the establishment because they are part of the establishment. People who are just tend to be pro-establishment in their ideologies and beliefs. Now, if they are mixed together, how can they have any credibility? Therefore, today, if Ms Margaret NG is allowed to go on speaking, turning every stone and putting all the clues together, and if some people have been watching the live television broadcast all the time, then they will really have no confidence in the Judges any more. Those people already have the prejudice that Judges side with the Government. Now that the Government is actually doing this way and designing a system that really makes Judges assist the Government in what it does — they are allowed to do so under the political system rather than driven by their inclination, that is, not by any ideology that thinks anyone who has committed an offence or who is likely to commit an offence is in fact wrong.

I think that to this day, the Secretary has hardly answered any of our questions. He is unwilling to explain to the public in this legislative process, why this step must be taken and how it complies with Article 30. Actually, in terms of the details, they have put the requirements of Article 30, which states that the freedom and privacy of communication of the Hong Kong public are protected by law, into practice. Apart from safeguarding public security and detecting crime in accordance with legal procedures, they cannot be violated.

The Government is making things apparently very impressive, however, it is getting the details of implementation all wrong. This is just like what a friend of mine from the Mainland whom I met recently said to me. He said that the cars produced by our country are quite good. They are cheap and they look very nice. However, he also said that sometimes, when the window lifter handle was broken, the whole car could not be used, or when there were problems with the seat, it would not be possible to use the car either. These were all minor things and even though it was possible to repair them, this would be a great trouble. However, if the mistakes were fundamental in nature, say, there were problems with the engine or the car would turn to the right when the steering wheel was turned to the left, Just now, I asked the Secretary to use five minutes to make a phone call to seek advice on whether concessions should be made at this juncture, so as to contribute to a good cause. However, he did not do so. The simplest way is not to appoint a Judge but to appoint a retired Judge and this is the only thing we want. In making a transaction, when other

people have already said that they will agree to everything and he only has to do one thing.....

DEPUTY CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please face the Deputy Chairman while speaking.

MR LEUNG KWOK-HUNG (in Cantonese): Face the Deputy Chairman while speaking. OK. Deputy Chairman, please tell the Secretary — I was too engrossed, so I looked at the Secretary when speaking, sorry about that — Deputy Chairman, can you please tell the Secretary that in fact, he should be amenable to good advice. Today, really, Mr James TO and Ms Margaret NG — to put it in a more vulgar way — cannot even go to pass water. The Secretary can ask Secretary Stephen LAM to stand in for him for a while, or he can also have Mr YING to stand in for him for a while. Members, can these two Members ask anyone else to stand in for them for a while? To put it not so nicely, they even do not have the time to pass water.

Why do we do this? A lot of people say that we are trying to play games or to filibuster, that we hope the legislation can be passed after 8 August so that the Government will be embarrassed, so on and so forth. This is not true. This is only because the Secretary is not answering our questions. If the Secretary really has good grounds, after he has given his answers, everyone will then shut up. It is because there is no answer from him that Members continue to pursue this matter. Since he does not answer, Members go on talking, or think that the Secretary cannot get it, so they use another way to explain to him. So do Members not think that the situation is very bad? Who are the people that filibuster? Who are filibustering? When a question that should be answered is not answered, this will lead to filibustering.

Members must understand that even though one holds sway, one must also have wisdom. Please look at King Solomon in the Bible. He was very wise. He believed that for one to hold sway, it was not necessary to hold power. Therefore, I hope the Secretary can really answer our questions, if not, he should still weigh matters up and seek advice from his superiors on whether he should make this stand firm and whether he can make some concessions. Otherwise.....

DEPUTY CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, please come back to the amendment.

MR LEUNG KWOK-HUNG (in Cantonese): The amendment requests that the Secretary use..... I am talking about the amendment and how the relevant amendment can be amended. I am not engaged in empty talk, rather, I want to solve problems. Every grudge can be traced to its source and every debtor has a creditor, so either this side makes some concessions or the other side makes some concessions, or both sides make some concessions.

Deputy Chairman, however, we can see that this Secretary is just like a certain general called YE Ming-chen, who adopted a doctrine of "three nos" — no fighting, no truce and no retreat. He would neither fight, nor negotiate for peace, nor make any escape. This famous general was sent to a zoo in Calcutta as an item of display. I believe the Secretary definitely will not end up like this. Deputy Chairman, please tell the Secretary that he definitely will not end up like this.

However, does the Secretary not think that this strategy of no fighting, no truce and no retreat is not right? Our country was bullied by the United Kingdom in those years and the British and French allied forces were poised for an invasion and China was practically no match for them, so this YE Ming-chen decided neither to fight, nor negotiate for peace, nor beat any retreat, so as preserve his honour. In fact, had this high-ranking mandarin who had been bestowed land retreated without permission in battle, his whole family would have been executed, so he chose neither to fight, nor make peace, nor escape and he would rather go to Calcutta and sacrifice himself for his family.

The Secretary, in not fighting, making peace or beating any retreat today, is sacrificing himself to save his master because Mr TSANG has issued a steely order: he is determined to make what he called the opposition gain nothing. Therefore, Members can see that reasonable concessions made with good will, that is, even if no concession is made on this point, still, concession can be made on another point — so concession is made on that point, then that point, then that point and that point — eventually, one ends up like using a melon to scoop water and all would be in vain. However, we still have one last stand and it is known as the "sunset clause".

All right, I think that although the Secretary holds sway in his hands, he has neither wisdom nor sincerity. Perhaps let us do it this way: we will let everyone pass his or her judgement. Up to now, on this "sunset clause", the more one looks at the sunset, the more beautiful it is.....

DEPUTY CHAIRMAN (in Cantonese): Mr LEUNG Kwok-hung, we are not discussing the "sunset clause" now. Can you come back to the amendment?

MR LEUNG KWOK-HUNG (in Cantonese): OK. This is because in this process, Ms Margaret NG advocates that Judges should not be allowed to deal with this sort of matters. Even though this is so reasonable, we still cannot persuade the authorities to make any concessions. I also know that Hong Kong people have really seen the world and as Mr Donald TSANG has said, people who have seen the world are not stupid. Since this debate lasting tens of hours each day is broadcast, they may think that the "sunset clause" is necessary. In the past, who would talk about a "sunset clause"? Now they think that a "sunset clause" is good.

Therefore, I beseech the Secretary to take note that the world and the times are different. Things are developing and when you are scoring one victory after another in this Chamber but also suffering one defeat after another, I hope the Secretary can reconsider giving Hong Kong people a beautiful sunset so that we can relish it, and after two years, let us also welcome a rising sun that everyone will love.

(THE CHAIRMAN resumed the Chair)

Chairman, I am facing you while speaking but I have finished now.

CHAIRMAN (in Cantonese): Wonderful. *(Laughter)*

MR JAMES TO (in Cantonese): Chairman, I wish to comment on two points raised in the response given by the Secretary earlier.

The Secretary said that he opposed our amendment and pointed out that in some instances, the appointment of the Commissioner may be revoked due to some personal reasons, however, it may not be all right for him to state the reasons in every instance, whereas in our version, a good cause must be given. In fact, if the Secretary thinks more clearly, he will find that this is not a factor to be considered. Why? We are concerned that the Chief Executive will dismiss the Commissioner arbitrarily, therefore, I propose that in the system, the Legislative Council should be responsible for vetting and approval. Therefore, if the Chief Executive dismisses the Commissioner arbitrarily without any cause — the Commissioner is just like our Judges in terms of their appointment and removal — generally speaking, the Commissioner will be protected by his independence and it will not be possible for the Chief Executive to dismiss the Commissioner arbitrarily without any good cause merely because he does not like him, say, for the very strict monitoring that the Commissioner carries out on the disciplined forces.

If the Commissioner really has personal reasons — it is possible that he and his whole family will emigrate and he does not want to come back and work in Hong Kong again — then he will have sufficient personal reason and he has to tender his resignation. He does not have to state what the reason is and he does not have to disclose it even if he is going to emigrate, as long as his resignation is truly voluntary. If he is not doing so voluntarily, he can lodge a complaint and explain to the outside world. Of course, he cannot disclose any secret concerning details of the operations, however, if he says that his resignation is not voluntary, such personal reasons will become sufficient grounds and his privacy will not be violated. That is to say, he may resign due to certain reasons, for example, illness (of course, he does not want others to know that he is ill and has to receive treatment) but he does not have to explain. In sum, as long as it is true that he resigns of his own accord, we will not be concerned that the Commissioner is dismissed because the Chief Executive dislikes him, will we? This is the first point. Therefore, if the amendment is opposed for this reason, I believe there are some problems.

Secondly, the Secretary said that this mechanism through which the Chief Executive makes the appointment is also applicable to many statutory bodies, so why should the Legislative Council interfere in this instance and request that approval be sought from it? I hope the Secretary will understand, and many Honourable colleagues, including me, have pointed out before that the most important thing is the differences between other statutory bodies and this one.

Firstly, the type and nature of work under discussion now and the confidentiality of the entire organization which is very high and very sensitive. Secondly, apart from the Commissioner, there is no other means to carry out comprehensive monitoring and we mainly have to rely on this Commissioner. His position is different from the chairpersons of any other public or non-public organizations as he has to handle cases relating to the violation of the public's rights in a totally secretive setting, so there is no other organization that is similar or comparable.

Here, I will first use the Privacy Commissioner for Personal Data as an example — because I also mentioned the Privacy Commissioner for Personal Data when moving my amendment earlier, so this will still be fresh in Members' mind. The Privacy Commissioner for Personal Data in fact has to carry out a lot of investigations to obtain results. If someone lodges a complaint, he will inform the complainant of the relevant results. According to the code of practice issued by it, the results obtained will in fact be publicized and known to all. If he has done a lot of investigations, he will also submit an annual report to disclose the details of his work. However, the Commissioner we are talking about now will not even disclose any information of a more sensitive nature. Moreover, in the report to be submitted by the Government in future, some sensitive information will be retained and will only be reported to the Chief Executive, and even the Legislative Council cannot know about it. Later on, I will move a two-tiered amendment to request that confidential information can be submitted to the Legislative Council and we will discuss such matters later. Therefore, no other organization is as unique as this one, the work of which is all done in a secretive setting and everything will depend on the Commissioner. Otherwise, we simply do not know how the rights of the public can be protected as there is no other similar organization around.

Therefore, why do I have to elevate this matter concerning appointment to such a fundamental level of confidence? Members can all see that if even the legislature gives its approval, the importance of this Commissioner can in fact be greatly elevated and he can actually be equal in status and importance to the Chief Justice as spelt out in constitutional laws, that is, the Basic Law. This is the reason for this arrangement.

MR RONNY TONG (in Cantonese): Chairman, the very touching comments made by Ms Margaret NG earlier made us reflect a lot. Under this system, it

seems we cannot have meaningful discussions and we can only implore the SAR Government to summon up their sense of public justice and consider carefully whether their proposals are in line with public justice and the rule of law. Concerning the arguments put forward by Ms NG, I do not want to repeat them. I only want to respond to the reasons given by the Secretary and this is something that we have not said before.

The Secretary insisted that there was one more safeguard in this system in which the Chief Executive makes the appointment, that is, judicial review can ensure that no mistake would be made regarding the appointment. Chairman, I do not know whether the Secretary has sought the advice of the legal experts before making this remark, because the way he says it proves that he does not understand what we are trying to do. Under the present Bill, the Government asks us to confer power on the Chief Executive and this is to ask us to be an accomplice. We are not willing to do so, however, many Members sitting behind me are willing to do that. However, after conferring power on him, how can judicial reviews be conducted? This is the first point.

The second point is that, as anyone with some knowledge of law will understand, there must be grounds in seeking a judicial review and it must be proven that one has suffered damage. If the Commissioner is dismissed, who has suffered damage? This will be difficult to prove.

Third, where can evidence be obtained? How can evidence be obtained? This Commissioner will be confined to a room, conducting an examination by sampling cases all by himself, working all alone and preparing a report all alone. And this report will be submitted to the Chief Executive. After receiving the report, the Chief Executive will inform the Legislative Council if he likes it. Otherwise, he does not have to submit it to the Legislative Council for scrutiny on grounds of confidentiality.

May I ask what safeguard is there in a system like this? I really hope that the authorities can reflect carefully on the comments made by Ms NG earlier.

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, I trust you also do not wish to speak again, do you?

(The Secretary for Security indicated that he did not wish to speak again)

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendment, I will remind Members that if that amendment is agreed, Ms Margaret NG may not move her relevant amendments.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment to subclause (2) of clause 38 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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

Mr James TIEN, Mrs Selina CHOW, 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, 10 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendments to subclauses (2) and (6) of clause 38.

*Proposed amendments***Clause 38 (see Annex)**

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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

Mr James TIEN, Mrs Selina CHOW, 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, 10 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): Before I put to you the question on Mr James TO's other amendment to clause 38, I will remind Members that if Mr James TO's amendment is agreed, Ms Margaret NG may not move her relevant amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment to subclause (5) of clause 38 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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

Mr James TIEN, Mrs Selina CHOW, 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, 10 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): Ms Margaret NG, you may move your amendment.

MS MARGARET NG (in Cantonese): Chairman, I move the amendment to subclause (5) of clause 38.

Proposed amendment

Clause 38 (see Annex)

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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

Mr James TIEN, Mrs Selina CHOW, 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, 10 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.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendment to subclause (3) of clause 38 and the addition of subclause (5A) to that clause, as set out in the paper circularized to Members.

The amendment to clause 38 by the authorities is in response to our amendment to the provision on the reappointment of panel Judge in clause (6) in order to stipulate that the reappointment of the Commissioner should also be made on the recommendation of the Chief Justice of the Court of Final Appeal.

Madam Chairman, I hope Members will pass this amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 38 (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 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): Clause 38 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 38 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.

CLERK (in Cantonese): Clause 42.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move the amendment to clause 42, as set out in the paper circularized to Members.

The amendment to clause 42 is in response to the views of the Bills Committee that the criteria of application for examination should be changed from "believes" to "suspects" and the relevant action is to be taken by an officer of a department.

Madam Chairman, I hope Members will pass this amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 42 (see Annex)

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

MR JAMES TO (in Cantonese): Chairman, when I proposed to change the criteria from "any person believes" to "any person suspects" in the Bills Committee, it was because in the many years past when we scrutinized the relevant legislation, we noted that different definitions to "suspect" and "believe" had been laid down in different precedents and the level of proof required by suspicion is indeed lower. So, when a citizen worries that he has been subject to interception of communications or covert surveillance, it will be relatively easy for him to request the Commissioner to conduct an examination and investigation. Therefore, I used the criteria of to "suspect" at that time and the Government had accepted my views.

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): Chairman, I have nothing to add.

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): Clause 42 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 42 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.

CLERK (in Cantonese): Clauses 43 and 45.

CHAIRMAN (in Cantonese): Mr James TO has given notice to amend respective subclauses (1) of clauses 43 and 45 and subclause (2) of clause 45, in relation to carrying out examinations by the Commissioner. In this regard, the Secretary for Security has given notice to move amendments to subclause (1) of clause 43 and addition of subclause (6) to that clause, as well as amendments to subclause (1) of clause 45 and addition of subclause (1A) to that clause, while Ms Margaret NG has given notice to amend respective subclauses (1) of clauses 43 and 45.

Committee now proceeds to a joint debate. I will first call upon Mr James TO to move his amendments.

MR JAMES TO (in Cantonese): Chairman, I move the amendments to respective subclauses (1) of clauses 43 and 45 and subclause (2) of clause 45, in relation to carrying out examinations by the Commissioner.

Clause 43 is related to examination by the Commissioner. The original proposal of the Government is restricted to a very limited scope, that is, an application received by the Commissioner on the ground that the complainant has suspected of having been subject to interception of communications. Here the word used is "suspects" rather than "believes". This is exactly the amendment just mentioned. But in fact, the Commissioner, in carrying out his duties during the entire work process, has independent responsibility to carry out examinations through random sampling or any other means that he considers suitable in order to oversee how the legislation is enforced. So, if in the course of discharging his duties, he discovers that some cases may have breached the legislation in conducting interception of communications and covert surveillance, it seems that he cannot conduct any examination under the current Bill. In our opinion, this will restrict the Commissioner from fulfilling his general duties and prevent him from carrying out his responsibility of monitoring how the law is enforced as a whole. Therefore, we think an amendment should be added to the Bill so that

when the Commissioner, in the course of enforcing the Ordinance considers or suspects that there is any case in contravention of this Ordinance, he can carry out an examination. This is the main point of the amendment.

Proposed amendments

Clause 43 (see Annex)

Clause 45 (see Annex)

CHAIRMAN (in Cantonese): I now call upon the Secretary for Security and Ms Margaret NG to speak on the amendments moved by Mr James TO as well as their own amendments respectively.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, based on the discussion of the Bills Committee on the determination criteria of the Commissioner, we agree that the original criteria should be clarified and therefore we propose to amend clause 43(1) and add subclause (6). The criterion to be stipulated is whether the operation has been carried out by the officers of a department without authorization of a prescribed authorization. In other words, it is concerned about whether the relevant operation has been properly authorized. This has included conducting surveillance on person who is not the target specified in the authorization. So, this should deal with the "mistaken cases" mentioned by Members.

Regarding the authorities' amendment to clause 45, it is mainly a corresponding amendment in response to the amendment to clause 43.

The amendment to clause 43(1) proposed by Ms Margaret NG will expand the functions of the Commissioner who is able to carry out an examination even though without receiving any application. The amendment to clause 43(1) proposed by Mr James TO is similar to that proposed by Ms NG.

Since the examination mechanism under the Bill will operate on the basis of application and the authorities have proposed a suitable notification mechanism. The authorities, therefore, oppose the relevant amendments.

Regarding the amendment to clause 45(1) proposed by Ms NG concerning the consideration criteria of the Commissioner on individual cases, it adds that the burden of proving that the interception of communications or covert surveillance alleged has been lawful shall lie with the Government. This is in addition to using the principles applied by a Court to deal with applications for judicial review. In our opinion, to place such a burden of proof on the Government will violate the general legal principles. In other words, a relevant party should not be required to prove that he has not carried out a certain act. Ms NG's proposal will render the original explicit testing criteria ambiguous and improper. So, we also oppose her amendment.

In our opinion, both are the Commissioner's proper functions and should not be further expanded. Similarly, Mr James TO has proposed to add in clause 45(2) "or the subject of interception or covert surveillance or the person who has sustained damages" to clause 45(2). This will also expand the scope of people who can lodge an application for examination to the Commissioner or those who can obtain compensation. The amendment will tremendously expand the functions of the Commissioner and so we also oppose it.

Madam Chairman, I hope Members will oppose Ms NG's and Mr James TO's amendments and support the authorities' amendment. Thank you, Madam Chairman.

MS MARGARET NG (in Cantonese): Chairman, the purpose of my amendment to clause 43 is to enlarge the Commissioner's power to protect the people's privacy.

Among the large number of provisions in the Bill, none of them mentions the consequence of a contravention. Will only the subject of surveillance be given notice and compensation? We think that is unfair.

Chairman, just now I heard the Secretary say that my amendment to clause 45(1) has violated the general principle of the burden of proof. I am extremely astonished at that. What is provided under clause 45(1)? According to the original provision, when the Commissioner carries out a review — sorry, concerning examination, there is a very special way of saying things here. The original provision says that when the Commissioner carries out an "examination" — in other words, when the Commissioner carries out an examination on the

basis of a complaint, the principle of judicial review shall apply. I can understand that the principle of judicial review will apply in order to determine whether a ruling, decision or authorization or the acts of the law-enforcement officers are proper or fair. This is understandable. However, if the complainant is required to adduce evidence in order to prove whether the act of the Government is lawful or not, this is basically beyond his ability.

Chairman, in fact, it is hard to explain why the Secretary does not understand this point which has also been mentioned in the Bills Committee. General speaking, when a judicial review is applied for, the applicant has to provide *prima facie* evidence in order to prove any illegality, unfairness or impropriety committed by a public officer or a government department before leave for a judicial review can be granted. However, when every act is carried out covertly, how can the complainant get any evidence to prove that the Government has done something unlawful?

Regarding this, we therefore consider that the burden of proof should be reversed because all information and all materials are confidential and kept by the Government. Why are we not allowed to stipulate that the Commissioner should give the burden of proof to the Government and ask it to prove that its actions are lawful? It is very easy for the Government to prove its actions are lawful because what it should do is to prove that it has obtained lawful authorization to carry out covert surveillance or interception of communications. What the Government should do is to act in accordance with clauses 4 and 5 which provide that if a prescribed authorization has been obtained, the operation can be carried out in a lawful manner, no matter if the application for prescribed authorization is made to the panel Judge or the head of the department. Since the ruling is written down and there should be written record, why is the Government unable to prove that its acts are authorized and lawful? Why such proof cannot be adduced by the Government? In fact, if the Government cannot do so, who else can do so?

Chairman, I have also raised a point concerning clause 43 and that is the amendment to subclause (3). Should the Commissioner provide reasons when he gives notice to the affected person? In accordance with the original Bill, the Commissioner shall not give reasons or details or reveal that the act is related to interception of communications or covert surveillance. All these should not be disclosed. But in my opinion, since the Government has given notice to the party concerned but the party concerned is entirely kept in the dark and only

knows that something unfavourable to him has been done, this is entirely unreasonable. In the Bills Committee, the authorities explained that if details or reasons were revealed, the operation of the whole covert surveillance system might be exposed and would pose problem to confidentiality and jeopardize the system of crime prevention and protection of public security in Hong Kong.

So, I have to add that regardless of whether or not reasons are given or what the extent of the reasons or details given is, the principle is that it will not affect or jeopardize the prevention or detection of crime or protection of public security. The Commissioner will be given a discretionary power so that he can determine whether he can give some general reasons which will not impose any adverse effect or whether problems will arise no matter what details are given. In other words, he can make the decision on his own or put his reasons and determination on record. This is the fairest, instead of.....you can see that when the rights of the people are involved, our laws are very rigid. Even the Commissioner is not trusted and he is told that he shall not give reasons. That means he is not allowed to give reasons.

Chairman, we do not think it is necessary. We should let the people affected know more whenever possible. So, I urge Members to support my amendment. 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?

MR RONNY TONG (in Cantonese): Chairman, as a matter of fact, many areas in our system are not feasible. It seems that the authorities have not considered under what circumstances the system will work as the Administration intends to equate the examination by the Commissioner to a judicial proceeding. We request that in this process, the burden of proof should rest in the Government because in the general judicial proceeding when two parties are in litigation, if one party possesses all information and documents, that party will be responsible for producing all these information and documents to the other party so that the

other party can make use of such materials to adduce evidence. Similarly, in the current situation, the applicant does not have any information. Nor is he entitled to request the Government to disclose any information or documents. So, in reality, he is unable to discharge the duty of the onus of proof in the examination process. If he is unable to discharge such a duty, but is required to do so or if some other responsibilities are imposed on him, he will be placed in an unacceptable situation and will not get any benefit from the procedure. So, although such a procedure has been set up, it is tantamount to a sham, offering no protection to the applicant. So, based on the practical reasons, we think it is necessary to request that the burden of proof should rest on the Government.

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): Chairman, I have nothing to add.

MR RONNY TONG (in Cantonese): Chairman, I do not quite understand why although the Secretary has not spoken, the first remark he makes is that he has nothing to add. Besides, what is his response after hearing our speeches? If he considers the system feasible, can he explain how it is feasible? In other words, how can the application be allowed?

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, there is already a mechanism provided for the applicant. We now oppose Ms Margaret NG's proposal to enlarge the jurisdiction of the Commissioner.

MR RONNY TONG (in Cantonese): I did not say that we lacked a mechanism. I only queried whether the mechanism was feasible. Can the Secretary explain how it is feasible?

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

MS MARGARET NG (in Cantonese): Chairman, I am also talking about the same point. We consider the system described in the Bill really infeasible and we have put forward our reasons. Should the Secretary not explain to the public why our worries are superfluous? How can we overcome the difficulties that we consider in existence? Should the Secretary also give us an explanation? Thank you, Chairman.

MR JAMES TO (in Cantonese): Chairman, I think the Secretary owes the public an account of the matter. Perhaps he should at least give us some explanation. If it is based on the mechanism currently designed by the Government, it is almost tantamount to no mechanism because it will not work at all and the case will not be found in the applicant's favour. In other words, if we speak in a more polite way, the Government is pleasing us. Put it bluntly, the provision is meant to cheat us.

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

MS MARGARET NG (in Cantonese): Let me elaborate in detail. According to clause 43(1), the Commissioner shall carry out an examination if he receives a complaint from a member of the public that he suspects that he is a victim of interception and covert surveillance. What will the Commissioner examine? First, the Commissioner should examine whether the interception and covert surveillance have really been carried out. This is a very easy task because he only has to ask the department concerned. I hope the relevant department will inform him of this. Second, if the abovementioned activities have really happened — I now base on the Secretary's amended version — if he has really been a subject of interception and covert surveillance, the Commissioner should ask whether proper authorization has been obtained for such purpose. Or,

although proper authorization has been obtained at the initial stage, the Commissioner should also examine whether the authorization has been properly renewed in accordance with the Ordinance. This is precisely concerned about whether such activities are lawful and whether a proper authorization has been issued. This is a question of legality. If the complainant is required to prove it, how can this be feasible?

So, Chairman, this is a very practical question. Can the authorities give us an explanation?

MR JAMES TO (in Cantonese): Chairman, let me quote a most straightforward example which is often cited by us in the Bills Committee. A person, CHAN Tai-man, is a chef and the Government is also tracing a person named CHAN Tai-man who is a crook engaged in drug trafficking. First of all, the former CHAN Tai-man must have suspected that he is put under surveillance and bugged, that is wiretapped. So he lodges a complaint with the Commissioner that he suspects that he is a victim of such activities. Then, what else can he do? He can tell the Commissioner that he is CHAN Tai-man, a chef and an upright person, and he suspects that he is wiretapped. But he has no idea of what is going on. What he can do is to say these few words. I really do not know what evidence he can adduce.

Why? Because after he has finished these few words, the Commissioner will call the file to see whether a person named CHAN Tai-man with identity card (ID) number 123456 has been wiretapped. If the complainant has provided the ID number, the fact can be verified by index searching. When the Commissioner has confirmed that the person has been wiretapped, he will find out the reason for carrying out such an operation. So he will open the relevant file and find that based on the intelligence of an informant that there is a person in Hong Kong named CHAN Tai-man, a criminal who is in possession of drugs and engaged in drug trafficking who hangs around in Sham Shui Po. The department concerned has applied for the authorization of wiretapping a person called CHAN Tai-man. Finally, the police may confirm that — because, you know, the intelligence may not be so accurate, so the police will insist that this is the name of the target — and many telephone lines have been bugged. For instance, from the telephone company it is found that eight telephone lines in Sham Shui Po have been registered under the same name and wiretapping has been conducted on these eight telephone lines. By coincidence, one of these

lines belongs to this chef CHAN Tai-man and his ID number is checked and confirmed. Under such circumstances, should the burden of proof rest on the police who have applied for an authorization to conduct such an operation in order to point out the following: why such intelligence was received at that time, whether such intelligence was the best in quality, whether the scope of targets had been narrowed down for wiretapping and whether the real suspect would certainly be covered after the scope has been narrowed down? The police should also point out whether there is any other method to tell the real suspect from the rest. The authorities may have used some unreasonable means to tell the real suspect from the rest but ultimately failed. As a result, the complainant has also been wiretapped. But the problem is that the complainant cannot prove it.

At the end of the day, it must be the law-enforcement agency which has grasped all the intelligence and all the information, no matter if it is good or bad. As to whether the authorities have used any other means to narrow down the scope of the operation and whether it is wrong to decide to conduct the wiretapping, the burden of proof should rest on the law-enforcement agency itself. If the burden of proof, in particular that of such a high standard as required by judicial review, is imposed on the applicant, the applicant can only provide his name, address and nothing else. He at the most can help prove clause 43(1)(a). Why? Because he can provide information such as his ID number and address and these can be checked. However, he cannot pass the threshold of subclause (1)(b), and that is, proving the absence of authorization.

If the Government cannot even understand this, I can expect that in future there will be an annual report to specify how many cases are found in the applicants' favour. Such information will be open to the public and I expect the number will be zero. If the number is zero, everybody will be glad, thinking that our agencies have not committed any mistake. However, please bear in mind that it will lead to the conclusion that nothing has gone wrong. This will certainly be the case because an individual is unable to adduce evidence to prove it. So, the entire mechanism is a sham.

MS AUDREY EU (in Cantonese): Chairman, first of all, I am very sceptical about the original provision, that is, the drafting of clause 45, because clause 45 requires that the principle applied is that for judicial review.

What is the focus of the discussion? It is not concerned about authorization, rather, it is concerned about a person who suspects to have been subject to unlawful surveillance or interception. So, he lodges a complaint with the Commissioner. What criteria will the Commissioner adopt when carrying out an examination? He will adopt the principle for judicial review. I am very sceptical about this concept. Why do I say so?

Although the general public have heard the term "judicial review" many times, they do not know what it actually means. Why is such a term adopted by the Government in drafting the Bill? The reason is to elevate the threshold to a very, very high standard. Why do I say so? Because generally speaking, the applicant for a judicial review must prove that the Government has acted unreasonably to such an extent that it is extremely unreasonable. Moreover, it must be so extremely unreasonable that it has become absurd before it can be called unreasonable. For instance, even if you think a reasonable person would not have done it, the Judge may not rule against the Government. Why? Because the Judge considers that the decision or discretionary power is not vested in him or a reasonable person but the government officials. So, even though the Judge considers the government officials are not quite reasonable, he will not rule against the Government. That is why I say that the threshold of judicial review is very, very high.

First of all, clause 45 has adopted a very high threshold. In other words, if a person lodges a complaint with the Commissioner, he has to prove that he has been put under surveillance or wiretapped and this matter is so unreasonable that it has become absurd. This is a very, very difficult hurdle to overcome.

Secondly, why does Mr Ronny TONG say that this will not work? You will get the answer by looking at the Secretary's amendment, that is, the amendment to clause 42 just passed. The amendment is about who can make a complaint to the Commissioner and what criteria are adopted. In the original Blue Bill, the person concerned must believe that he has been wiretapped. The Secretary, after listening to the Bills Committee's views, has agreed to lower the threshold. He has pointed out that any person who suspects of such a situation may lodge an application with the Commissioner. But what does he suspect? He suspects that his communications have been intercepted by some government officers or he has been a subject of covert surveillance.

In other words, the Secretary can put forward some reasonable argument. But for an ordinary person, how can he have the evidence to prove that he has reached the standard of having reasons to believe or he reasonably believes? How can he reach such a threshold? So, the Secretary has reasonably accepted that a person can make a complaint if he suspects. Fine, now I suspect that has happened and I am now making a complaint. However, the Secretary has said that it is not so simple. When a person makes a complaint to the Commissioner, the Commissioner will say that, first of all, he has to prove that this matter is so unreasonable that it has become absurd because he has to meet the threshold of judicial review. This is the first point that I think hard to understand.

Then, Ms Margaret NG's only amendment does not amend the wording of judicial review. Rather, she has only added the wording "the burden of proving the interception or covert surveillance alleged to have been lawfully carried out shall lie with the government" at the end. If there is such an allegation, the burden of proof shall lie with the Government. This is natural. If the Government's position is that it has obtained reasonable and lawful authorization although the complainant suspects that such activities have been conducted, then of course the law-enforcement officers should adduce the evidence. How can the complainant be required to prove that the interception or covert surveillance is lawful? This is entirely unreasonable. He is totally kept in the dark. He has only told you he suspects that such activities have happened and therefore he makes a complaint. But then you tell him that he is entitled to lodge a complaint but is required to adduce evidence concerning whether such activities are lawful. Is this illogical? So, Ms Margaret NG has added this point in order to stipulate that the burden of proof on reasonableness shall lie with the Government. Even for the criminal cases, the same rule applies. If the Secretary does not believe it, he can consult the Secretary for Justice or the officers of the Department of Justice sitting behind him.

In other words, generally speaking, the burden of proof in criminal cases always lies with the prosecution. The prosecution is obliged to prove that the defendant is guilty beyond any reasonable doubt. However, there are some exceptions. If all evidences such as those concerning whether the defendant has a licence, are held by the defendant, the defendant is legally obliged to prove that he has a licence to carry out certain activities. In fact, Ms Margaret NG has invoked the same principle to ask the Government to add such a requirement. If the surveillance or interception is carried out under lawful authorization, the burden of proof should lie with the Government. This is a very reasonable

request. But in response, the Secretary has said that this is contradictory to the general practice on the burden of proof.

It seems that the Secretary does not understand why Ms Margaret NG has moved such an amendment and why Mr Ronny TONG and James TO have said that this will not work. When CHAN Tai-man complains that he has such suspicion, you cannot ask him to prove that such interception of communication or covert surveillance are legal. So, it is a very reasonable recommendation. We have all accepted the high threshold of judicial review, the only remaining point is, the burden of proof on whether such activities are lawful should lie with the Government.

I think the Government is duty-bound to adduce evidence. Therefore, I very much hope that the Secretary, after understanding the whole issue or having discussed or considered the matter with the Secretary for Justice, will accept Ms Margaret NG's amendment which is very reasonable. Thank you, Madam Chairman.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, regarding this matter, we did not invent it out of our imagination. The Government has conducted a lot of researches and made reference to the practices of other common law jurisdictions. Moreover, we have also exchanged views on this issue in the Bills Committee. Our current practice is similar to that of the United Kingdom. Regarding complaints, I think our views are mainly concerned about the functions and powers given to the Commissioner. I wish to point out in particular that clause 51 of the Bill provides that the Commissioner is given powers and functions to conduct relevant investigations. In our opinion, such provision is sufficient.

MS MARGARET NG (in Cantonese): I would like to make my last effort. As the Secretary has pointed out that this is an international practice, let us pretend that we are greenhorns and do not understand it. As the Secretary has conducted so many studies, perhaps he can explain to us what follow-up actions will be taken after CHAN Tai-man has lodged a complaint, as in the case just mentioned by Ms Audrey EU. How can he adduce evidence to prove his case?

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, as I am not a lawyer, my views are different from theirs. In my opinion, the complainant does not need to prove anything. The investigation is conducted by the Commissioner.

MR RONNY TONG (in Cantonese): Chairman, in that case, why is there no explicit provision in the Bill? In the Secretary's reply just now, it seems that the Commissioner is responsible for adducing evidence because if the Commissioner is responsible for conducting investigation, he will not inform the suspected victim of this. In that case, why is it not explicitly provided? Why is the principle for judicial review which is so puzzling added here?

Chairman, just now I was not kidding. Ms Margaret NG asked earlier what would happen. It will be very simple. When the proven suspected victim informs the Commissioner that he suspects interception and covert surveillance conducted by the Government, the Government will say that it is lawful. Even if the victim repeats his complaint, the Government will insist that it is lawful and that is the end of it. (*Laughter*) Is this a bit absurd? Are we watching cartoons? If the Secretary does not think so and the Commissioner can indeed offer assistance to the complainant, please tell us which clause, which part and which word in the Bill has explicitly so provided? Which clause has explicitly provided that the Commissioner will conduct investigation and help the complainant reach the standard of judicial review? Where is that explicitly provided? Perhaps Ian WINGFIELD can find it out.

CHAIRMAN (in Cantonese): Mr Ronny TONG, please sit down if you have finished your speech because Ms Margaret NG is waiting for her turn to speak.

MR RONNY TONG (in Cantonese): Sorry.

MS MARGARET NG (in Cantonese): Perhaps let the Secretary for Security speak first.

CHAIRMAN (in Cantonese): I thought you wished to speak. At this juncture, Secretary for Security, do you wish to speak?

SECRETARY FOR SECURITY (in Cantonese): Perhaps let me read out subclause (2) of clause 43: "If, on an examination, the Commissioner, having regard to section 45(1), determines that the interception or covert surveillance alleged has been carried out by an officer of a department without the authority of a prescribed authorization, he shall as soon as reasonably practicable give notice to the applicant."

CHAIRMAN (in Cantonese): Now I have to mention one thing. It seems that these problems should be dealt with in the Bills Committee but are now they are tackled in the Committee of the whole Council. Although this is worth clarification, I hope everyone can focus on the main points.

MS MARGARET NG (in Cantonese): Chairman, it is precisely because we cannot obtain a reasonable response despite our effort that I have proposed the amendment in the hope that it can be achieved. I heard the Secretary seemed to be saying that the burden of proof would lie with the Government which would prove to the Commissioner that its act was lawful. We seem to have heard that. I now see the Secretary for Justice shaking his head forcefully as a gesture to indicate that it is not necessary prove it. In that case, my amendment is very clear and it will not go against the Government's policy. If even I cannot have a clear concept about it, can this show that the general public will not be clear about it? I think if it is written down in the Bill, it will be clearer. Why does the Secretary still urge Legislative Council Member to oppose my clarification? I have no intention to change the policy of the Government.

CHAIRMAN (in Cantonese): Please sit down after delivering your speech. Does anyone else wish to speak?

MR JAMES TO (in Cantonese): Chairman, the wording of subclause (2) of clause 43 is: "If, on an examination, the Commissioner determines that". But now the problem lies with the words "on an examination". Does it mean that under this concept, the Commissioner will explore and find out all the facts as if he has acted on behalf of the applicant and will apply the principle of judicial review on the facts in front of him as if the applicant has dug out all the facts? It is because the Commissioner has done so on his behalf. If so, it is not right. Why? Because the answer should be as follows: The Commissioner — I do not know whether this is the Government's procedure or not — after having received a complaint from someone who suspects that he is subject to covert surveillance, will call file immediately. If the surveillance is conducted by the police, the Commissioner will request the police to submit a report. If it is confirmed that the police has wiretapped a person, the police have to give reasons. If the police cannot prove that their act is reasonable and the authority issued is proper and all their conducts are right, then the Commissioner will rule in favour of the person who is under surveillance. So, the police have to submit the report expeditiously. This will be in response to the provision of subclause (1)(b) of clause 45 that the Commissioner shall "carry out the examination on the basis of written submissions made to him". This is consistent with the fact that the Commissioner is provided with submissions by the law-enforcement agencies. That the law-enforcement agencies should convince the Commissioner that they have acted in a proper manner with proper authorization without errors is exactly the basis of Ms Margaret NG's amendment. There is no inconsistency in respect of policy. In other words, the ambiguous implication that the onus of proof will rest on the law-enforcement agencies will become explicit. If it is consistent with the policy, why does the Government oppose Ms Margaret NG's amendment? On the contrary, if the onus of proof is on the applicant, the system is a sheer sham. Such two situations are mutually exclusive.

MS MIRIAM LAU (in Cantonese): Chairman, I agree with you that these discussions should have taken place in the Bills Committee. In fact, when the Bills Committee scrutinized the provisions, we had got a clear understanding of the situation. Now Members have selected and read out different parts of the

provisions. If we look at clause 43, it is very clear. Clause 43 describes what the Commissioner will do after receiving an application under section 42. Let me read out the text in English: "he shall, "(that means he must)" subject to section 44, carry out an examination to determine —" What are the two things to be determined? First, it is concerned about "whether or not the interception or covert surveillance alleged has taken place"; and second, "if so, whether or not the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization". So, with the word "shall" used in the provision, it implies that the Commissioner should initiate a review in order to look into the facts. Hence, the applicant is not required to prove anything. The Commissioner has a legal responsibility before what is described in clause 43(2) as read out by Mr James TO will follow. Therefore, if we go on reading, we will clearly know who should take up the responsibility and what the Commissioner will do after receiving a complaint. In fact, the applicant has only to prove that he has a reasonable doubt before he can ask the Commissioner to commence his work. According to my understanding, the Commissioner should demand the relevant law-enforcement department to prove whether it has conducted any interception of communications. If it has, the law-enforcement department should prove whether it has obtained a prescribed authorization. If not, a series of remedies should be carried out.

Chairman, I just wish to make a clarification. In fact, in the Bills Committee, we have gone through every word of the Bill and we are very clear about the situation. Now some Members have selected and read out some part of the Bill and this is very confusing.

MR RONNY TONG (in Cantonese): Chairman, I am grateful to Ms Miriam LAU for her support to our arguments. I hope she can vote for our amendments. What she has said just now is very correct. The problem is that in clause 43, it only mentions that the Commissioner should determine whether there is anything unlawful. How can he make the decision? That is the problem. In English, the problem is: "Who is going to prove to his satisfaction?" Will the Commissioner prove it to himself as he has the right to conduct an examination? Or will he ask the applicant to prove it to his satisfaction? This is the crux of the problem. Ms Miriam LAU is right. This should be determined by the Commissioner. On what ground should the applicant be required to bear the onus of proof? This is exactly the point we

hope the Government can draft it in an explicit manner. So I thank Ms Miriam LAU for supporting. We hope the Liberal Party will vote for us.

MS MIRIAM LAU (in Cantonese): Chairman, what have I said that has led to this misunderstanding by Mr Ronny TONG? What I mean is that the provision I have just read out, according to my understanding, is very clear. In my understanding, Ms Margaret NG's amendment is not necessary because the provision has stipulated clearly who should do what and what should be found out in order to prove the relevant matter. Thank you, Chairman.

MS AUDREY EU (in Cantonese): Chairman, just now, Miriam LAU said that we selected and read out some parts of the provisions in the Bill. This is not true. We have studied Division 3 as a whole carefully. First, clause 42 is concerned about application for examination. Anyone who "suspects" — the word "believes" has now changed to "suspects" — that he has been subject to surveillance or interception can lodge an application to the Commissioner. Clause 42 is as simple as that. The applicant can lodge an application to the Commissioner if he "suspects" that.

Clause 43 is about examination by the Commissioner. The Commissioner is like a middleman and will be responsible for determining two matters just mentioned by Ms Margaret NG. These are: whether the interception or covert surveillance alleged has taken place, and if so, whether or not a prescribed authorization has been issued. These are the matters which will be determined by the Commissioner as a middleman. In accordance with clause 43(2), if on an examination the Commissioner determines that a prescribed authorization should have been, but has not been issued or renewed, he shall give notice to the applicant. In other words, he should determine whether lawful authorization has been issued and renewed. The problem is how to make such a determination.

Let us look at clause 45 and it has the problem which I have said. Clause 45 says "For the purposes of an examination, the Commissioner shall apply the principles applicable by a court on an application for judicial review". This is the question I just mentioned. In my opinion, the concept is hard to understand because for the general public, they will wonder what principles are applicable for judicial review. So in my opinion, the threshold is

very high. Furthermore, when the applicant applies for a judicial review, the onus of proof is usually on him. Coming back to the question of who should discharge the onus of proof that lawful authorization has been issued, as the Commissioner has to determine whether lawful authorization has been issued, then who will prove it? The burden must either rest on the Government or the applicant or be determined by the Commissioner after undertaking an examination. There will not be any fourth possibility.

However, clause 45 states: "For the purposes of an examination, the Commissioner shall apply the principles applicable by a court on an application for judicial review." When lawyers look at this clause, their first response will all be this: as the applicant has applied for a judicial review, the onus of proof should rest on him. So, it is natural and logical for Ms Margaret NG to add a phrase in that clause. In her opinion, if the burden of proof lies with the applicant, the applicant has to prove that the unreasonableness of the matter has reached such a high threshold as that of judicial review.

Another problem is whether a lawful approval or authorization has been issued and whether it has been lawfully renewed. Generally speaking, if clause 45 stipulates that the principles of judicial review shall apply, then the burden of proof will certainly lie with the applicant. If you accept Ms Margaret NG's argument that the burden of proof does not lie with the applicant, there are only two possibilities. The first possibility is that it lies with the Government as Ms Margaret NG has pointed out. Since the Government is most certain whether or not there is a lawful authorization, it should be in a position to clarify it. If you deny this and consider that the Government needs not prove it, then the Commissioner should carry out an examination. However, what is the level of criteria to be adopted? As to whether a level as high as that for judicial review should be adopted is another question.

Ms Margaret NG has moved to add in clause 45 because clause 45 reads, "apply the principles applicable by a court on an application for judicial review." What do the principles include in general? They include the principle of the burden of proof lies with the applicant. Hence, Ms Margaret NG has added the words to indicate that the burden of proof does not lie with the applicant but the Government. The Secretary must answer which party should discharge the burden of proof according to his policy. If he thinks that the burden of proof should lie with the Commissioner, I am really sorry, the clause has not explicitly

provided this. In addition, clause 45 clearly provides that "the principles applicable on an application for judicial review" shall apply. Generally speaking, the burden of proof should lie with the applicant. If the burden of proof does not lie with the applicant, the clause should reflect this. But the clause is not so provided. Even clause 43, just mentioned by Ms Miriam LAU, has not provided that the burden of proof lies with the Commissioner. It only mentions what the Commissioner should look for in an examination. But as to how the examination should be conducted, who should discharge the burden of proof and adduce evidence, clause 43 remains silent.

Under the general principles of judicial review, the complainant or the applicant should adduce evidence. Otherwise, this should be explicitly provided through adding the amendment proposed by Ms Margaret NG. This is a very important point. Another problem is, if there is any error or omission in the authorization, or such error or omission has reached an unreasonable level, who should discharge the burden of proof, the Commissioner or the applicant? Generally speaking, the burden of proof should, of course, lie with the applicant. If from the beginning to the end, the applicant does not have to discharge the burden of proof or any other responsibility, except informing the Commissioner that he is CHAN Tai-man and suspects being subject to interception, the Government should clearly explain the principles applicable on an application for judicial review under clause 45. The reason is that the current way of drafting, that is, "apply the principles applicable by a court on an application for judicial review", will include one of the applicable principles and that is, the burden of proof will lie with the applicant. The current way of drafting has included such a meaning. Therefore, if the Government considers that this is not the case, clause 45 must be amended in order to specify that the applicant does not have any burden of proof. He does not need to do anything except informing the Commissioner that he is CHAN Tai-man and what he suspects. The Government should clearly reflect this in the clause. Thank you, Chairman.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, it is precisely because of this clause that lengthy discussions were held in the Bills Committee. We have listened and accepted Ms Audrey EU's view which is reflected in our CSA. Just now, what Ms Audrey EU held in her hand is the Blue Bill. We have already proposed a CSA to it.

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

(Mr James TO indicated that he did not wish to speak)

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

(No Member indicated a wish to speak)

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

(No Member or public officer indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, I will.....

(Mr Ronny TONG raised his hand to indicate that he wished to speak)

MR RONNY TONG (in Cantonese): Chairman, I would like to clarify one point. I am really sorry, perhaps it is already 10 pm and our mind is confused. Concerning clause 45(1)(a), did the Secretary refer to the point we just read out? The Secretary just referred to clause 45(1)(a), right? The original text in Chinese is: "為進行審查的目的，專員須(a)應用可由法院在有人申請司法覆核....." The English text is: "For the purposes of an examination, the Commissioner shall (a) apply the principles applicable by a court on an application for judicial review....."

MS MARGARET NG (in Cantonese): No, what you have just read out is my version, you read.....

CHAIRMAN (in Cantonese): I think we can see our constraint in this very well.

MS MARGARET NG (in Cantonese): No, Chairman, I can assure you that in the Bills Committee, each one of us had tried our best to express our views.

But Chairman, perhaps you will understand, in dealing with these provisions in the Bills Committee, each one of us can speak for five to seven minutes. In a nutshell, one has to stop after expressing his views on a certain part of the Bill before another Member speaks. After some interval, it will be his turn to speak for another seven minutes again. If, after speaking for seven minutes, the public officers do not have time to respond, then sorry, that will be it. So, we have encountered great difficulties. We have tried very hard in scrutinizing the Bill so that it can be enacted into legislation and can be enforced. But we have failed despite the tremendous efforts we make.

Therefore, Chairman, such things happen at this final juncture. Chairman, if we were in the course of scrutinizing the Bill in the Bills Committee, we could go back to have a full discussion. But now we do not have such an opportunity because we have to vote soon.

MR RONNY TONG (in Cantonese): Chairman, I have found it.

CHAIRMAN (in Cantonese): Mr Ronny TONG, have you found it?

MR RONNY TONG (in Cantonese): Sorry, the Secretary has not yet explained. The original wording of the amendment is: "專員在斷定任何截取或秘密監察是否在沒有訂明授權的授權下進行時", (The English text is: "in determining whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization, the Commissioner shall.....") I could not have written such Chinese. But it does not matter. The word used here is still "determine", the same as the word used in clause 43(1), which means his determination. Now we are not discussing who should make the determination. We all know that it is the Commissioner, rather than the person who adduces evidence or the applicant, who makes the determination.

Now the problem is: who is required to adduce evidence so that the Commissioner can determine that he is satisfied with the proof? In Chinese, the Commissioner "滿意" (is satisfied) and "接納" (he accepts) that such a matter has happened. This is the most contentious point here. Chairman, our view that the applicant should not be required to discharge such a responsibility is not contradictory to the provision just mentioned by the Secretary. Rather, the two

will actually supplement each other. Why does the Government refuse to accept our view?

CHAIRMAN (in Cantonese): Honourable Members, this is a debate and you are free to express your views. Of course, you can ask the other party why your views are not accepted. If the other party tries to convince you, he may give an explanation. But if he considers his justifications are sufficient, he can choose not to speak any more. This is the regular practice in the debates of the Legislative Council. So

MR RONNY TONG (in Cantonese): Chairman, how can he oppose for the sake of opposing it?

CHAIRMAN (in Cantonese): Every Member has his own views. This is your own analysis and decision. In the Committee stage, however, I cannot allow all of you to speak in a manner as if it is an exchange of conversations. In fact, many Members have spoken many times and I have not made a record. I believe the record has been broken. Now, I allow Members and public officers to speak one more time. After that, I think it is time to make the decision.

Does any Member wish to speak?

MR ALAN LEONG (in Cantonese): Chairman, in fact, I also remember that the Bills Committee has discussed subclause (1) of clause 45. I am now looking at the final amendment proposed by the authorities as set out in explanatory note G3. I want to do my utmost by making a last-ditch attempt, in the hope that the authorities will see why the onus of proof matters so much. Say, when the Commissioner carries out an examination, one scenario may occur.....of course, one kind of scenario is very obvious and that is, law-enforcement officers are required to obtain prescribed authorization but they have not, so the Commissioner will determine on examination that this is improper. Another extreme scenario is that the Commissioner considers after examination that obviously, no authorization is required, so this will not pose any problem either. However, it is when a matter is hanging in the balance that the onus of proof is called for, that is, the scenario is not obvious and it is difficult to decide whether

the prescribed authorization should be obtained. In fact, as far as I understand it, this is exactly the focus in the deliberation carried out by the Bills Committee. I believe all lawyers know that it is when a case is hanging in the balance that the onus of proof is required. How a matter is to be decided will depend on who bears the onus of proof. I believe that the final amendment proposed by the Government cannot address the focus of the matter then. I wonder if this is last chance to make clarifications on the focus will help the Secretary understand the importance of why the onus of proof has to be included. Thank you, Chairman.

MS MARGARET NG (in Cantonese): Chairman, please allow me to speak for the last time on this amendment.

Chairman, perhaps in a setting like this, it is really difficult for us to explain ourselves clearly and understand clearly the difficulties of the other side. Perhaps if there is really the opportunity to do so, we will be able to know whether we are in the right and there is a real need to make an amendment or whether the Government is in the right, and that the provision is really very clear already and there is no need to make any amendment. Chairman, may I call on the Government to, firstly, accept my amendment if it thinks that my amendment will not change its policy. In the event that the Government does not accept my amendment and it is not passed, I still hope that the Government can make clarifications afterwards, so that everyone will understand that the Commissioner will not be virtually non-existent, that is, a scenario will not occur in which a complainant suspects that he is wiretapped and the Commissioner tells him that he is about to make a ruling but the complainant must produce evidence to show that law-enforcement officers have indeed wiretapped him without getting an authorization. I hope such a scenario will not occur. Chairman, I appeal to the Government for the last time and hope that the Secretary can at least make a pledge on this matter. Thank you.

MR JAMES TO (in Cantonese): Chairman, I am also speaking for the last time.

The method I propose is somewhat different from the one proposed by Ms Margaret NG in her final attempt to salvage the situation. If possible, I hope the Secretary can rise and say the following remarks. I think that the Commissioner — since ultimately, the Commissioner has to do his work and perhaps he will have to start his work a few days from now — when he does his

work in accordance with this piece of legislation after it is passed, he can read these several lines in the provision carefully. Of course, he can think of a number of possibilities. However, if the Secretary can rise and say the follow words, the Commissioner can then say that since at the Second Reading, the official concerned has also said such and such a thing, so when he tries to figure out who has the onus of proof, he will think that the Government's explanation is correct and this will put everybody's mind a lot more at ease. What are these remarks? I call on the Secretary to rise and say, firstly, that the Government's policy, that is, the original intention in drawing up clause 45(1)(a) is not to require the complainant to assume the onus of proof; secondly, in adopting such a yardstick in drafting this provision, it does not mean that applicants have to meet the Commissioner's requirement concerning the standard of proof using the yardsticks adopted in judicial reviews and thirdly, in actual operation, it should be the responsibility of the disciplined forces that have first applied for authorization to adduce evidence, since they have the best understanding of the developments of the concerned case. If the Secretary is willing to say the foregoing three comments or comments to this effect, then there is no need for us to be afraid. At least, the Commissioner will not seek any judicial review and the likelihood will also be very low and this will not be done openly. Moreover, he will only do so discreetly. If the Commissioner understands the foregoing to be the meaning of the Secretary and he accepts it, the issue will actually be resolved. Of course, the provision itself is not ideal, however, in practice, the problem will be solved.

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

MR ALAN LEONG (in Cantonese): Chairman, I wish to add a few words to the approach proposed by Mr James TO just now. In fact, there is no need for the Secretary to say too much. If he simply says that when the Commissioner carries out an examination and if the final conclusion on whether prescribed authorization is required is ambiguous or it is unclear whether there is such a need, then the benefit of doubt should go to the complainant. In fact, this will already suffice. This is my view on this.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary for Security, do you wish to speak again?

SECRETARY FOR SECURITY (in Cantonese): I do not think I have the legal standard that Mr Alan LEONG has, so I cannot make the remarks he has suggested. However, I am grateful to Ms NG for the views she has given us. In fact, we will state in the Code of Practice that the departments concerned must co-operate with the Commissioner in his work and investigation. We will consider this further in future.

CHAIRMAN (in Cantonese): Before I put to you the question on Mr James TO's amendments, I will inform Members that if the amendments are agreed, the Secretary for Security 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 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 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 and Mr KWONG Chi-kin voted against the amendment.

Geographical Constituencies:

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

Mr James TIEN, Mrs Selina CHOW, 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, 19 were present, nine 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): Chairman, I move the amendments to subclause (1) of clause 43 and addition of subclause (6) to that clause, as well as amendments to subclause (1) of clause 45 and addition of subclause (1A) to that clause.

Proposed amendments

Clause 43 (see Annex)

Clause 45 (see Annex)

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.

Mr James TIEN, Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, 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 Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, 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 45 Members present, 28 were in favour of the amendment and 16 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 amendments moved by the Secretary for Security have been passed, Ms Margaret NG may not move her amendments, which are inconsistent with the decision already taken.

CHAIRMAN (in Cantonese): The Secretary for Security has given notice to move amendments to add subclauses (2A) and (2B) to clause 43 and the deletion

of subclause (4) from that clause, in relation to orders made by the Commissioner for the payment of compensation. In this connection, Mr James TO has given notice to add subclauses (2B) and (2C) to clause 43 and amendment to subclause (5) of that clause, while Ms Margaret NG has given notice to move the deletion of subclause (4) from clause 43.

Committee now proceeds to a joint debate. 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 subclauses (2A) and (2B) to clause 43 and the deletion of subclause (4) from that clause, as set out in the paper circularized to Members.

The Bill originally provides that the Commissioner can immediately make an order for the payment of compensation on finding the case in the applicant's favour. We now propose an amendment to require that the applicant should be invited to confirm with the Commissioner whether the applicant wishes to seek an order for the payment of compensation, and if so, to make written submissions to him for that purpose. The Commissioner may make an order for the payment of compensation upon taking into account the written submissions.

The authorities opposes Mr James TO's proposed additions to subclauses (2B) and (2C) to specify that the Commissioner may notify the person who is the subject of the interception or covert surveillance concerned, the person who has sustained damages arising from such activities or the applicant to seek an order for compensation. To include the person who has sustained damages in the category of persons who may apply to the Commissioner for an examination will broaden the ambit of the Commissioner. As we have explained earlier on, this is inappropriate. Therefore, the authorities oppose Mr TO's amendment.

I hope Members will support this amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 43 (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 their own amendments respectively.

MR JAMES TO (in Cantonese): Chairman, my amendment seeks to add subclauses (2B) and (2C) to clause 43. I wish to comment on this briefly. In fact, subclause (2B) mainly provides that if a claim for compensation from the applicant or other people who are the subjects of interception or covert surveillance is received, upon receiving confirmation from such applicant or subject, the Commissioner has to take into account the written submissions made to him for that purpose, after which an order for the payment of compensation may be made. The compensation ordered to be paid may cover compensation for injury of feelings. Conceptually, since clause 43 has to do with examination, therefore, if the Commissioner confirms that there is a need for the applicant to claim compensation, the relevant application can then be considered.

MS MARGARET NG (in Cantonese): Chairman, in fact, there is nothing that I wish to say since my amendments to subclauses (2A) and (2B) are opposed by the Government and the President has ruled against moving the amendments. I propose the deletion of subclause (4) because I originally proposed that subclause (4) be replaced by subclauses (2A) and (2B). Since the Government has also moved its amendment to replace subclause (4) with subclauses (2A) and (2B) as well as deleting subclause (4), therefore, Chairman, I have nothing to say.

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 LEUNG KWOK-HUNG (in Cantonese): Sorry, I have pressed the wrong button.

CHAIRMAN (in Cantonese): It does not matter.

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

MR JAMES TO (in Cantonese): I wish to clarify a little. Probably because it is already past ten o'clock, I have not made myself very clear just now. My amendment has to do with the proposals that have been negated just now. I can see that subclauses (2A) and (2B) added by the Secretary are the same as subclauses (2B) and (2C) in my amendment. They are actually the same and what I have done is just to include that particular part of the Government's amendment in my amendment. Therefore, my amendment is actually the same as the Government's.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, 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 the question to you on the Secretary for Security's amendments, I will remind Members that if the amendments are agreed, Mr James TO and Ms Margaret NG may not move their respective amendments.

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 amendments passed.

CHAIRMAN (in Cantonese): As the amendments moved by the Secretary for Security have been passed, Mr James TO and Ms Margaret NG may not move their respective amendments, which are inconsistent with the decision already taken.

CHAIRMAN (in Cantonese): The Secretary for Security has given notice to amend subclauses (2), (3) and (5) of clause 43 and subclause (3) of clause 45, in relation to giving notices by the Commissioner to applicants for examination. In this connection, Mr James TO has given notice to amend subclause (2) of clause 43 and subclause (3) of clause 45, while Ms Margaret NG has also given notice to add the definition of "subject of interception or surveillance" to subclause (1) of clause 2, and to amend subclauses (2) and (3) of clause 43 and subclause (3) of clause 45.

Committee now proceeds to a joint debate. 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 subclauses (2), (3) and (5) of clause 43 and subclause (3) of clause 45, as set out in the paper circularized to Members.

We have earlier on explained the amendments to the criteria according to which the Commissioner makes his determination, therefore, consequential amendment should be made to clause 43(2).

The amendment to clause 43(3) moved by the authorities clearly provides that the Commissioner shall give notice to the applicant as soon as reasonably practicable. It is proposed in response to the suggestion of the Bills Committee.

The amendment to clause 43(5) is a consequential amendment proposed in view of the introduction of the notification mechanism.

The amendment to clause 43(2) proposed by Ms Margaret NG will broaden the standard based on which a case will be determined in favour of the person concerned, including the Commissioner's determination that the authorization concerned should not have been issued or renewed. In other words, even if all the conditions and procedures for authorization have been complied with, the view of the Commissioner can still supercede the decision of the authorizing authority. We find this inappropriate, so we oppose the proposal.

Mr TO's amendment to clauses 43(2) and 45(3) expands the scope of information to be provided by the Commissioner when giving notifications. This will have an effect on the confidentiality of the operation and increase the factors that the Commissioner has to consider when giving notifications. We believe that the present mechanism has already struck a balance between various factors and the information found in the notification is appropriate. In view of this, the authorities also oppose the amendment concerned.

I hope Members will pass the Government's amendment. Thank you, Madam Chairman.

Proposed amendments

Clause 43 (see Annex)

Clause 45 (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.

MR JAMES TO (in Cantonese): My amendment has mainly to do with the lodging of complaints with the Commissioner by the complainants — issues such as according to what criteria and who will be responsible for adducing evidence will be discussed later because that part has already been passed and no matter

according to what criteria, in any event, the finding is in favour of the complainant — in fact, since the Government has carried out wiretapping without authorization, so what should he be informed of? Since the complainant is the aggrieved person and the victim, what should he be informed of? My amendment mainly seeks to add the broad nature of such activity to the several items originally proposed by the Government, for example, whether wiretapping has been carried out on him. What does the broad nature of such activity mean? My understanding is that, for example, he will be told that his telephone has been bugged and which telephone number is involved. We must bear in mind that he is the aggrieved person and the Government has carried out the wiretapping on him without authorization.

In addition, the amendment has to do with the commencement and the end. I must talk about the source of my brainwave. I have taken on board what Ms Emily LAU thought of in a meeting of the Bills Committee and added it to the amendment. If the Government has wiretapped a complainant's telephone, is the telephone number of his fixed residential line or the telephone numbers in his company involved? If his mobile phone number is involved, it is also possible that there are two numbers, so which number is it? One number is perhaps used specifically to get in touch with his lover and the other may be dedicated to contacting a tycoon with whom he has frequent business dealings. Which one or more telephone line is involved? With different telephone lines, the extent of the Government's infringement upon his privacy can also be very different.

Concerning the commencement and the end, if the Government has intercepted the mobile telephone communications of the complainant with his lover (this is only an example to facilitate comprehension), when does that commence? If the telephone bugging was carried out over the past nine months, that means his telephone communications with about 40 lovers were intercepted, but not his telephone communications with his lovers prior to that period. Thus the complainant's mind may be more at ease because he has sired several illegitimate children with those lovers but not with his lovers of late. In this way, at least he can take precautions and know how to minimize the impact on him. What is more, it is possible that the telephone lines in the complainant's company are all devoted to placing orders. Let us say that he is the dealing director of his company, his communications concerning his strategies in placing orders may have all been wiretapped. In that event, since he has no idea how the professional ethics of police officers are like or how many people have heard his conversations, there is no knowing if all those people have

seized the opportunity to buy shares together with him and invited all their aunties and uncles to do the same when he was buying the rising shares of a company. In that event, would he end up buying the shares at higher prices? In that event, would he not end up doing a disservice to his clients? If he wants to buy the shares of a certain company amounting to \$1 billion, he may have to consider doing it step by step and defer buying for a while to avoid other people pre-empting him and so paying more for the shares.

Therefore, in these circumstances, conceptually, the aggrieved party should be allowed to know the general scope of the interception, since frankly speaking, even though there may be compensation, how much will that amount to? Rather, if he is informed of the broad nature of the interception, he will know how to take precautions and reduce his losses. I believe this aspect is even more important to him.

The Secretary said just now that he was concerned that the confidential nature of an operation would be exposed. Please remember that it is in fact necessary to make a choice in this regard. If the whole mechanism will affect law enforcement and public security, it is in fact possible for the Commissioner to make a postponement for so far as desired. So long as law enforcement is not affected, the Commissioner can then make a disclosure. Therefore, the several new amendments I have proposed are all general in nature. In addition, I have also added another safeguard as an additional precaution. If those items will affect law enforcement or public security, the Commissioner will never make any disclosure in any case. Therefore, I believe the entire concept is very important. If the finding is in favour of an aggrieved person who has really been victimized, yet the Government does not provide sufficient information to him to let him understand the situation, nor does it allow the Commissioner to provide information to him even though law enforcement is not at stake, I believe that in the final analysis, this is because the Government wants to have absolute confidentiality and this is not a balance. What about the aggrieved person? Sorry, if he suffers, it is his business. It cannot be helped even if he is sacrificed because the Government wants to maintain absolute confidentiality.

MS MARGARET NG (in Cantonese): Chairman, following Mr James TO's speech, my amendment deals mainly with the question of what sort of people can be considered to be aggrieved persons. The central idea of the amendment can be found in clause 43(2). At present, according to the description of the Bill,

only the target person, that is, the subject originally and specifically targeted in the covert surveillance or interception of communications carried out by law-enforcement agencies, has the right to complain to the Commissioner. After the Commissioner has investigated his complaint and if the finding is in favour of the complainant, then the relevant details can be disclosed to him.

However, Chairman, the interception of communications is not carried out on just one person and it is possible that the communications of other people are also intercepted. When carrying out covert surveillance, it is also possible that many other people are also involved. If these people suffer losses as a result of activities involving illegal intrusion, should they not be entitled to making an application, just as the original target person of such activities carried out by the Government is entitled to do so? I believe the damages and intrusion that they have are the same as the original target person, therefore, we consider that the definition of the target person should be broadened so that the so-called "third party" who are wiretapped and whose communications are intercepted can also be given the same treatment. In other words, one does not have to be the target person on whom this type of activities are directed right from the beginning for one to be regarded as an aggrieved person.

Therefore, to this end, I firstly point out in clause 43(2) that the Commissioner can carry out an examination to see if anyone has carried out interception of communications and covert surveillance in breach of the legislation. If the answer is in the affirmative, the Commissioner will notify the target person on whom the interception of communication and surveillance are carried out. Next, I have also added in the provision relating to the definition that the target person of the interception or surveillance does not merely refer to the original target person. In fact, the activities or communications of other people are also intercepted. In order to address this matter, it is pointed out in the ensuing clause 45 that the targets to be notified should also include these people. Put simply, this is to broaden the definition of "the aggrieved person" to cover people who are directly affected, that is, people who have been unlawfully wiretapped, they are also entitled to being notified and compensated. Thank you, Chairman.

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

MR LEUNG KWOK-HUNG (in Cantonese): The point is very simple and it can be summed up with a proverb, "The burning city gate brings calamity to the fish in the pond.". No matter if it is a mistake or a deliberate move on the part of the authorities, if the finding is in favour of the target person of surveillance, then people who are drawn into this matter as a result of the authorities' mistake should also qualify as victims and they can lodge complaints and claim compensation. The Commissioner should inform these victims and give them the right to information, otherwise, it really will be the case that only heaven knows that one has been involved. Since we want to protect this right, when the Commissioner finds something wrong, he should have the power at his disposal to investigate into the whole matter. Since the authorities have set up safeguards to protect victims whose privacy is violated for no reason or who suffer other losses due to improper actions of the law-enforcement authorities, quite simply, they should of course be notified and the Commissioner should also have the power and duty to fulfil this responsibility.

The legislation should be comprehensive because as we all know, both covert surveillance or the interception of communications often result in collateral damage. To use I myself as an example, if I am the subject of surveillance and if I suddenly come across someone on the street and then I have a game of chess with him, then this friend will become an innocent victim because he will be followed frequently. Therefore, I believe that it is only a matter of course and right that these victims should be notified. Therefore, I hope Members will support this move.

Since our discussion has been so lengthy, many people may ask why is it necessary to make things more complicated. Is it not even better to pass the Bill quickly? Chairman, many people think that we are complicating matters and a lot of comments among the general public also hold that we who move the amendments, actually wants to filibuster and make things complicated. In fact, this is a good example which shows that if this amendment is not made, it will be very difficult for the public authority to take the initiative and notify the victims. But if this is done through the Commissioner, an appropriate safeguard will be put in place because the Commissioner is a third party and he will assess the whole matter and give appropriate notifications. I hope this amendment can be passed because I believe a lot of people are watching this debate and tomorrow, it will also be possible for them to learn about the debate in a general way from the mass media. People may have one query, that is, why does the Government not

put in place a safety exit even as it seeks to protect our freedom and privacy of communications in accordance with Article 30 of the Basic Law? This is not a safety exit that will enable the Government to abuse its power but one that will protect the interests of other people (and not just the target persons). Therefore, I hope the Government can give itself a way out.

Of course, the Government may find doing so very troublesome because this will give rise to two kinds of consequences. One of them is that in this process, the Government may find that it is under a lot of constraints and it cannot abuse its power as much as it likes because if 100 people are drawn into this matter as a result of putting one person under surveillance and in the event that there are a lot of legal actions, the Government will be very embarrassed. However, this is in fact a price that must be paid. When the Government exercises public authority to deprive people of their indispensable freedoms, it should be given a very stern warning so that it can exercise restraint. Therefore, I believe this is a very good mechanism. Someone may say that some people may make use of such opportunities and abuse such a right. I can tell Members that in fact, this will not happen because the Commissioner will keep an eye on this, so there is no need to be worried at all. Since the Government will appoint a Commissioner, it should not appoint anyone who is mistrusted. The Government should not mistrust anyone who is appointed and he should be given the power to protect the rights of the public. Chairman, I believe doing so is highly appropriate.

I hope the Secretary can handle this task properly so that the rights of the Hong Kong public are genuinely protected and they will not become the fish in the pond on which calamity befalls due to a fire at the city gate. Thank you, Chairman.

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

(Mr James TO indicated that he did not wish to speak again)

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): Secretary for Security, do you wish to speak again?

(The Secretary for Security indicated that he did not wish to speak again)

MS MARGARET NG (in Cantonese): Chairman, I am sorry. Earlier on, the Secretary for Security said that my amendment will have the effect of broadening the scope of the work and responsibilities of the Commissioner. I believe if the Commissioner is the only person who can protect public interests, then it is only right that his scope of work is broadened. Since the President has allowed me to propose this amendment, that means it does not have the effect of requiring additional public funds. Since no additional public funds will be required and a larger number of people will benefit, why do we not do it? Does the Secretary not want the public to benefit too? Why has he called on Members to oppose my amendment? Thank you, Chairman.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary for Security, I trust you do not find it necessary to speak again as well?

(The Secretary for Security indicated that he did not find it necessary to speak again)

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.

Mr James TIEN, Dr Raymond HO, Dr David LI, Dr LUI Ming-wah, Mrs Selina CHOW, 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 Martin LEE, Mr Fred LI, Ms Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Ms Emily LAU, Mr Andrew CHENG, Mr Albert CHAN, Ms Audrey EU, Mr LEE Wing-tat, Mr Alan LEONG, Mr LEUNG Kwok-hung, Dr KWOK Ka-ki, 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, 30 were in favour of the amendment and 16 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 amendments moved by the Secretary for Security have been passed, Mr James TO and Ms Margaret NG may not move their respective amendments, which are inconsistent with the decision already taken.

CLERK (in Cantonese): Clauses 43 and 45 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clauses 43 and 45 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): Mr James TO and the Secretary for Security have separately given notice to move amendments to clause 46.

Committee now proceeds to a joint debate. I will first call upon Mr James TO to move his amendment.

MR JAMES TO (in Cantonese): Sorry, Chairman.

No, Chairman, this is because it is originally attached to other amendments and this amendment is in fact completely the same as the one proposed by the Government.

CHAIRMAN (in Cantonese): Just the same as the amendment to be moved by the Secretary for Security later?

MR JAMES TO (in Cantonese): Chairman, I believe it is.....

CHAIRMAN (in Cantonese): You can take a look at the explanatory note. The number is H1.

MR JAMES TO (in Cantonese): Chairman, I have already looked at it.

CHAIRMAN (in Cantonese): Do you wish to delete.....

MR JAMES TO (in Cantonese): Chairman, may I request a break for five minutes?

MS MARGARET NG (in Cantonese): Chairman, I also have some doubts. I also found it rather confusing when I had a look earlier.

CHAIRMAN (in Cantonese): Fine, we can have the meeting suspended for five minutes but Members should not wander too far away. *(Laughter)*

10.45 pm

Meeting suspended.

10.50 pm

Committee then resumed.

CHAIRMAN (in Cantonese): I had no idea that I would be welcomed with the sound of the gong. *(Laughter)* I have to wait a little bit because a quorum is not present now. 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 James TO, please speak.

MR JAMES TO (in Cantonese): Chairman, finally, I have sorted out that it is like this. Firstly, I wish to apply to withdraw this amendment. Let me explain this a little bit. Earlier on, I proposed that panel Judges be replaced by the Judges of the Court of First Instance but the amendment was negated. However, since the amendment itself involved changing a lot of references to "panel judges" to "judges of the Court of First Instance", as is the case for clause 46(3), in which there is one such reference, and since the abovementioned amendment has been negated, this relevant amendment should also be deleted and should no longer be moved. In fact, I appreciate the script prepared by our colleagues very much, however, probably due to the very tight timeframe, this part has not been deleted, so it appears as though it were to be moved. However, since the amendment concerned has been negated, there is no point whatsoever in retaining this part alone. Therefore, I apply to withdraw this amendment.

CHAIRMAN (in Cantonese): Since Mr James TO has withdrawn his amendment, I now call upon the Secretary for Security to speak and move his amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, the amendment to clause 46 is proposed by the authorities according to the suggestions of the Bills Committee and matters related to the determination by the Commissioner are provided clearly. On an examination, the Commissioner makes a determination, he shall notify the head of the department concerned of the determination, including any order or findings he has made in the examination. The Commissioner may also refer the determination and any other matters he thinks fit to the Chief Executive or the Secretary for Justice or the panel Judges; and it is also provided that the head of the department shall submit to the Commissioner a report with details of any measures taken by the department, including any disciplinary action taken in respect of any officer.

Madam Chairman, I hope Members will pass the authorities' amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 46 (see Annex)

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

CHAIRMAN (in Cantonese): Does any other 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 Members present. I declare the amendment passed.

CLERK (in Cantonese): Clause 46 as amended.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 46 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.

CLERK (in Cantonese): Clause 39.

MR FRED LI (in Cantonese): Chairman, concerning clause 39 of the Interception of Communications and Surveillance Bill on the duties of the Commissioner, I propose the following amendment on behalf of the Democratic Party.

We believe that the role of the Commissioner on Interception of Communications and Surveillance is that of a final gatekeeper in protecting human rights and privacy. His role is an independent one and he is very important in overseeing the Government to ensure that it complies with the legislation on interception when it is implemented. We propose that the responsibilities of the Commissioner should be enhanced by including the overseeing of the overall implementation of the legislation. Not only can this arrangement reflect the functions of the Commissioner more clearly, but the

Government can also make reference to the views of the Commissioner when reviewing the overall implementation of the legislation in future.

I hope Members will support my amendment. Thank you, Chairman.

Proposed amendment

Clause 39 (see Annex)

CHAIRMAN (in Cantonese): Members may now jointly debate the original clause and Mr Fred LI'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 authorities oppose the amendment moved by Mr Fred LI to clause 39. As we have explained to the Bills Committee, the creation of the post of the Commissioner on Interception of Communications and Surveillance is designed to put in place independent monitoring on the authorizations granted in accordance with the Bill. In order to ensure that departments and their officers comply with the relevant requirements, the Commissioner can also carry out examinations in response to applications from members of the public. In addition, we have also moved an amendment to enable the Commissioner to notify the target person of operations that have not received proper authorization. This amendment is also moved with the aim of enhancing the monitoring functions of the Commissioner.

However, the implementation of the Bill involves many areas, such as arranging supporting staff for panel Judges, and the work procedures, manpower and resources needed by law-enforcement agencies, and so on. These matters

fall within the scope of the Government and the executive and it is inappropriate for the Commissioner to monitor these matters.

Madam Chairman, I call on Members to oppose the amendment moved by Mr LI to clause 39 of the Bill. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Mr Fred LI, do you wish to speak again?

(Mr Fred LI indicated that he did not wish to speak again)

MR JAMES TO (in Cantonese): Chairman, Members can look at clause 39 concerning the functions of the Commissioner. Paragraph (a) states that the Commissioner is to oversee the compliance by departments and their officers with the relevant requirements. This is stated in the very first line. The ensuing provisions are even more detailed and specific, however, on the general descriptions concerning the Commissioner, as I have said, I believe the relevant provisions are far from adequate if he is only responsible for monitoring the authorizations granted to those departments, since in practice, the implementation of this legislation will involve a lot of arrangements. In the whole process of random sampling files for examination, when he finds problems and inadequacies, he can form his own views and can even handle them carefully in his special capacity. It is possible for him to deal with them from a wider perspective. I believe that the advice he gives will even be better than that given by us or any other person.

However, the Government may say, "If you are responsible for overseeing the overall implementation of the legislation, then as the Secretary for Security, what am I responsible for? Are you in charge of monitoring or am I in charge of it? You should be in charge of it? No. I am the Secretary for Security." I believe the problem is that it is not stated there that the Commissioner is the only person responsible for monitoring. In other words, on assuming leadership on and implementing the legal policy, the Secretary for Security has in fact a role to play. However, on practising and implementing the law, I believe the Commissioner also has a role to play. I hope the Secretary will not mind this and say, "Why are you responsible for overseeing the implementation of the law? Is that not my responsibility? Why have you taken away my power?" I

can only say that if the Secretary looks at the implementation of this policy from a macro perspective, there are in fact many areas in which work should be done.

In a recent special meeting of the Panel on Security, we discussed what checklist was needed for the implementation of this piece of legislation because there were only a few days left. The reason that we are in such a great hurry is also because there are only a few days left. I dare not say that the preparation is lacking or inadequate, however, at least, up to a few days ago, nothing that was raised then could give us the satisfaction that something could be achieved, even though there were only a few days left. Perhaps things of that nature were mentioned in the meeting, however, they were not discussed in detail.

As we look at the procedures which should have been included in the papers, these are things like certain codes of practice for the disciplined forces. And as we go further, these may include certain menus and instructions, that is, the systems designed for training. Since the Commissioner himself is well-versed with the whole body of the legislation — or he will be, as he may not necessarily be at the beginning but he will gradually be — he will see in which cases the abuse of power can be detected, what the abuse of power means, how it can be prevented, and so on. It may not necessarily be the case that he will always detect it in the codes of practice. Sometimes, some papers of a more confidential nature may be involved or he may learn about the abuses from sources other than the codes of practice, in such sources as headquarters' orders, standard instructions or confidential orders. The Commissioner may examine these areas and offer his advice, bearing in mind the whole picture, going from the front line to every level in the hierarchy and delving further into the inside.

I wonder if the Secretary will say that in doing so, is this not tantamount to taking away even the power of the Commissioner of Police? If he thinks this way, he will not be able to inspire confidence among the public on laws relating to privacy. This Commissioner will be truly capable of practising the whole body of law and no matter what detail is involved, he has the duty to examine it. Will he be the only person in charge of monitoring? I have not said that he will be the only person. However, if he is given such a responsibility, he can then offer his advice in areas within his ambit properly. If this is not the case and he does not have such a function, there will be several possibilities. Firstly, he may mentally put under some self-restraint; the second situation is that if someone says that the Commissioner does not have such a power, then he cannot say anything further.

Therefore, if we can write the provisions with latitude and such latitude is not given to only one person — please bear in mind that the Commissioner is not the only person who oversees the implementation of the legislation — I believe doing so can give the Commissioner sufficient confidence and latitude to serve the public and protect the privacy of the public secretly. On a host of issues such as operations of this nature, measures to maintain confidentiality and even complaints, and whether officers will abuse their powers in certain circumstances, as well as the preventive mechanisms, the Commissioner will have greater room and rightful status to comment on them. This can be accomplished through the law.

Therefore, I hope the Secretary will not mind this too much and query if this will deprive him or "Brother Number One" (the Commissioner of Police) of their power because this definitely will not happen. Conversely, if the Commissioner is not given such a power and his power is only limited to a very narrow scope in every domain, then he can only focus on some very technical and minor issues concerning compliance with the law. This will not help him represent the public, and act in secret to facilitate the implementation of the law and serve as a counterbalance to law enforcement, as well as safeguard the freedom from violations of privacy and the freedom of communication as provided in Article 30 of the Basic Law.

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

(No Member indicated a wish to speak)

CHAIRMAN (in Cantonese): If not, Secretary for Security, do you wish 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 Mr Fred LI 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 KWOK Ka-ki, Dr Fernando CHEUNG and Miss TAM Heung-man voted for the amendment.

Dr Raymond HO, Dr David LI, 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 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 Albert CHAN, 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, Mrs Selina CHOW, 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, 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 negated.

SUSPENSION OF MEETING

CHAIRMAN (in Cantonese): Members, I am very satisfied with the progress of the deliberations today. (*Laughter*) However, since our script is very complicated and even when the deliberations were in progress, Members still received amended pages all the time. Sometimes, Members also feel that there may be some commissions, therefore, I wish to make a little more time available so that on the one hand, colleagues of the Secretariat can look at the script again; on the other hand, I also call on those Members who will propose amendments later to check whether some of the amendments are unnecessary, so that we can delete them and save the time needed to deal with them. In view of this, I want to suspend the meeting now and resume at nine o'clock tomorrow morning, so that everyone can have more time.

Please wait. Ms Margaret NG, is it a point of order?

MS MARGARET NG (in Cantonese): Chairman, this can be said to be a point of order because the next item is "Ms Margaret NG moves an amendment to clause 39". In fact, as one of the sub-items was opposed by the Government, it was ruled out by the President. Consequently, my amendment has become meaningless, so I take this opportunity before the Chairman formally declares the

suspension of the meeting to withdraw this amendment. As a result, it will not be necessary to deal with it.

CHAIRMAN (in Cantonese): Do you wish to withdraw this amendment? Ms Margaret NG, you mean you wish to withdraw the amendment to clause 39 concerning the prescribed functions of the Commissioner, do you?

MS MARGARET NG (in Cantonese): Yes, thank you, Chairman.

CHAIRMAN (in Cantonese): All right, you have my consent to withdraw the amendment. As a result, we will have a fresh start tomorrow. However, I hope Members will co-operate. Thank you.

I now suspend the meeting until 9 am tomorrow.

Suspended accordingly at ten minutes past Eleven o'clock.