

**Extract from the Official Record of Proceedings
of the Council meeting of 10 July 2002**

X X X X X X X

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move deletion of the definitions of "authorized officer" and "property" from; addition of the definitions of "Committee", "items subject to legal privilege" and "prescribed interest" and subclauses (4) and (5) to; and amendments to the definitions of "funds", "terrorist associate" and "weapons" in clause 2, as set out in the paper circularized to Members.

The Bills Committee was of the view that the coverage of "financial assets" and "economic resources" in the existing definition of "property" in clause 2 was too extensive, making it difficult for the real substance of "property" to be ascertained. We agree with the Bills Committee and in order to avoid unnecessary confusions, propose to delete the definition of "property" and rely instead on the definition under the Interpretation and General Clauses Ordinance as the criteria for interpretation of "property".

In response to the Bills Committee's opinion that law enforcement agencies were granted excessive powers under Schedules 2 and 3, I am going to move the deletion of Schedules 2 and 3. The deletion of the definition of "authorized officer" and the amendment to the definition of "funds" in clause 2 are consequential amendments to the deletion of the two Schedules.

As regards the mechanism on the specification of terrorists, terrorist associates or terrorist property, I am going to move amendments to clause 4 to

propose that United Nations specified and non-United Nations specified terrorists, terrorist associates and terrorist property be dealt with under different mechanisms. The addition of the definition of "Committee" and the amendment to the definition of "terrorist associate" are technical amendments made in relation to the establishment of the relevant mechanisms, to allow the executive authorities to specify terrorists and terrorist property through administrative measures.

Furthermore, the Bills Committee and the legal profession were of the opinion that the Bill should clearly protect legal professional privilege, so as to safeguard the relationship of mutual trust between professional lawyers and their clients and to clearly prescribe the privilege against self-incrimination. This is to prevent the Government from forcing the relevant profession and persons under investigation to provide information against its professional code or provide self-incriminating information under the pretext of investigating terrorist activities.

In fact, even if there is no specific provision in the Bill, the above privileges are still protected under common law principles. However, in order to allay the worries of the Bills Committee members and professionals concerned, we are very happy to add the relevant provisions:

- (a) Addition of the definition of "items subject to legal privilege", the meaning of which is the same as that under the definition in the Organized and Serious Crimes Ordinance, and that is, communications between a professional lawyer and his client in connection with the giving of legal advice or for the purposes of legal proceedings, and addition of subclause (5) specifying that the Bill does not require a lawyer to disclose any "items subject to legal privilege" and authorize the search or seizure of any "items subject to legal privilege";
- (b) New subclause (5) also specifies that the Bill does not restrict the privilege against self-incrimination.

The addition of the definition of "prescribed interest" and the addition of subclause (4) seek to empower the Court, in making regulations on appeals concerning the relevant property, may prescribe that a person who has a "prescribed interest" may include the affected persons who do not directly hold

or own the relevant property and that they have the right to make appeals with regard to the relevant property.

The Bills Committee also mentions that part (d) in the existing definition of "weapons" includes any components and goods used in the manufacture or maintenance of any arms or related material. As such components and goods could be used for both military and civilian purposes, members of the Bills Committee were concerned that this clause may affect the normal trading and purchase and sale of certain commodities. We share the Members' concern and have thus proposed to amend the definition of "weapons" by deleting paragraph (d) and amending the provision on chemical, biological, radiological or nuclear weapons in paragraph (a) to add "the precursors (先質)" of those weapons, so as to state more clearly that only significant materials used in the manufacture of those weapons fall within the definition of "weapons". Companies engaging in the trading of commodities that can be used for both military and civilian purposes could, therefore, feel free to continue with their normal commercial activities and do not have to worry that they would be unjustifiably accused of providing "weapons" to terrorists.

The above amendments have been discussed by the Bills Committee and endorsed by the majority of its members. I implore Members to support and pass the amendments.

Proposed amendment

Clause 2 (see Annex IX)

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

MS AUDREY EU (in Cantonese): Madam Chairman, in respect of certain parts of the Bill, I owe the Secretary and the relevant officials some thanks. For instance, the definition of "property" has been deleted in response to suggestions by the Bills Committee because the definition of "property" includes "economic resources". It is a very good example because the term is found in the UNSCR 1373. As the Secretary has said, the term should be included if we indiscriminately copy the UNSCR 1373 but the Bills Committee has discussed how the term should be interpreted and what the term should cover. Finally,

the Secretary accepted the view of the Bills Committee that the term was too broad and general and we were not sure of its coverage, so it should be deleted. It is a very good example proving that indiscriminately copying a term may not necessarily work and it depends on how the resolution can be substantively realized in Hong Kong. It is good to do so and I am very grateful to the Secretary for making the relevant improvement and deleting part of the definition of "property".

The term "Committee" is newly added because according to the original clause 4 of the Blue Bill, where the Chief Executive has reasonable grounds to believe that a person is a terrorist, the Chief Executive may publish a notice in the Gazette specifying the name or names of the person. When the Bills Committee first discussed this, we said that a person might suddenly find his name published in the Gazette and that he had become a terrorist without going through any procedures; he was a terrorist as long as the Chief Executive had reasonable grounds to believe so. Later, the Secretary accepted the suggestion of the Bills Committee; so, clause 4 was rewritten as it is today. This part is applicable to a person specified as a world-class terrorist after the Committee has studied his case and his case can be handled according to clause 4. It is also an improvement that his property will be handled in a manner that is different from that for terrorist property under clause 5. Frankly speaking, Madam Chairman, I think the Bills Committee has not adequately discussed other additions and deletions such as the "prescribed interest" under discussion now. Although the topic was raised and I had asked some questions, there were too many issues for discussion and we did not have time to discuss what was "prescribed interest", how to exercise the relevant power or co-ordinate it with other laws. We did not have time to discuss these matters at that time.

Madam Chairman, we can only say that the Bills Committee has exerted its utmost and some of our 15 meetings lasted more than two hours. Therefore, we have discussed whatever we could discuss and the amendments proposed by us and the Secretary indicated some of the improvements made. Yet, we cannot say that the Bill has been thoroughly and suitably discussed. Thank you, Madam Chairman.

MR ALBERT HO (in Cantonese): Madam Chairman, the amendment to clause 2(5) is very important indeed. It is related to the preservation of legal professional privilege and the constitutional right for enjoying safeguards against self-incrimination. As Members are all aware, the purpose of adding this

provision is to safeguard the operation of the entire legal system and our tradition of the rule of law. I hope the Secretary can pay attention to only one point, and this is, some similar provisions might lack the express safeguards as provided for under clause 2(5). I hope the Secretary and her colleagues can re-examine this matter. As far as I can remember, a couple of laws, apparently related to money laundering, passed several years ago contain similar provisions, involving, for instance, the requirement to report, power of search, and so on. However, they lack the safeguards as provided for in this provision. I hope the Secretary can examine this matter and introduce appropriate amendments. Thank you, Madam Chairman.

MISS MARGARET NG (in Cantonese): Madam Chairman, unfortunately, I am not as generous as Ms Audrey EU, although some amendments have improved the previous provisions, I feel quite uneasy about certain points such as legal professional privilege. Throughout the entire process, our understanding is that legal professional privilege is a very basic common law privilege that is essential to the impartial administration of justice. Conventionally, the privilege would not be affected unless there is express provision on it being restricted or reduced. Therefore, if it is specified in certain wordings at the outset, the list cannot be exhaustive. In particular, since we have been in such a hurry, the concept of privilege might be different from references under other ordinances to "items subject to legal privilege". The expression is copied from other ordinances but I can really not tolerate having some express provisions and certain provisions presented in a different way. It is really bad, but we have no alternative but to accept them, which is very unsatisfactory indeed.

As we would be able to see later, clause 11 of the Bill is not satisfactory. It has imposed new requirements and responsibilities on everybody, including those in the legal profession. How could the legal professional privilege tie in with the new responsibilities? We did not have time to elaborate this point. Lastly, I would like to discuss "the right against self-incrimination" that actually gives inadequate and inexplicit protection. Therefore, I am very pleased that the Secretary has just said very clearly that the specified would be protected and the unspecified would not be protected for the avoidance of doubts in future. At least, the Secretary has explained that the provision is intended to avoid doubts rather than restricting or replacing the common law principles. It is beneficial to the parties concerned but "the right against self-incrimination" has still not given adequate protection for we have failed to consider the new responsibilities under the Bill.

Madam Chairman, I can only say that we have no alternative but to accept these amendments in order to pre-empt the emergence of even worse scenarios. Making amendments are after all better than not making any. But if I am asked if I am grateful to the Secretary, I am afraid I cannot express my gratitude to her this time. Perhaps I would be able to express my gratitude to the Secretary next time around. Thank you.

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

(No Member responded)

CHAIRMAN (in Cantonese): If not, I now call upon the Secretary for Security to speak again.

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

(The Secretary for Security indicated that she did not 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 motion passed.

CLERK (in Cantonese): Clause 4.

CHAIRMAN (in Cantonese): Both the Secretary for Security and Miss Margaret NG have separately given notice to move amendments to clause 4 of the Bill.

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate. I will first call upon the Secretary for Security to move her amendment, as she is the public officer in charge of the Bill.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 4 be amended, as set out in the paper circularized to Members.

According to clause 4 as it stands, the Chief Executive has the power to specify, where he has reasonable grounds to believe, that certain persons and property are terrorists, terrorist associates or terrorist property. Precedents for such administrative specification can be found in other countries such as the United States and New Zealand where similar administrative arrangements can be found. The Bills Committee was of the view that the executive was given excessive powers under this mechanism without suitable checks, so a judicial procedure should be introduced to protect the interests of the affected persons. We have carefully considered the views of the Bills Committee and share members' views. Therefore, clause 4 is amended in accordance with the direction proposed by the Bills Committee and two separate mechanisms are established in relation to specification by the Chief Executive of persons and property as terrorists, terrorist associates or terrorist property. The first mechanism is provided in the amended clause 4. Where any persons and property are designated by the United Nations as terrorists, terrorist associates or terrorist property, the Chief Executive may publish a notice in the Gazette specifying the names of those persons and property.

If the persons and property cease to be designated by the United Nations, then the notice published by the Chief Executive will lapse, and the Chief Executive should also publish a notice in the Gazette as soon as is practicable to revoke the relevant specification notice.

The second mechanism is provided for under new clause 4A. If a certain person or property is not designated by the United Nations as terrorist, terrorist associate or terrorist property and the Chief Executive wishes to specify that person or property, then he has to make an application to the Court of First Instance which shall grant the Chief Executive's application and make the order sought by the application only if it is satisfied that the person or property is a terrorist, terrorist associate or terrorist property. And, the Chief Executive shall publish the order in the Gazette and the validity period of the said order will also be reduced from the original period of three years to two years. Where the Chief Executive receives information which causes him to have reasonable grounds to believe that the person or property is not, or is no longer, a terrorist, terrorist associate or terrorist property, the Chief Executive shall, as soon as is practicable, make an application to the Court of First Instance for the order to be revoked and the Court of First Instance shall grant the Chief Executive's application. It is also clearly provided that unless the application of the Chief Executive falls within the exception circumstances specified in rules of court, an application shall be made *inter partes*, to ensure that the affected persons may make a defence.

The above amendments have been discussed by the Bills Committee and endorsed by the majority of its members. I implore Members to support and pass the amendments.

Proposed amendment

Clause 4 (see Annex IX)

CHAIRMAN (in Cantonese): I now call upon Miss Margaret NG to speak on the amendment moved by the Secretary for Security as well as her own amendment.

MISS MARGARET NG (in Cantonese): Madam Chairman, my amendment divides the original clause 4 into clauses 4 and 4A, which is similar to that proposed by the Government, and clause 4 after the division is identical to clause 4 as amended by the Government. Under clause 4A, the Chief Executive may specify in the Gazette the name of a person not designated by the Committee as a terrorist. On this point, my amendment differs from the amendment of the Government in a few aspects: firstly, we can see from the Blue

Bill that the specification will have a validity of three years, which is quite excessive, and the Government has also decided to change the validity period to two years. However, the Hong Kong Bar Association and I have stated in the submission that we do not think it is necessary to change the period to two years. It is mainly because the United Nations has stated that the issue should be handled expeditiously, if so, the validity period of specification may last less than two years. In particular, the Government may specify a person as a terrorist again when there is stronger justification. Therefore, the validity period is only one year in my amendment, as stated under clause 4A(8).

Secondly, I have added subclause (10) to clause 4A, specifying that we cannot assume that everybody could read the Gazette. The Chief Executive may make an application to the Court and when the Court grants the application, he shall cause a notice on the order to be published in the Gazette to specify a person or property as a terrorist, terrorist associate or terrorist property. Upon specification by the Chief Executive by notice in the Gazette, it is presumed that a person specified in the notice as a terrorist is a terrorist, a person specified in the notice as a terrorist associate is a terrorist associate, and property specified in the notice as terrorist property is terrorist property. It shall be presumed so in the absence of evidence to the contrary. I wish to clarify how effective the presumption is. Can we presume that other people have read the Gazette after a notice has been published in the Gazette, and that they already know that the person or his property has been presumed as a terrorist or terrorist property? Therefore, I propose adding subclause (10) to illustrate that, even if it is specified so, the criminal offences specified under clauses 6, 7, 8 and 9 to be read the Second time later cannot presume that any person has already noted any order published in the Gazette or its contents. Let us take a look at clause 6, 7, 8 or 9, specifying that no person shall provide or collect funds to be supplied to terrorists or make funds or financial services available to terrorists. After the Chief Executive has made a specification by notice in the Gazette, has he presumed that people know that they are terrorists or have read the Gazette? If so, the criminal offences would become very strict criminal offences and even if a person does not have any knowledge of the specification, he may have committed many criminal offences. I have proposed the amendment because it completely fails to meet the requirements of criminal offences.

Madam Chairman, I would like to spend some time on the point that the International Commission of Jurists and the Hong Kong Bar Association do not fully agree to requesting the Court, through court procedures, to allow the Chief

Executive to specify by notice in the Gazette certain people as terrorists, terrorist associates or their property as terrorist property for the Court should not be involved in such political incidents. But as Ms Audrey EU has mentioned earlier, during consideration of the Bill by the Bills Committee, the original draft of the Government specified that the Chief Executive shall cause a notice to be published in the Gazette if he has reasonable grounds to believe so. We think that the practice is not monitored at all and an unbiased Court not involving any interests must approve the application through judicial procedures. It would be more objective and reliable and provide the public or affected persons with better protection. The proposal made by the Government is not satisfactory but we have no alternative but to accept it. Anyway, it would be better than no monitoring at all. Hence, we have not proposed any amendment for we have no alternative.

Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Members may now debate the amendment moved by the Secretary for Security and Miss Margaret NG's amendment.

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

MISS CYD HO (in Cantonese): Madam Chairman, the amendment by the Administration is certainly much better than the original provision. According to the original provision, so long as the Chief Executive has reasonable grounds to believe so, he shall cause a notice to be published in the Gazette to specify a person as a terrorist and there is no checking on this power. We often say that we have to make reference to the examples in foreign countries, but in these countries it would actually involve the parliament. The executive authorities have to seek the consent of the parliament before declaring a person or an organization as a terrorist or a terrorist organization. However, I understand very well why we cannot consider the possibility in Hong Kong and we have no alternative, as Miss Margaret NG has said, but to leave such cases to the Court. I believe the principal reason is that this is not a fully elected Council after all. We actually have worries about whether this Council is going to pass whatever legislation, motion or notice proposed by the Government at that time. When we considered the Bill, though we knew that there were examples in foreign

countries in which the consent of the parliament was required before the executive authorities could declare a person or an organization as a terrorist or a terrorist organization, this Council in Hong Kong has not taken this alternative into account.

As specified in the amendment of Miss Margaret NG, we cannot presume that anybody knows the notice of the relevant order or revocation of notice and its contents. It is a realistic approach. Does any one of us, legislators, go through the entire Gazette every Friday? Therefore, I fully support the amendment but, in actual operation, I hope the Government would also notify various sectors by putting out press releases besides publishing notices in the Gazette in future (the way in which the executive authorities will handle the matter now is already sounder). Although the public would have knowledge of such matters through the media, we cannot specify this in the law. We also cannot formulate a provision to specify that the executive authorities must put out press releases. Besides publishing a notice in the Gazette, how else can we let more people know that it has been declared that certain persons, organizations or companies are related to terrorist activities and that they should make a clear break with them lest they would be implicated and be held criminally liable? In future, when the executive authorities invoke section 4 or 4A or publish the United Nations list in the Gazette or publish with power conferred by the Court a notice in the Gazette specifying a person as a terrorist, I hope they would make efforts to let people know that there is such a law that they must abide by whether they like it or not. Thank you, Madam Chairman.

MR ALBERT HO (in Cantonese): Madam Chairman, the Democratic Party supports amending the existing clause 4 to clauses 4 and 4A and we think that they are very important amendments. After all, I think the Government has the responsibility to examine and determine whether certain persons or organizations are terrorists or terrorist organizations and it is far more appropriate for the Court than other bodies to check and balance this power of the Government. I do not understand why it would be better for such cases to be considered by this Council. This Council makes laws and monitors public finance, and we may have to hold a lot of hearings and hear a lot of evidence if we also consider individual cases. Given its existing structure and mode of operation, I think it is inappropriate for this Council to engage in such work but it is most suitable for the Court to act as a mechanism for checks and balances. In any case, I believe Members would agree that it is more suitable for the Court to act as the

mechanism for checks and balances although they have different views on or doubts about the principles of clauses 4 and 4A.

The Democratic Party also agrees with the addition proposed by Miss Margaret NG. As I have just explained the reasons very clearly, I am not going to repeat them. Given the order of voting, we would vote against the amendment of the Secretary first, hoping that we would have a chance later to vote for the amendment of Miss Margaret NG.

MR JAMES TO (in Cantonese): Madam Chairman, I just wish to make two points. First, we already discussed the concept of separate handling at the first meeting of the Panel on Security of this Council, that is, the Court should adjudicate or judge the specification of names not designated by the United Nations. The Blue Bill introduced by the Administration did not adopt the view and amendments were subsequently made. Had the Government formulated the provision earlier, it would have saved plenty of time for we had used several sessions discussing clauses 4 and 4A.

If possible, I wish the Government would respond to the second point that I am going to make. Under the existing clauses 4 and 4A proposed by the Government, once a notice has been published in the Gazette, it would be presumed that a person is a terrorist. The amendments of Miss Margaret NG are mainly related to the offences under clauses 6, 7, 8 and 9, such as the collection of funds and provision of assistance. Although a certain person is a terrorist, would the Government carefully investigate if the persons who commit the said offences knows that particular person is a terrorist? How much do they know? Have they read the Gazette? When the police makes an investigation, would they ask the persons who have committed the offences if they have read the Gazette? We hope that the provisions of clauses 6, 7, 8 and 9 would be enforced in a sounder manner. On the basis of my preliminary observation, in regard to legal concepts, even if a notice has been published in the Gazette, when the Government prosecutes a person by virtue of clauses 6, 7, 8 and 9, it may not necessarily presume that he knows that a certain person is a terrorist. If it presumes that he knows that a certain person is a terrorist, he would be in a fairly disadvantageous position as far as evidence is concerned. I wish the Secretary would tell us how to adopt a sounder enforcement method, which is a very important point. We think that the amendment of Miss Margaret NG specifies the point more explicitly. I am not sure if we are only being wise after the event

but I believe that if we had ample time, perhaps the Secretary might have also added that, that is, it may not be presumed that a person must have read the Gazette and known its contents after a notice has been published in the Gazette. When clauses 6, 7, 8 and 9 are invoked to prosecute a suspect, it may be disadvantageous to the suspect in terms of evidence. It is a pity that we did not have time to discuss the matter in detail.

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

(No Member responded)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, in fact, there are two major points in Miss Margaret NG's proposed amendment.

The first point was to shorten the validity period of the order of the Court of First Instance from two years to one year. In this regard, clause 16 has already provided an appeal mechanism for specified persons or other affected persons to apply to the Court for revocation of the relevant order. Moreover, the validity period of two years is also not too long and it is certainly not too excessive as opined by Miss Margaret NG. Therefore, I do not think that there is a need to shorten the validity period.

The second point is to make additional provisions to prescribe that the provisions in clauses 6, 7, 8, 9 and 11, relating to the supply of funds and weapons, recruitment of members for terrorists and disclosure of terrorist property should not presume that any person knows that the Court of First Instance has granted approval for the Chief Executive to publish an order in the Gazette. I would like to explain that the presumption referred to in clauses 4(5) and 4A(4) does not seek to presume that the public knows the content of the Gazette. This is not the case. I hope I have already answered Mr James TO's question. The main purpose of this presumption is to presume that the person specified is a terrorist. The purpose of the presumption in clauses 4(5) and 4A(4) is to ensure that there is no need to prove that persons and property specified in a gazetted notice and order are terrorists, terrorist associates or terrorist property when the Government makes prosecutions under clauses 6, 7, 8, 9 and 11. This presumption is made on the assumption that there is no local terrorist in Hong Kong and that all terrorists come from overseas, while the

information we got is also from overseas. Therefore, we must specify terrorist organizations like Al Qaeda who is active in overseas countries because it is virtually impossible for Hong Kong to get hold of much evidence to prove that these persons are terrorists, thus such a presumption must be made.

However, under the principle of criminal prosecution, even if there is such a presumption, the Government still has to prove beyond reasonable doubt (that is, 毫無合理疑點地) that the accused, that is, the person who is accused of breaching clauses 6, 7, 8, 9 and 11, has supplied funds, financial services, weapons and recruited members for terrorists when he actually knows or has reasonable grounds to believe that a certain person is a terrorist or terrorist associate, or that the accused actually knows or suspects certain property is terrorist property but fails to make a report, before charges made under clauses 6, 7, 8, 9 and 11 could be substantiated. Therefore, certain elements such as psychological factors like "has reasonable grounds to believe" and "actually knows" must first be proved beyond reasonable doubt, before any charges could be substantiated. The simple fact that a notice or an order has been published in the Gazette certainly cannot be regarded as substantial evidence on the charge. Therefore, we believe Miss Margaret NG's proposal on making additional provisions is unnecessary.

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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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

CHAIRMAN (in Cantonese): Are Members sure about the question already put?

Mr Andrew WONG, since you are present, please press the "present" button to indicate your presence. You are free not to cast any vote, but please press the "present" button. Thank you.

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

Mr Kenneth TING, Mr James TIEN, Dr David CHU, Dr Raymond HO, Mr Eric LI, Dr LUI Ming-wah, Mr NG LEUNG-sing, Mrs Selina CHOW, Mr CHAN Kwok-keung, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr YEUNG Yiu-chung, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Mr Ambrose LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Miss LI Fung-ying, Mr Henry WU, Mr Tommy CHEUNG, Mr LEUNG Fu-wah, Dr LO Wing-lok, Mr IP Kwok-him, Mr LAU Ping-cheung and Mr MA Fung-kwok voted for the motion.

Miss Cyd HO, Mr Albert HO, Mr LEE Cheuk-yan, Mr Fred LI, Miss Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr SIN Chung-kai, Dr YEUNG Sum, Miss Emily LAU, Mr Andrew CHENG, Mr SZETO Wah, Mr LAW Chi-kwong, Mr Michael MAK, Mr Albert CHAN and Ms Audrey EU voted against the motion.

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

The CHAIRMAN announced that there were 47 Members present, 29 were in favour of the motion and 16 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Miss Margaret NG may not move her amendment to clause 4, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 4 as amended.

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 5.

CHAIRMAN (in Cantonese): The Secretary for Security and Miss Margaret NG have separately given notice to move amendments to clause 5 of the Bill.

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 5 be amended, as set out in the paper circularized to Members.

The validity of the freezing period for terrorist funds specified by a notice under the existing clause 5 is three years. Members on the Bills Committee are of the view that the freezing period is too long, and they also think that the provision which allows the Secretary to freeze the same funds upon expiry

without having to give any new justifications is unfair to the affected person. Having listened to the views of the Bills Committee, we now propose to shorten the freezing period from three years to two years. Besides, since under clause 13 of the Bill, the Government may, during the validity of the freezing period, apply to the Court of First Instance for the forfeiture of the funds concerned, we now propose to perfect this clause by introducing a new clause 13(3A), specifying that the freezing period will end only if the funds concerned still remain not forfeited when the relevant proceedings are completed.

In addition, in response to the concerns expressed by some law academics during the discussions of the Bills Committee, we now also propose to introduce a new clause 5(3B), specifying that unless there has been any new evidence or any material change in the evidence, the Secretary for Security shall not freeze the same funds again. This new provision can give added protection, thereby ensuring that the authority of freezing funds will not be abused.

As for the amendment to clause 5(1), the objective is to make the provision clearer and more concise. The amendment has incorporated the recommendations of the Bills Committee. I implore Members to support and endorse it.

Miss Margaret NG has put forward an amendment to clause 5, proposing to shorten the validity period of a notice on freezing terrorist funds to one year. I think this amendment fails to take account of practical needs. We hope the Bills Committee can realize that after freezing some funds suspected to be terrorist property, the Government will not just wait for the expiry of the freezing period with folded arms. Instead, it will make every possible effort in the meantime to collect evidence and apply to the Court for the forfeiture of the funds, so that they will not be used for financing any terrorist activities.

Since we may have to request relevant information and evidence from other jurisdictions through mutual legal assistance arrangements, we think a two-year freezing period will be appropriate, as it can allow us the time for investigation, liaising with other jurisdictions and the legal proceedings required. Besides, since clause 16 already sets down a channel of appeal, whereby an affected person may apply to the Court of First Instance for the revocation of a notice, we do not see any need to shorten the freezing period.

Miss Margaret NG also proposes to introduce a new clause 5(7), specifying that the notice on funds freezing shall not affect the supply of funds to the specified person or his dependants for the purpose of meeting expenses on food, clothing, accommodation, medical treatment and legal services. I understand that Miss Margaret NG's amendment is based on the principle of safeguarding basic human rights. But in practice, her amendment will lead to loopholes in the legislation, making it possible for some unruly elements to supply funds to terrorists for terrorist activities under the guise of the humanitarian grounds mentioned above.

Actually, both clause 5 and clause 7 of the Bill already provide for the authority of the Secretary for Security to grant a licence for the supply of funds to the affected person to meet various types of expenses. And, later on, I will also move the addition of new clause 14A, specifying that the affected person may use the relevant funds to meet reasonable living and legal expenses.

In addition, if the Secretary for Security refuses to grant a licence, or if the affected person is not satisfied with the conditions set out in the licence, he may, under the amended clause 16, apply to the Court of First Instance for a licence, or for the alteration of the licence conditions.

All this shows that our proposals can already take account of Miss Margaret NG's concerns. Her amendment is therefore largely unnecessary.

Proposed amendment

Clause 5 (see Annex IX)

MISS MARGARET NG (in Cantonese): Madam Chairman, clause 5 is the most important part of the entire United Nations (Anti-Terrorism Measures) Bill (the Bill). As the Secretary has disclosed, the Chief Executive may not specify a person as a terrorist or property as terrorist property in a short while.

As specified in the clause, the Secretary may by notice in writing freeze the funds where the Secretary has reasonable grounds to suspect that any funds held by any person are terrorist property, and the Secretary may by notice in writing freeze the funds at once. It is originally specified that the funds shall be frozen for three years, but it is now proposed that the period should be two years. The Secretary can more or less say that she has reasonable grounds to suspect so

at any time and the requirement can easily be met. The definition of terrorist property is very broad and we feel concerned because the Secretary may do so by giving a notice in writing, without going through any court procedure.

The Drug Trafficking and Organized Crimes Ordinance that Mr James TO is very familiar with has also specified that an application for a restraint order has to be made before freezing the property of a person, and it must be demonstrated that the person is going to be prosecuted for specific criminal offences. After seeking the advice of the relevant Bills Committee, I know that the Government must not only do so but also promise to make compensation if the application for a restraint order has been wrongfully made. Thus there are very stringent procedures. While court procedures are required for an obvious criminal offence case, can the property of a person be frozen without a court procedure so long as it is suspected that it is terrorist property even though it may not necessarily be his property? I feel very uncomfortable about this part of the clause.

Madam Chairman, as time was limited, we did not have time to work out an alternative or create an additional court procedure, therefore, we had no alternative. We understand very well that we must take some measures under Resolution 1373 and take expeditious actions to freeze the funds. Hence, we have considered two points. First, should the property be frozen for as long as two years? Second, can the period be shortened to one year at least? We have also discussed compensation and expressed views that are actually consistent with those of the Hong Kong Bar Association. Firstly, at least, we wanted to limit the period of freezing. Therefore, we have to take actions very quickly and we cannot take too long. As the Secretary has said, the Government would not seek to freeze the property indefinitely and it would make efforts to confiscate the property. As the Government would have sufficient time to take factors into consideration before confiscating the property, would it consider taking other actions? How can it freeze the property for a long time, such as two years, because it fails to confiscate it? It takes the Government two years. When we passed the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 earlier today, some Members remarked that, without special request, the Government would generally be allowed to freeze the property for six months only and, if it wished to extend the period, it had to file another application with the Court and furnish justifications for doing so. Under the present circumstances, it would be very convenient for the Government to freeze the property for one year. This Council is very understanding towards the Government and we understand that it has to fulfil the requirements of the United

Nations. Therefore, we have gone out of the way to bargain with the Government before allowing a freeze period of one year.

Why do I wish to make the addition of subclause (7)? I wish to illustrate that expenses on feeding, clothing, housing and legal proceedings should not be made under the authority of a licence. The Bill specifies that property once frozen cannot be used but I wish to make an amendment to it. I think property that cannot be used should not include expenses on feeding, clothing, housing and legal advice because all of us need food, clothing and housing, for these are basic rights. Why should the Secretary be given authority to grant a licence for the purpose? The Secretary may grant a licence when she has time and remembers to do so, but we have to note that the licence would be specially granted and we cannot take it for granted. If the Secretary is busy and does not have the time, an application should then be filed with the Court. The applicant can do nothing in the meantime and he has to wait for the Secretary to grant a licence before he can have food. If a person's property has been frozen without cause, he may have to immediately apply for the revocation of the written notice under clause 16 as the Secretary has just suggested. That means legal expenses. As a layman, the applicant would not know what to do and he would have to pay legal charges for the legal advice he needs. Thus, it is necessary to file applications with the Secretary for everything and, if the Secretary does not have the time, applications have to be filed with the Court.

Therefore, I propose slightly amending clause 5 for these basic rights. I wonder if we should at least shorten the period as proposed in my amendment and explicitly state that the expenses on feeding, clothing, housing and legal advice should not fall within the scope of freezing. Madam Chairman, I find it very reasonable to do so and I implore Members to support my amendment. Thank you.

CHAIRMAN (in Cantonese): Members may now debate the amendment moved by the Secretary for Security and Miss Margaret NG's amendment.

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

MR JAMES TO (in Cantonese): I am not going to repeat the points already made by Miss Margaret NG. The only thing I wish to say is that the Secretary

should note one point about the Government's amendment. The originally proposed validity period is rigidly set at three years, meaning that after three years, the validity period will come to an end no matter what, even though the application made by the Government is unsuccessful and the property concerned cannot be forfeited. But the Secretary now proposes to shorten the period to two years, with a proviso, set out in clause 5(3A), that if proceedings are still pending by that time, the validity period shall not expire. Do these two changes represent any improvement to the clause? I really wonder. Apparently, there is improvement, but then something new is added. Logically, if the Government has really made an application under the law, that is, if legal proceedings are in process, with the aim of forfeiting the funds concerned, then the *status quo* should be maintained. However, what is so bad is that we have not yet finalized all the technicalities and procedures of forfeiture applications. And, it is still unknown whether the Court will be given extensive authority in this respect. When the Secretary applies for the forfeiture of some funds, if, for example, the Court deems that there is not enough time to balance the interests of both sides, can it conduct a new hearing? And, I suppose the affected person should be granted licence to use part of funds for some necessary purposes in the interim. I am not talking about food, clothing or legal expenses, but about others, such as the expenses required to keep a business running, for example. The authority in this respect has not yet been firmly set down.

The amendment of Miss Margaret NG also touches on this point. It states that as long as proceedings have been started, as long as proceedings are still pending, the one-year validity period of the notice can be extended. In other words, it is fine as long as proceedings can be started within the one-year period. The whole world has now entered an emergency state of anti-terrorism. The terrorists referred to by the Secretary may mostly come from foreign organizations and countries, which is why the Government should be very anxious to get information from overseas relating to the affected person. Actually, since the funds and property concerned are in Hong Kong, they must logically be handled by the Hong Kong Government. Since the latter part of the amendment states that if legal proceedings are still pending, the notice shall not expire, I think one year will be enough to strike a proper balance. Actually, my experience of working with staff of the Department of Justice on the Organized and Serious Crimes Ordinance and the Drug Trafficking (Recovery of Proceeds) Ordinance has made me realize that in many proceedings, as long as some substantial *prima facie* evidence can be given at the beginning, the Court will find it very difficult to refuse to hear the case right away. In some prosecutions,

there may even be the possibility of holding charges, meaning that it is very difficult or even impossible for the other side to prove some specific crimes or doubts. Given this balance, I think if proceedings have already started on *prima facie* evidence, a pending period of one year is enough and the validity period shall not expire. If the Government asks for two more years, the balance will not be a proper one.

MISS CYD HO (in Cantonese): Madam Chairman, as I have repeatedly remarked, under this Bill, a person declared as a terrorist is not guilty because he has not gone through court proceedings. However, it is stated in clause 5 that the person declared as a terrorist would be punished by freezing his property.

The power under clause 5 is actually greater than that under clauses 4 and 4A. Clause 4A specifies that the Chief Executive has to do so through the Court but clause 5 specifies that a notice in writing may do. Miss Margaret NG has just made this point. We understand that funds flow very fast nowadays, only by pressing the relevant key on a computer keyboard, unlike before when people transmitted money abroad by certain means of transport. It is not necessary to do so now for the instant transfer of funds can be made in a short while. Due to the lack of an opportunity to discuss a sounder mechanism, the Bills Committee has not proposed an amendment to take away this power of the Secretary, so the Secretary would still have the power to freeze property. As we all know, it is our international obligation to stop the transfer of funds by terrorists for terrorist activities. However, there is a dangling end to this clause. Is it necessary to set such a long freezing period?

Before the Secretary mentioned the exclusion under clause 13, we would be able to imagine the bad feeling of a person whose property has been frozen. If he is conversely put into prison, he may still live in a carefree manner and have shelter. Before the exclusion provision was proposed to us, the specified punishment was very serious indeed, and its implications were very extensive.

Madam Chairman, we all understand very well that the Secretary should be vested with the powers to deal with emergency so as to enable the Government to crack down on terrorists more effectively. However, should the validity period last as long as two to three years? In my opinion, one year is already too long. Anyway, we did not have too much time to consider the Bill. Should we put an end to the freezing if the executive authorities fail to collect

sufficient evidence to prove that the funds are related to terrorist activities within the two-year validity period of the freeze?

Madam Chairman, Miss Margaret NG has also referred to expressly specified exclusions on humanitarian grounds that do not require a licence to be granted by the Secretary. The bitter experience of the dependants has left a deep impression on me. Even a terrorist whose identity has been confirmed and who has not been done injustice has children and parents. Should such family members be implicated and be so seriously affected just because there is a terrorist in the family? Therefore, I wish Members would support Miss Margaret NG's amendment and that, if the amendment is not passed, we would continue to discuss the matter in the second-phase exercise to find out if there is a sounder mechanism for striking a balance between the power of enforcement and protection for the innocent.

MR LAU KONG-WAH (in Cantonese): Madam Chairman, this clause is extremely important because it empowers the enforcement agencies to freeze such funds with the highest possible speed. The flows of such funds are not measured in hours but just seconds, which is why they must be stopped at the highest possible speed. As I heard from Miss Margaret NG, she also agrees that such funds must be frozen with the highest possible speed. But the two amendments before us both seem unable to provide any viable alternative that can enable us to freeze such funds with the highest possible speed.

As far as I am aware, the major difference between the Government's amendment and Miss Margaret NG's is that while the rationale behind the former may be freezing before deduction (to be licensed later on by the Secretary to meet necessary expenses), that behind the latter is deduction before freezing. If Miss Margaret NG's amendment is carried, there will be very serious consequences indeed. The reason is that such funds do flow very quickly, so if lengthy negotiations are held with the affected person on how much he needs for clothing, food, accommodation and transport, on how many bowls of rice he needs, and on whether he needs brand name clothing, then even by the time the whole investigation is completed, we may still fail to freeze his funds, or the funds may have long since remitted elsewhere. As a result, if the intent of the law is really to freeze such funds with the highest possible speed, then I suppose there is no other alternative. Admittedly, even terrorists need money for food, clothing, and so on, but such needs are already catered for in the subsequent

clause 14A. This clause is able to make sure that the affected person can have the money to meet reasonable living and legal expenses. So, the basic protection is already there.

Madam Chairman, I think if we adopt the approach of deduction before freezing, we will run counter to the spirit of the Special Recommendations made by the FATF. Special Recommendation III states clearly that "each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organizations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts." The expression "without delay" is used, which means that we cannot possibly compute very slowly how much is to be deducted for expenses. As for UNSCR 1373, it also states that all the States should "freeze without delay funds..... of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts." The expression "without delay" is again used. The intent is absolutely clear.

I believe that Miss Margaret NG's amendment is certainly well-intentioned. She puts it very clearly in the amendment that the affected person must be allowed enough money to meet reasonable expenses on food, clothing, and so on. But I am afraid that such express provision may not be exhaustive, because it is often very difficult to list out certain types of expenses. For example, is transport a type of necessary expenses? And, children's education? And, the maintenance of dependent parents? There are lots of other examples. I on the other hand think that clause 14A can serve the general purpose of setting down reasonable living and legal expenses. Mr Albert HO may perhaps add another item of expenses on employees (that is, their wages). This is perhaps more in line with the needs of city people, for it can make sure that there will be money to meet a genuine need.

Due to the premise advanced by me before the resumption of Second Reading debate, that is, the premise that such funds must be frozen with the highest possible speed, I am unable to support Miss Margaret NG's amendment.

MISS MARGARET NG (in Cantonese): Madam Chairman, I wish to briefly respond to the remarks made by Mr LAU Kong-wah. In fact, the United Nations has not specified that the humanitarian stand must be upheld and it has not mentioned such issues as feeding. Therefore, my amendment has kept the

scope very narrow, that is, it only covers providing assistance for the purposes of clothing, feeding, housing and legal advice. If Members do not think that deduction should be made before freezing and if they think that the funds should be frozen without making any deduction, I would like to ask them to take a look at subclause (1) of the clause related to funds, that is, "the Secretary may, by notice in writing specifying the funds, direct that the funds not be made available, directly or indirectly, to any person except under the authority of a licence granted by the Secretary for the purposes of this section." In other words, an affected person would not have food and the question is not whether deduction has to be made. Certainly, those who have food may not violate the provision and we are not suggesting that deductions should be made from the funds. But it is certainly unacceptable for an affected person to raise the expenses to a certain level and indicate that \$100 million must be made available for the purpose of feeding for he is used to having expensive meals. Actually, huge amounts of funds are going to be frozen and the expenses I have mentioned account for a very limited part of the sum and it would not have any effect on the funds to be frozen.

Madam Chairman, concerning clause 14A, Mr LAU Kong-wah may have forgotten how clause 14A comes into being. When we considered the provision, we had asked some questions. What was clause 14A actually about? What was the authority of a licence? What did the licence cover? We asked if legal expenses would be included if the affected person sought legal advice, defended his case in the Court or challenged the notice in writing.

The Bureau subsequently promised to specify the reasonable expenses and the Secretary has proposed adding a new clause 14A to provide that "(1) Without prejudice to the generality of conditions and exceptions which may be specified in a licence mentioned in section 5(1) — (a) such conditions may relate to specifying the manner in which the funds to which the licence relates shall be held from time to time", I do not quite understand the above expression, and "(b) such exceptions may relate to the reasonable living expenses and reasonable legal expenses and the payments liable to be made of any person by, for or on behalf of whom the funds are held." It can thus be seen that the provision explains the items covered by a licence, so, Members do not have to argue over these items because they have been specifically covered by the scope of the licence.

Notwithstanding the provision in clause 14A, these expenses cannot be automatically deducted. The affected person has to apply for the approval of

Secretary Regina IP for the expenses on feeding, clothing and legal advice. Since there would be a problem in the time required for application, I think that the provision appears rather excessive and it is unnecessary.

Therefore, I urge Mr LAU Kong-wah to reconsider the matter and perhaps support my amendment. Thank you, Madam Chairman.

MR JAMES TO (in Cantonese): Madam Chairman, Miss Margaret NG has covered 90% of the remarks I would like to make and I just wish to make one more point. Why do we grasp the opportunity to express our views now? It is because there is going to be a second wave of discussion about this legislation and a review is going to be conducted, I think it is important for me to express my views.

I only wish to say that, in respect of the one-year or two-year validity period under discussion, if proceedings or the legal procedures for confiscation are pending, the period would become invalid and the legal procedures can go on. It should be noted that consideration of the one-year or two-year period is the first level of fund freezing. In an extreme case, the Government may not necessarily freeze such funds immediately when it investigates or track down the funds of terrorists. It is because the Government wants to catch the big fish and find the mastermind behind the scene, thus, sometimes it may not freeze the funds but just follow closely the flow of the funds. In an extreme case, the Government would rather grasp information on the funds and the relevant accounts. If the persons concerned were an obvious target, all intelligence organizations in the world would have his information. Therefore, the one-year validity period of a notice is useless. Regardless of the whereabouts of the funds, they can be traced. Even if the funds have flown out of Hong Kong, they can be traced in another place (even if the place is unable to freeze the funds). It is very important that information tracing would be conducted in most operations. Thus, I think that a balance should be struck between the two. Even if the Bill is passed today and the funds have to be frozen, I believe the Government would still have to sum up experience and see whether improvements have to be made when it conducts a second-phase review on the legislation in the future.

MS AUDREY EU (in Cantonese): Madam Chairman, I wish to briefly respond to the remarks just made by Mr LAU Kong-wah. He said that the funds should be restrained at the highest speed, and all of us agree with him without objection. However, he has also said that the humanitarian stand mentioned by Miss Margaret NG involves the issue of freezing before making deduction or making deduction before freezing. Actually, I think Mr LAU Kong-wah has misunderstood the amendment proposed by Miss Margaret NG. The part of the amendment of Miss Margaret NG related to humanitarianism is pinpointed at clause 7, not the licence. Clause 7 of the Bill prohibits making funds available to a terrorist or terrorist associate. In other words, if a person has been specified as a terrorist or terrorist associate and another person provides him with money, that latter person has violated the law. Therefore, according to Miss Margaret NG, when a person has been specified as a terrorist and another person who knows that his money has been frozen gives him \$10 for a lunch box, that latter person has violated the law under clause 7. The amendment proposed by Miss Margaret NG intends to exempt certain matters from the prohibition under clause 7. In that case, if a person makes funds available to another person on humanitarian grounds for the purposes of feeding, clothing, housing and medical needs of that person, he has not violated the law. The amendment only seeks to make these changes and is not related to the question of freezing before making deduction or making deduction before freezing.

MR LAU KONG-WAH (in Cantonese): Madam Chairman, I believe I have not misunderstood the contents of the amendment, but I think I can consult the Member who proposed the amendment again. As Miss Margaret NG has explained, basically, the funds have been frozen and the affected person cannot automatically transfer certain amounts from the funds for living expenses. How is he going to meet his feeding or housing needs? He has to make an application for a licence to be granted by the Secretary. Should we consider the issue of dignity? As far as I understand it, Miss NG does not think that should be the case.

How would the provision be actually applied? In actual application, the Government will immediately restrain the funds if it suspects that a terrorist is going to use the funds for terrorist activities such as bombings. The Government will not bother about other things such as the living expenses of the affected person and it would immediately restrain the funds. It would not bother about what he will wear or eat.

I also wish to ask Miss Margaret NG about her views on the actual application. What procedures are involved and what formula would be adopted to calculate various expenses before deducting certain amounts of money? What will actually be done? The most important point is, after the repeated transfer of funds, we will hardly be able to tell who owns the funds. The funds may belong to a person outside Hong Kong or overseas, how can we calculate his expenses? Should we go overseas and interview him? In that case, the Government would not be able to freeze the funds at the highest speed, therefore, the proposal in the amendment will not work.

MISS MARGARET NG (in Cantonese): Madam Chairman, Ms Audrey EU is right in saying that my comments on that point are a bit confusing. In fact, Mr LAU Kong-wah only needs to read the original text of my amendment to find that the funds will be frozen by the Government as a lump sum. If the Government suspects that the funds of Ms Audrey EU are terrorist property and freezes the funds but I would like to offer her a lunch box without abalone, of course, out of good will. May I ask the Government if I can do so? I propose an addition to subclause (7) which reads: "if a notice (notice to freeze funds) under subsection (1) (on the freeze) has not been revoked under subsection (2), it shall not affect the provision of funds to the person specified in the notice (by another person) for the purpose only of feeding, clothing, housing, satisfying the medical needs of or any such person or dependant of such person or for the purposes of the obtaining of legal advice or representation." Therefore, even if I financially assist Ms Audrey EU, as I am not Ms EU and my sympathy for her is limited, people do not have to worry that I may spend too much money. Mr LAU Kong-wah is worried by the question of whether putting aside funds for reasonable living expenses would affect the speed of freezing the funds. Actually, it would not have any effect on the speed. Thank you, Madam Chairman.

MR JAMES TO (in Cantonese): Madam Chairman, I wish to convince Mr LAU Kong-wah. When Miss Margaret NG proposed the amendment, if she put the proposal under clause 5(7) under clause 7 instead of clause 5, it would have been easier to understand. But since she has put the proposal under clause 5(7), Members may thus think that the funds referred to are those restrained under clauses 5(1), (2) and (3). I think it would be clearer to put the proposal under clause 7, but it is fine to put the proposal under either clause so long as the funds referred to are different.

MISS CYD HO (in Cantonese): Madam Chairman, I am sorry to make you stay with us to hold this meeting of the Bills Committee. As a matter of fact, we have not been able to hold these discussions in the Bills Committee. I wish to make a certain point, but I am not sure if my memory would betray me.

This piece of legislation has a great number of subsidiary legislation. In the last meeting of the Bills Committee, the legal adviser from the Government told us that some provisions can come into force with immediate effect, while some others, be they subsidiary legislation or primary legislation, would have to wait until the "second wave" before they can come into force. If my memory has not betrayed me, clause 5 cannot come into operation immediately. Even if the Bill is passed, there are still many practical details in respect of clause 5, such as the granting of licence, the calculations, the procedures for application to the Court, and so on. All these will have to wait until the latter parts are complete before they can be put into force. In addition, issues like entry into premises to conduct searches, confiscation of property, and so on, which are found in Schedules 2 and 3, would have to be discussed in depth later.

Having said that, I still support Miss Margaret NG's proposal of giving some exclusions under certain provisions in the Bill and these should be incorporated into the Bill. Mr LAU Kong-wah's concern is how these should come into operation. Actually, when the "second wave" of the Bill comes, we will have a chance to consider the enactment of provisions in greater depths and discuss them thoroughly before a decision is made. If we can clearly provide for some exclusions in the primary legislation, we would have something to follow by in the second phase when we discuss the provisions.

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

(No Member responded)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, after listening to the remarks of Members, I tend to agree with Mr LAU Kong-wah's views because the amendment proposed by Miss Margaret NG is very much different from the original provision. What is involved is not just the speed with which freezing of property can be achieved; the amendment itself may generate a large loophole. Indeed, the current provisions make it possible that

where the living needs or humanitarian needs of a person affected require, the person may apply to the Secretary for a licence. Here, discretion is involved. Against this background, Miss NG asked: "Does one have to wait till the Secretary has time before approval can be given?" I do not think officials will act in this way! If anyone has a genuine living, medical or legal need, do we really believe the Secretary will act in such a slow manner? Naturally, the person affected will make an application immediately and certainly he will appoint a solicitor to make the application and any person in his capacity as Secretary will consider the application as soon as possible.

Nevertheless, if Members look at the wording by Miss NG, it makes the provision of living expenses an entitlement, a right, because she uses these words: "A notice under subsection (1) which has not been revoked under subsection (2) shall not affect (she uses the word 'shall') the making available of funds to a person specified in such notice," Thus, the person affected may argue that he is entitled to living expenses as of his right. If the terrorist happened to be Ms EU, a lunch box would suffice as assistance, as pointed out by Miss NG. But if the terrorist was a really "rotten guy", he would not be asking for just a lunch box. If the terrorist is a Muslim, firstly his legal fees may be very high. An ordinary lawsuit may cost several million dollars. Secondly, he may say he has four wives and 40 children. How much is needed for his living expenses? Or he may indicate he is sick. We can see that Usama bin LADEN looked rather pale on television. Would he demand that a hefty sum be paid as medical expenses? The words "shall not affect" mean that a list is made. If \$100 million belonging to a terrorist was frozen, he might demand that \$90 million be returned and the Government would have to pay as demanded. Would such an amendment create a large loophole? For this reason, we cannot support the amendment.

MISS MARGARET NG (in Cantonese): Madam Chairman, I would like to make one comment only.

First, despite the fact that Usama bin LADEN is a rotten guy, he has a right to life and we cannot deny him of this right because he is rotten.

Second, this provision does not have a very tall requirement. The provision can be invoked if the Secretary suspects a certain person, but actually the person may not be Usama bin LADEN, it could be Ms Audrey EU and she is

taken to be the rotten guy simply because she wears the wrong clothes.
(*Laughter*)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, my reply is simple. The Bill already empowers the Secretary to exercise discretion to grant a licence. Moreover, though the Secretary may act when she has reasonable grounds to suspect, the person affected may also apply to the Court of First Instance to revoke the notice. Therefore, I think the original clause has provided sufficient protection.

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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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 Kenneth TING, Dr David CHU, Dr Raymond HO, Mr Eric LI, Dr LUI Ming-wah, Mr NG Leung-sing, Mrs Selina CHOW, Mr CHAN Kwok-keung, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Mr Andrew WONG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr YEUNG Yiu-chung, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Mr Ambrose LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Mr Abraham SHEK, Mr Henry WU, Mr LEUNG Fu-wah, Mr IP Kwok-him, Mr LAU Ping-cheung and Mr MA Fung-kwok voted for the motion.

Miss Cyd HO, Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Miss Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr SIN Chung-kai, Dr YEUNG Sum, Mr LAU Chin-shek, Miss Emily LAU, Mr Andrew CHENG, Mr SZETO Wah, Mr LAW Chi-kwong, Miss LI Fung-ying, Mr Michael MAK, Mr Albert CHAN, Mr WONG Sing-chi and Ms Audrey EU voted against the motion.

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

THE CHAIRMAN announced that there were 50 Members present, 29 were in favour of the motion and 20 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Miss Margaret NG may not move her amendment to clause 5, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 5 as amended.

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 6.

MISS MARGARET NG (in Cantonese): Madam Chairman, I move that clause 6 be amended as set out in the paper circularized to Members. Madam Chairman, clauses 6, 7, 8 and 9 have one point in common and that is, they are provisions stating certain criminal offences on the supply or collecting of funds, or the supply of weapons to terrorists or terrorist associates. Madam Chairman, as these are criminal offences, at least they should have the prerequisite of a subjective *mens rea* which is composed of the following two elements: first, there must be an intention of assisting terrorists or terrorist associates; second, there must be knowledge that these persons are terrorists or terrorist associates. The absence of any one of the two will not do.

The common point about clauses 6, 7 and 8 is not only should there be an intention to assist terrorists or terrorist associates, but that there should also be knowledge that these persons are terrorists or terrorist associates. The wording of the amended clause is: "knowing and having reasonable grounds to believe". The words "having reasonable grounds to believe" are objective and maybe a person does not know or believe, but it would be an offence if objectively speaking, he has reasonable grounds to believe. I think that is unacceptable as it is against the principle of criminal offences. In this regard, I agree with the view expressed by the Hong Kong Bar Association, that is, in any criminal offence, there must be a clear subjective *mens rea*.

The Secretary says at least we should put into practice UNSCR 1373, but I think that will have to depend what its original requirement is. Paragraph 1(b) of the Resolution stipulates that the funds collection must be done in the

knowledge that they are used by terrorists and only such acts are to be criminalized. Madam Chairman, let me read out the original in English, "Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in the territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. " So that is the intention here.

Madam Chairman, clause 6 of the Bill is on the collection of funds and clause 7 is on the provision of funds, so the Administration should not confuse the two. Clause 6 is very complicated and it is not clear and there is also the problem of "having reasonable grounds to believe". Therefore, I have proposed a simple amendment to state that the purpose of clause 6 is to prohibit the provision of funds to terrorists or terrorist associates. The wording of the amendment to clause 6 proposed by me is "A person shall not provide or collect, by any means, directly or indirectly, funds with the intention that the funds should be used in whole or in part in order to carry out a terrorist act." The amendment would be clearer and consistent with UNSCR 1373. I implore members to support my amendment which is aimed at rectifying the ambiguities in clause 6 and the point on "having reasonable grounds to believe".

Proposed amendment

Clause 6 (see Annex IX)

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

MS AUDREY EU (in Cantonese): Madam Chairman, I would like to make a brief comment on clauses 6, 7, 8 and 9. As a matter of fact, the Bills Committee did not have time to discuss these clauses. If we look at the wordings of the headings of clauses 6 and 7, we will find that the meaning of these two clauses is quite similar. Clause 6 is on "Prohibition on supply of funds to terrorists and terrorist associates" and clause 7 is on "Prohibition of making funds or financial services available to terrorists and terrorist associates". When I first read these two clauses, I felt as if there were some repetitions and the Bills Committee should have discussed that thoroughly. As for other details

and technical problems, apart from those brought up by Miss Margaret NG just now, they should also have been discussed by the Bills Committee. However, honestly, the Bills Committee has not discussed them. Even as the amendment proposed by Miss Margaret NG, it has not been discussed by the Bills Committee in detail. In circumstances as these, it would not be fair and proper if a voting is made.

MR JAMES TO (in Cantonese): Madam Chairman, the following comments I am going to make are meant for Mr Eric LI. When we were deliberating on the amendment bills of the Organized and Serious Crimes Ordinance and the Drug Trafficking (Recovery of Proceeds) Ordinance, many Honourable colleagues mentioned clause 6 of this Bill on the part of having reasonable grounds to believe that someone is a terrorist. I recall an overwhelming majority of Honourable Members agreed that "having reasonable grounds to believe" that someone is a terrorist is an objective condition and that can be said to be an objective ground. If the objective condition makes people think that there is no ground which makes people think that someone is not a terrorist, then we would not be so foolish as not to believe it. That is why in the amendment bills of the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance the Government retracted and withdrew some of the amendments a few hours ago, and it gained the agreement of all the political parties. But in this rare case, that is, in the United Nations (Anti-terrorism Measures) Bill, it is almost impossible for the Government to get one vote of support. The words "having reasonable grounds to believe" come from the same formula and they are made a part of clause 6. I would think that apart from having reasonable grounds to believe, the person concerned should be "truly believed" to be a terrorist. Of course, there is some difference between to truly believe and to know, for the degree of belief in knowing may well be higher. "Knows" refers to some very certain matters. If someone just have reasonable grounds to believe, then will this mean that he really believes in it? Will there be people who are so foolish as not to believe it? If so, then that person may be penalized for this. The present Bill is related to the previous bills which I have mentioned. Therefore, I would like Members to know that with regard to this point, I would say that someone must really believe, that is, there must be an element of "do believe" or "did believe" before an act is said to have constituted the offence under clause 6. That would be a fair approach to tackle the issue.

MRS SELINA CHOW (in Cantonese): Madam Chairman, I believe what Mr James TO has said cannot be made a direct comparison. I recall when we talked about combating money laundering, we pointed out that those who would be affected might be some professionals or financial institutions and often times this would have an effect on the public. However, these people we are talking about now may be the lifeline of the terrorists and these terrorists depend on them for the provision of money so that the terrorists may do whatever they like. We should bear in mind that the terrorists are cunning and their network is huge and they are very pervasive. By the logic of Miss Margaret NG, it must be proved that there is an intention of providing money to terrorists to carry out terrorist activities before such act constitutes a criminal offence, then it will make the scope of application very narrow indeed. In other words, if the funds are not used in terrorist activities, the persons concerned are merely one of the sources of funds for the terrorists. Then it would not constitute any offence. Mr James TO mentioned earlier the difference between "knows" and "having reasonable grounds to believe", but it is different from the situation under discussion. What we are now discussing is the question of supply of funds and weapons which is directly related to the activities carried out by terrorists, so I believe we should make an extra effort to ensure that terrorists will not be supplied with funds.

MR LAU KONG-WAH (in Cantonese): Madam Chairman, I would just like to talk about the difference between "use" and "carry out". Before the resumption of the Second Reading debate, I said that if it was obvious that it was known that someone was a terrorist but despite this fact he was still supplied with funds, then it would be necessary to prove that he was carrying out terrorist activities before such supply of funds was to be prohibited, but if the funds were used in the ordinary manner, then no prohibition would be imposed. In such circumstances, the scope involved would be very wide indeed. I would imagine that there is no such ledger in the world, even if it is owned by terrorists, that would list out an item like "carrying out terrorist activities". Terrorists have all sorts of weird activities and so I think if funds are permitted to be supplied to terrorists, then it is just condoning their acts of terrorism. For the general public, that is a great threat. Therefore, I am afraid I cannot agree with such a narrow drafting of the provision.

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

MISS MARGARET NG (in Cantonese): Madam Chairman, if it is said that the scope is narrow and it is queried how we know whether there is an intention or not, then it must be remembered that the Bill in question also uses the word "intention". And if it is said that the "intention" in my amendment is too narrow, then the way in which it is written in the Bill is likewise narrow as well. The UNSCR 1373 is in itself narrow. Let me read out that sentence in English: "Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts." Madam Chairman, from this it can be seen that the way in which it is written is very narrow. The provision is about the collection of funds. If Members think that my amendment to clause 7 is too wide then we had better wait until the time when we discuss clause 7. But clause 6 is about the collection of funds and the way in which UNSCR 1373 is written is narrow. So Members can rest assured and I urge Members to support my amendment.

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

MR LAU KONG-WAH (in Cantonese): Madam Chairman, I have read UNSCR 1373 very carefully and I agree with Miss Margaret NG 's point, that the essence is only on the carrying out of terrorist acts. However, Miss Margaret NG may like to take a look at Recommendation III made by the FATF, which states that countries should implement measures to detain and confiscate the proceeds from the financing activities carried out by terrorist organizations. Financing activities can be speculations in properties or stocks, and money derived from these activities may not necessarily be used in terrorist acts. All these proceeds are to be confiscated. It is not possible for us to distinguish in the accounts of the terrorists what are related to terrorist acts and what are related to other activities. So, I would think that it is not possible for us to separate them. The other thing is, should we use the greatest efforts in cracking down on these proven terrorists or should we use minimal efforts? That makes a difference. It would be bad if we fail to get this message.

MR JAMES TO (in Cantonese): Madam Chairman, that would be a more serious problem. I hope Members can take a look at the original clause 6 of the Government. The clause does not say anything about proven terrorists. It

only says "having reasonable grounds to believe" that a person is a terrorist. The words "having reasonable grounds to believe" refer to grounds which are objective and reasonable. Having said that, there may really be persons who are so foolish as not to believe, but still they have to be penalized. I am very surprised to hear Mrs Selina CHOW say that the context is different, but the point in law is completely the same. There are opinions that sterner measures than those used to combat organized crimes should be used against terrorists. Even if someone is more foolish than others and while other people who have reasonable grounds believe that a certain person is a terrorist, but that person does not, it would be better if the foolish are punished, rather than to let terrorists escape. It is because of this reason that the foolish should be punished. I would respect such an argument. For if not, the mental element would be the same as the argument we had during the debate on the Drug Trafficking and Organized Crimes (Amendment) Bill 2000 earlier. However, the Government has withdrawn the relevant amendment because of this reason.

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

(No Member responded)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I agree with the views of Mr LAU Kong-wah and Mrs Selina CHOW. I wish to reiterate that in reading UNSCR 1373, we should not just read paragraph 1(b). We should read paragraph 1(d) as well. Though the word "wilful" is used in paragraph 1(b), the wording in paragraph 1(d) is strict: "Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;"

Let me now return to the point raised by Miss Cyd HO, who said our action would implicate a whole clan of people. Well, that is the wording of UNSCR 1373, which is very strict. Since terrorism is a public threat and is too great a threat to ignore internationally, people must be prohibited from giving assistance to terrorists, whether the assistance is given intentionally by way of

provision of funds to assist terrorist activities. If the Bill is not drafted in this way, we will not be able to fulfil our duties.

Ms Audrey EU said she did not understand what "economic resources" and "related services" meant. Well, such words appear in UNSCR 1373. Maybe other countries are cleverer and so they can do it but we cannot. But since they can do it quickly, why can we not?

Mr James TO asked why we must state the need to have "reasonable grounds to believe" rather than changing the wording to "prove" or "know". Let me reiterate a possible scenario. Hong Kong presumably has no terrorists within its boundaries. Most probably, people whom we have to penalize when we freeze funds for terrorist activities stay overseas. In other words, a certain government may inform us someone, probably terrorists from India or Pakistan, are transferring funds to Hong Kong or raising funds here and request that Hong Kong immediately stop or penalize them or criminalize the act. In this case, it is impossible for us to prove they are terrorists or extreme Muslims from Pakistan. I can only rely on the evidence provided by overseas governments to tell and believe with "reasonable grounds". I request that Members have faith in the Government and trust the good faith of not only the Special Administrative Region of Hong Kong but also other governments. That is, they have to trust that we are acting in good faith. Otherwise, we would be hindered from doing what we should do by some minor issues.

MR JAMES TO (in Cantonese): Madam Chairman, I am getting more and more confused. We have amended clause 5 to give the Secretary power of prohibition.

Miss Margaret NG has also said that very few provisions are written this way, but despite this we have passed it. However, from clause 6 onwards, these are provisions on offences. The meaning of these is: provided that the mental element is fulfilled, a person can be prosecuted, and that person may be liable to a prison sentence of more than 10 years. I am the Chairman of the Bills Committee on Drug Trafficking and Organized Crimes (Amendment) Bill 2000. I recall that every one of the members of the Bills Committee, including Mr Ambrose LAU, Mrs Selina CHOW, Mr Eric LI, and even Mr NG Leung-sing, opposed the idea that these foolish people should be punished. However, when it comes to clause 6, if it is so drafted, then these foolish people will have

to be punished. Would that be reasonable? There is nothing I can do about it. I hope, however, that when the Bill is passed, the Government can think, when a review is to be made, whether or not it is fair to punish these foolish people.

MISS CYD HO (in Cantonese): Madam Chairman, I would like to say the same thing again: it is unfortunate that we did not have time to deliberate on the Bill. The Secretary has admitted earlier that these provisions do have the effect of causing extensive and all-pervasive impact on many people. That is something which she did not mention in the meetings of the Bills Committee. She also says that these provisions which cause such extensive and all-pervasive impact are borrowed from the UNSCR 1373. Members have different interpretations of the UNSCR 1373. But unfortunately, we did not have a chance to discuss these provisions by citing exhaustive references in the Bills Committee and we can only discuss them now.

In addition, I would also like to point out that although many countries have enacted anti-terrorism laws, they are met with objections from human rights bodies. Some cases of wrong judgements have been exposed and the trend now is that the governments are beginning to relax these provisions. The Chairman of the Bills Committee, Mr LAU Kong-wah, said earlier that we hoped to renew our deliberations on the Bill when meetings are held in the second phase of the legislative exercise. Now in this Blue bill, there are very few mechanisms that restrain the powers of the Government. This is not enough. Since the Secretary has admitted that these provisions would have extensive and all-pervasive impact on many people, then why can we not improve on these checking mechanisms so that those innocent people will get some protection when they have contact with people whom they have no idea that they are terrorists and dealings that have nothing to do with terrorism?

Madam Chairman, I know that this Bill will certainly be passed today. But I would still like to make one point and that is, I hope that we can have more time to discuss the relevant provisions at the second phase so that a better system can be devised. That will also avoid making deliberations on the Bill in a Council meeting as we are doing now.

MR JAMES TO (in Cantonese): Madam Chairman, I am not going to repeat what I have said. I am sorry, I forgot to say one point earlier. As a matter of

fact, in the Bill on organized crimes and combatting money laundering, the drafting in clause 6 is adopted, that is, those people who are reasonably believed to be engaging in money laundering will be punished. So we pointed out that if the person who was punished was a foolish person, then things would become very bad indeed. The Government took a long time, that is, three or four months, to consider the question and then proposed adding a defence to the clause. It is proposed that if only the person concerned can prove that he is really a very foolish person, despite objectively speaking there is no ground not to believe, but the person is so foolish as really not to believe, then irrespective of whether the person is a teller or any other person, that can be regarded as a defence. But in this provision, the Government is unable to propose even a defence like that. In the Bills Committee, we opposed that the onus of proof be rested on the accused, but now the Government cannot even propose a defence that the accused raise the defence that he is a foolish person. Now such a person will be punished in any case.

MISS MARGARET NG (in Cantonese): Madam Chairman, I will be very brief. The Secretary said that she did not want to implicate too extensively, but it was only because the wording of UNSCR 1373 was like that. However, the wording of the resolution does not have words "having reasonable grounds to believe". The wording in UNSCR is "in the knowledge", that is, to know. Also, there is a clear distinction in the resolution, if it is "collection", that is collecting funds, then it has to be criminalized. But if that is supplying funds, as the scope will be very wide, so there is only a need to prohibit their nationals. That means prohibition would suffice. Prohibition can be made in a lot of ways and the freezing of funds in clause 5 is already one of the ways. Prohibition can also be effected by clause 7. As clause 6 is about criminalization, so we have to be very careful. There is no such wording in the UNSCR, so I urge Members to support my amendment.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Miss 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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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:

Miss Margaret NG, Mr CHEUNG Man-kwong, Mr SIN Chung-kai, Mr LAW Chi-kwong and Mr Michael MAK voted for the motion.

Mr Kenneth TING, Dr Raymond HO, Dr LUI Ming-wah, Mrs Selina CHOW, Mr CHAN Kwok-keung, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr Howard YOUNG, Mr LAU Wong-fat, Ms Miriam LAU, Mr Abraham SHEK, Miss LI Fung-ying, Mr Henry WU, Mr IP Kwok-him and Mr LAU Ping-cheung voted against the motion.

Mr Eric LI abstained.

Geographical Constituencies and Election Committee:

Miss Cyd HO, Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Dr YEUNG Sum, Miss Emily LAU, Mr Andrew CHENG,

Mr SZETO Wah, Mr Albert CHAN and Mr WONG Sing-chi voted for the motion.

Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Mr TAM Yiu-chung, Mr NG Leung-sing, Mr YEUNG Yiu-chung and Mr MA Fung-kwok voted against the motion.

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 motion, 16 against it and one abstained; while among the Members returned by geographical constituencies through direct elections and by the Election Committee, 21 were present, 12 were in favour of the motion 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 motion was negatived.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That clause 6 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.

(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 7.

CHAIRMAN (in Cantonese): Miss Margaret NG and the Secretary for Security have given notice respectively that they will move an amendment to clause 7.

CHAIRMAN (in Cantonese): Committee will now proceed to a joint debate. I will invite Miss Margaret NG to move her amendment first.

MISS MARGARET NG (in Cantonese): Madam Chairman, the criminal offence under clause 7 of the Bill is about the supply of funds. The scope with respect to the supply of funds is very broad and I have read out section 1(b) of the UNSCR 1373 earlier and its scope is also very broad, but that does not mean that the scope of clause 7 should be expanded to include criminal offences and to delete the wording "has reasonable grounds to believe". About the proposed clause 7(1), now I would like to read out the English version first. This is the amendment which I propose on criminal offences:

"No person shall knowingly make available, or cause to be made available, directly or indirectly, without lawful justification or reasonable excuse, any funds or financial services either to, or for the benefit of, a person, knowing that the person is for the time being specified in a notice under section 4(1) or (2) or specified in an order under section 4A(2) published in the Gazette as a terrorist or as a terrorist associate;"

Madam Chairman, I shall not read out the Chinese version. The scope which it embraces is very broad but even so, a person will be liable to criminal offence only if the person commits such an act knowing that the person to be assisted is a terrorist and that the person giving the assistance does not have any reasonable grounds to account for the act committed. So this is the mental element with respect to the offence.

Also, Madam Chairman, as I think that the scope concerning the supply of funds is also very broad, therefore, I have addressed the views proposed by the deputations to make the provision free from obstructing normal activities. With respect to the protection of human rights, the proposed clause 7(2) provides that prohibition will not be applied to the making of funds available to a movement or organization advocating normal or truly democratic activities or for the protection of human rights. Now I would like to read out the English version of the provision:

"Nothing in subsection (1) prohibits a person making funds available, or causing property or financial services to be made available, either to, or for the benefit of, a movement or organization advocating democratic government or the protection of human rights or promoting or providing humanitarian relief or assistance and that is not involved in any way in the carrying out of a terrorist act;"

Therefore, the public will not be subject to such a restriction if they are not actually making funds available to others to carry out terrorist activities. These provisions are specifically formulated for the protection of human rights.

As for the proposed clause 7(3), I think Honourable Members should be very familiar by now that if the funds supplied are only for the purpose of enabling people to have food, that is, related to the provision of clothing and accommodation, and so on, that it should not be considered a criminal offence. Madam Chairman, I have made myself very clear when I discussed clause 6 earlier and I would not repeat it here.

I hope Members can support this amendment. As for the amendment proposed by the Secretary, as far as I can remember, it is only a technical amendment which seeks to delete the restriction in "for the purpose of this section" under clause 7. The real and substantial amendment is my amendment. Therefore, I hope Members can oppose the amendment proposed by the Secretary and support my amendment. Thank you, Madam Chairman.

Proposed amendment

Clause 7 (see Annex IX)

CHAIRMAN (in Cantonese): Honourable Members, we have spent six hours on this Bill. I think the meeting can be adjourned for 10 minutes for a break. The meeting will resume after 10 minutes.

6.20 pm

Meeting suspended.

6.35 pm

Council then resumed.

CHAIRMAN (in Cantonese): I now invite the Secretary for Security to speak on the amendment moved by Miss Margaret NG and her amendment.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, we do not agree with the amendment moved by Miss Margaret NG for several reasons.

First, clause 7(1) proposed by Miss NG narrows the scope of the prohibition on the making available of funds or financial services to terrorists and terrorist associates. That means only the making available of funds or financial services to persons specified in a notice or in an order published in the Gazette as terrorists or terrorist associates is prohibited and the prohibition will not affect those people not specified in the Gazette, even if they are actually terrorists or terrorist associates. This way of dealing with the matter will actually create a great loophole.

Perhaps some Members may regard persons not specified in a notice or in an order published in the Gazette as terrorists or terrorist associates are in effect not so regarded by the Government and so no prohibition should be imposed on the making available of funds or financial services to them to avoid any mental burden being imposed on the industries dealing with the transaction of funds, in particular, the financial services sector. I wish to point out that this is a wrong thinking. Indeed, some people or organizations may be terrorists or terrorist associates before they are so specified in a notice or an order in the Gazette. A possible situation is that the Government is processing or confirming the source of the relevant information or is in the process of pursuing certain administrative and judicial procedures to arrange for specification in the Gazette of the persons or organizations as terrorists or terrorist associates or to specify that they are terrorists active only in individual regions but the relevant countries have not yet requested Hong Kong to so specify in the Gazette. If Miss NG's amendment is passed, law-breakers may use the loophole in the law to indiscriminately make available funds or financial services to terrorists or terrorist associates not yet so specified in the Gazette. This will encourage terrorists to use Hong Kong as a base for financing.

Secondly, UNSCR 1373 prohibits people from making any funds or financial services available to terrorists or terrorist organizations. The prohibition is not restricted to terrorists or terrorist organizations in a certain country or territory. The spirit is to combat financing activities by terrorists or terrorist organizations through joint efforts in the international community. Miss NG's amendment cannot fully reflect the requirements contained in UNSCR 1373.

Thirdly, clause 7(2) proposed by Miss NG states that no prohibition should be made in respect of a person making funds or financial services available to activities or groups not involved in terrorist acts to facilitate advocating democratic government or the protection of human rights or promoting or providing humanitarian relief or assistance. In this connection, I wish to reiterate that the aim of the Bill is to cut off funding sources of terrorists. The Government will never suppress activities organized by non-government organizations in the name of anti-terrorism. People or organizations that carry out lawful activities referred to by Miss NG will not be classified as terrorists and the relevant activities will not be regarded as terrorist acts. Thus, the Bill will not prohibit any person from providing funds to these people or organizations. Put simply, the Bill does not empower the Government to restrict or prohibit lawful civic activities. Therefore, Miss NG's amendment is not necessary.

Lastly, the amendment proposed by Miss NG allows the making available of funds to or for the benefit of any person specified in the notice or an order published in the Gazette as a terrorist or a terrorist associate for the purpose of feeding, clothing or housing, satisfying the medical needs of such person or for the purpose of obtaining legal advice, and so on. As I said in my earlier response to Miss NG's amendment to clause 5, Miss NG's amendment will create a great loophole in the law, making it possible for law-breakers to freely make available funds to terrorists to be used on terrorist activities in the name of expenses for humanitarian or legal purposes. For example, under Miss NG's amendment, law-breakers holding funds that can be made available to terrorists or for terrorist activities may claim that most or all of the funds are to be used to cover medical or legal expenses, which can be colossal. Then, the Secretary for Security cannot exercise the power to freeze the funds and the relevant provision becomes useless.

In fact, the present clause 7 specifies that the Secretary for Security has the authority to grant a licence to make funds available to affected persons. I will later on move a new clause 14A to state that funds may be used on reasonable living expenses and legal expenses. The amended clause 16 will specify the appeal mechanism for appeals made by dissatisfied affected persons to make applications to the Court of First Instance to vary the terms of the licence.

Thus, we have considered the situation mentioned by Miss NG. Other members of the Bills Committee also agree with the amendment proposed by the Government.

Madam Chairman, can I explain that proposed amendment now? Shall I explain it later, or shall I do it right now?

CHAIRMAN (in Cantonese): Secretary, under the Rules of Procedure, you may explain later in moving the motion formally. However, if you wish to continue speaking and for the sake of a more efficient meeting, I will allow you to explain now the amendment you are going to move.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, then I will explain it now in passing.

Madam Chairman, I will later on move an amendment to clause 7 later, as set out in the paper circularized to Members.

Clause 7 states that "for the purposes of this section" the Secretary for Security may grant a licence. During the process of the scrutiny of this Bill, legal experts pointed out that the meaning of "for the purposes of this section" is not clear enough and suggested that the phrase be deleted. We agree with the suggestion to make the provision more concise.

The amendment to delete that part was discussed and endorsed by the Bills Committee. I implore Members to support the amendment.

CHAIRMAN (in Cantonese): Members may now debate the amendment moved by Miss Margaret NG and the Secretary for Security's amendment.

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

MR LAU KONG-WAH (in Cantonese): Madam Chairman, I would like to focus on clause 7(2) in Miss Margaret NG's amendment. As a matter of fact, there is really no such need for it, because the amendment proposed by Miss Margaret NG has mentioned that there will be no prohibition if no terrorist act is involved.

In my opinion, words like "democracy", "human rights" and "organizations providing humanitarian relief", and so on, have become a protective umbrella. If these are written into the clause, then the public may have a wrong impression that these organizations are related to terrorists and that is not necessary.

In fact, terrorists are so named because of their acts, not because of the names of any organization to which they belong. Even if words like "democracy", "humanitarianism" or "human rights" appear in the names of these organizations, the organizations will be subject to legal sanction if their activities fall in any one of the three definitions of a terrorist act, no matter how attractive their names may sound. So the consequence is clear.

Even if the persons or organizations used to be involved in democratic or human rights activities — Usama bin LADEN is one example and he has made a lot of remarks on democracy and human rights — but if their acts fit in with the three definitions of terrorist act, that is, they have caused serious harm to other people, then they are terrorists regardless of the things they did in the past.

MR ALBERT HO (in Cantonese): Madam Chairman, this provision is originally intended to empower the Government to combat terrorists, including making use of the intelligence they have obtained and curbing their source of funds. These are the most important points about that provision.

However, it can be found that there is more to the provision when it is read carefully. The provision imposes many obligations on the public, requiring them to act on their own initiative to find out who are terrorists, take monitoring actions and suspect people whom they have reasonable grounds to do so. If members of the public are so foolish as not to harbour suspicions when they should and make funds available to these people, then they will commit an offence regardless of whatever grounds they may hold.

Please note the wordings of this provision. A person specified as a terrorist does not violate the law, but on the other hand, a member of the public who makes funds available to someone whom he has reasonable grounds to believe is a terrorist commits an offence. And this so-called terrorist has not been specified in the Gazette. Would we not be too harsh if we do not endorse the amendment proposed by Miss Margaret NG? Just imagine how harsh it is on the public when they are imposed so many criminal liabilities for no reason.

Please read carefully. If the public are so unwary as to have made available funds to people who have not been specified as terrorists, but if these people turn out to be really terrorists, then irrespective of how these people spend the money, the public will have committed an offence as a result of the unwary and foolish act of making funds available to these people.

Thus the whole community is left with the obligation of surveillance. Not just in this clause, but also in clause 11, where it can be found that the public have the responsibility of providing information to the Government. So I think Members will be able to see how this Bill has imposed so many criminal liabilities on the public. This especially applies to clause 11 which we will discuss later. The public have previously not been imposed any obligation to report, but this Bill is doing precisely that.

As for this clause, the meaning is if the public are so unwary as to have made available funds to someone, and even if this someone has not been specified as a terrorist at that time, but if he turns out to be one, then the public will unfortunately be held criminally liable. So this clause is very harsh. If we do not put any restraints on it, then the scope of the clause will go far beyond the original intention of the UNSCR of curbing the sources of funds for terrorists, for this clause will really make the public at large be held criminally liable.

Therefore, I strongly request Honourable Members to support the amendment. It is only when the terrorist in question is specified by the Government or when the public should really have reasonable grounds to suspect and really know that the person receiving assistance is a terrorist, then in such circumstances, the person who supplies funds should be held criminally liable. The amendments have all listed out this requirement. So it would not really matter if the Government has not made the specification, people will only be deemed to have committed an offence if what they do meet the two requirements of having reasonable grounds to suspect and act knowingly. For if not, many innocent people may have to be held criminally liable.

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

(No Member responded)

CHAIRMAN (in Cantonese): Secretary for Security, before I invite Miss Margaret NG to speak again, would you like to speak?

(The Secretary for Security indicated that she did not wish to speak)

MISS MARGARET NG (in Cantonese): Madam Chairman, I am aware that many Honourable colleagues are not at all familiar with this provision, for the time spent by the Bills Committee in deliberating on the Bill was very short indeed. However, I can tell Members that this provision is not unfounded. Madam Chairman, when we were deliberating on the Bill, many professionals thought that while an anti-terrorist law was important, they would be dismayed to see human rights affected for no reason. They also understood that the Government was pressed with the need to pass the relevant legislation within a very short timeframe. Thus within this short span of time, apart from members of the Bills Committee, our counterparts in the Government also worked very hard to facilitate the early completion of scrutiny of the Bill. I also discussed with them on many occasions about the amendments and I appreciate the time they spent so readily and willingly on these discussions.

Therefore, Madam Chairman, my amendment is not proposed with the slightest political intention at all. It is not an amendment based on any empty slogan, either. The focus is on some point of law which I think is sound.

Madam Chairman, I would like to respond briefly to some comments made by the Secretary. First, the Secretary said that the scope of the amendment was too narrow, for it was confined to those persons specified in the Gazette. However, for terrorists whom even the Chief Executive does not have any knowledge of, then would it be too harsh, as Mr Albert HO has put it, if the people are required to know of the existence of these terrorists?

Besides, if these people are indeed terrorists, I do not think the Secretary would be short of means to deal with them. For if the Secretary only needs to be aware of item (b)(i) under clause 2(1) on the definition of "terrorist property" which I tried to amend but without success, that is, "any other property consisting of funds that (i) is intended to be used to finance or otherwise assist the

commission of a terrorist act". That is to say, if any person uses funds to finance or assist terrorists in the commission of a terrorist act, even if these terrorists are not specified in the Gazette, the funds are considered as "terrorist property". Then the Secretary can invoke clause 5(1) immediately to freeze such funds. Thus the Government is not entirely without any means to deal with the situation. The only difference is that the member of the public concerned will not commit a criminal offence for such act, that is, he will not be held criminally liable.

Madam Chairman, some Honourable colleagues are of the view that the scope of my amendment is too narrow and that of the Administration is too wide. As a matter of principle, the solution is quite simple. In choosing a provision on criminal liability, we should choose one which has a narrower scope, instead of one with a wider scope, for it can be expanded when there is a definite need and ground in future for doing so. That would be better than expanding the scope for no justifiable ground and to narrow it later. In such circumstances, if clause 7 really includes a provision on "having reasonable grounds to believe", that is, an objective standard, then the persons concerned would be held liable. Therefore, there must be a clear definition on criminal liability. So we must choose a narrow definition as much as we can.

Mr LAU Kong-wah expressed the concern that clause 7(2) of my amendment is not necessary. He is of the view that with regard to human rights, there are many activities done in the disguise of human rights. But in the provision proposed by me, it is stated that only when the activities carried out are not terrorist activities that they will be protected. So they cannot cry wine but sell vinegar. If it is known that they are carrying out terrorist activities, they are no longer protected by clause 7(2) of my amendment.

Is the amendment really necessary? At first, I was not sure if it would be necessary. However, after listening to the speech made by Mr LAU Kong-wah, I do think it is necessary. He said that people should not be allowed to do anything they like under a sweet pretext or in the name of a democratic or human rights movement. However, it is precisely due to the fear of many who advocate democracy and human rights that some countries will suppress democratic and human rights movements in the name of anti-terrorism that such a demand is put forward.

Mr LAU Kong-wah cited the example of Usama bin LADEN. Bin LADEN used to say a lot about democracy and the rule of law. Now people who talk about democracy and human rights are often asked whether they are in

fact people like bin LADEN when they talk about democracy and human rights. That is why after listening to the comments made by Mr LAU Kong-wah, I feel that he has actually reminded me that the amendment to clause 7(2) proposed by me is really necessary.

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

CHAIRMAN (in Cantonese): Before I put the question on Miss Margaret NG's amendment, the Committee will please note again that if Miss Margaret NG's amendment is passed, the Secretary for Security may not move her amendment to clause 7.

CHAIRMAN (in Cantonese): I now put the question to you and that is: That the amendment moved by Miss 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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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:

Miss Margaret NG, Mr CHEUNG Man-kwong, Mr SIN Chung-kai, Mr LAW Chi-kwong and Mr Michael MAK voted for the motion.

Mr Kenneth TING, Mr James TIEN, Dr Raymond HO, Mr Eric LI, Dr LUI Ming-wah, Mrs Selina CHOW, Mr CHAN Kwok-keung, Mrs Sophie LEUNG, Dr Philip WONG, Mr WONG Yung-kan, Mr LAU Wong-fat, Ms Miriam LAU, Mr Timothy FOK, Miss LI Fung-ying, Mr Henry WU, Dr LO Wing-lok, Mr IP Kwok-him and Mr LAU Ping-cheung voted against the motion.

Geographical Constituencies and Election Committee:

Miss Cyd HO, Mr Albert HO, Mr LEE Cheuk-yan, Mr Martin LEE, Mr Fred LI, Mr James TO, Dr YEUNG Sum, Mr LAU Chin-shek, Miss Emily LAU, Mr Andrew CHENG, Mr SZETO Wah, Mr Albert CHAN, Mr WONG Sing-chi and Mr Frederick FUNG voted for the motion.

Mr CHAN Kam-lam, Mr Jasper TSANG, Mr LAU Kong-wah, Mr TAM Yiu-chung, Mr NG Leung-sing, Mr YEUNG Yiu-chung and Mr MA Fung-kwok voted against the motion.

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

THE CHAIRMAN announced that among the Members returned by functional constituencies, 23 were present, five were in favour of the motion and 18 against it; while among the Members returned by geographical constituencies through direct elections and by the Election Committee, 22 were present, 14 were in favour of the motion 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 motion was negatived.

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

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 7 be amended, as set out in the paper circulated to Members.

Proposed amendment

Clause 7 (see Annex IX)

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 motion passed.

CLERK (in Cantonese): Clause 7 as amended.

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.

X X X X X X X

X X X X X X X

CLERK (in Cantonese): Clause 11.

CHAIRMAN (in Cantonese): Both the Secretary for Security and Miss Margaret NG have separately given notice to move amendments to clause 11 of the Bill.

CHAIRMAN (in Cantonese): Committee now proceeds to a joint debate.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 11 be amended, as set out in the paper circularized to Members.

The existing clause 11(1) provides that "where a person knows or has reasonable grounds to suspect that any property is terrorist property, then the person shall disclose to an authorized officer the information" In this regard, professions which would often deal with property or financial transactions, such as the banking, finance and accounting professions, have all expressed that the objective mental element of "has reasonable grounds" would impose an onerous burden on them when they carry out these transactions. It is because, according to the principle which the element of "has reasonable grounds to suspect", when a person in normal circumstances encounters some crucial information and evidence, suspicion would be aroused. In this regard, according to members from these professions, they have to deal with a large amount of transaction information in their daily work and when this is added to the different personal styles in handling things, there may not be any suspicion about the property concerned. But if the objective element of "has reasonable grounds to suspect" is added, this would mean that from the perspective of a third party, those in the sectors should have suspicions about certain properties and thus pressure would be exerted on those working in the sectors.

After considering this view carefully, I accept the argument presented by the sectors and propose to change "has reasonable grounds to suspect" to "suspects". That is to say, the objective element is removed and the sectors would have to report only when they suspect that some properties are terrorist properties. The sectors welcome this amendment. Amendment is also made to subclause (4) to delete "has reasonable grounds to suspect" and substituting "suspects" to bring the wording in line with the previous amendment. That is to say, if any person suspects that other people have disclosed the information of some properties to the authorities, the person should not disclose to any other person that report has been made on such properties, for this will affect the investigation being carried out.

As to other amendments proposed, they are meant to safeguard the operation of the relevant sectors or amendments of a technical or consequential nature. The first amendment is new clause 11(3A) which provides that if procedure has been established by the employer for the making of reports, an employee would be deemed as having complied with the requirements of

clause 11(1) if the person has acted in accordance with such procedure and disclosed the information to persons specified by the employer. The amendment has the effect of offering protection to front-line and basic rank workers. The sectors have agreed to this amendment. The second amendment is the addition of clause 11(5) to state clearly that the reference to "authorized officer" under clause 11 means a public officer authorized by the Secretary for Security to receive such reports as specified in clause 11. In practice this would mean the Joint Financial Intelligence Unit formed by the Customs and Excise Department and the Hong Kong Police Force.

The amendment proposed by Miss Margaret NG seeks to substitute "has reasonable grounds to suspect" by "suspects on reasonable grounds". To put it simply, this means that the suspicion must be reasonable. As far as I am aware, the sectors should have a clear test for report and one which is easy to understand and comply with. If only the employees have any suspicions, then they should report the case. The two criteria of "knows and suspects" are well-established ones. They are well understood in the operation of the sectors. This mechanism has operated smoothly for a long time, and if employees are required to meet a new requirement, that is, they will report only when they suspect on reasonable grounds, that would only add new pressures on them. I think Miss NG's amendment would cause inconvenience to the sectors.

Having said that, however, I would like to make use of this opportunity to stress again that in order to combat money laundering activities more effectively, the international trend is to change the mental element with regard to the disposal of proceeds from drug trafficking and other serious crimes and their disclosure, from "knows or suspects" to "knows or has reasonable grounds to suspect". The Financial Action Task Force on Money Laundering (FATF) is presently making a review of the 40 recommendations it has made for combat on money laundering. At the end of the day, it is likely that a recommendation will be made to its members, including Hong Kong, to adopt the mental element of "has reasonable grounds to suspect". As a matter of fact, many member governments of the FATF have adopted this mental element in offences related to money laundering.

Proposed amendment

Clause 11 (see Annex IX)

CHAIRMAN (in Cantonese): I now invite Miss Margaret NG to speak on the amendment moved by the Secretary for Security and her own amendment.

MISS MARGARET NG (in Cantonese): Madam Chairman, the Secretary has analysed the differences between my amendment and the Government's amendment very clearly. It is true that I demand that the suspicion be based on reasonable grounds. In other words, both subjective and objective elements are required. Madam Chairman, apart from clause 5, clause 11 is the most important provision in the Bill. This is because the application of this provision can be very broad. All citizens will bear the responsibility to report their suspicion for they might be criminalized if failing to do so. This is because the relevant provision reads: "Where a person knows". "A person" is defined in a very broad manner. The Secretary stated earlier that my amendment would only add to the anxiety of the sectors. What she meant is the anxiety of the sectors will be aggravated if my proposed amendment is accepted, though mine is more reasonable and less broad, or stricter, so to speak. I feel sorry that the provision requires that all citizens, not just the sectors, to bear the responsibility. Why should all citizens bear the responsibility? According to the Secretary, there is a need to do so internationally. Actually, this is not the case.

I have repeatedly stated and recited the special recommendation made by the FATF. Let me read it out once again: "If financial institutions or businesses or other entities subject to anti-money laundering obligations suspect, or have reasonable grounds to suspect". It should be noted that reports should be made only if there is suspicion, or reasonable grounds for suspicion. The fact that the expression "any person" is not mentioned in the special recommendation means that not every person is involved. The onus of responsibility is thus entirely different. May I ask why there is such a great difference? Why can we not amend the Bill to reflect that only financial institutions will be made to bear the responsibility?

We were told by the Government at that time that it was impossible for the Bill to be amended because the existing laws do contain provisions governing every person. The Government even cited such examples as the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance where there are such wordings as "Where a person knows". Nevertheless, we should note that the scope of these two Ordinances is entirely

different from that of the United Nations (Anti-Terrorism Measures) Bill under discussion at the moment. The first example is related to proceeds derived from drug trafficking or crimes. First, its scope is relatively narrow. It cannot be put in different contexts. Second, the Bill needs to be enacted because there is a need to do so in Hong Kong. In some cases, proceeds derived from drug trafficking might go to an individual. Whether there is a need for a law to be enacted remains uncertain. As regards anti-terrorism measures, how can we expect every person, whether he suspects or suspects on reasonable grounds, to know what property should be considered terrorist property?

Today, Madam Chairman, I raised the point hours ago (I have forgotten when) that the scope of terrorist property can be very broad. Can someone tell me how broad such expressions as "a person", "terrorist property" can cover? Why should we require every citizen in Hong Kong to bear such an important responsibility? If it is intended that only certain industries, such as the one represented by Mr Eric LI, not every citizen in Hong Kong, should bear this responsibility, why do we not tell the citizens clearly that there is nothing to worry about?

This explains why I find this point problematic. However, Madam Chairman, there is nothing I can do. As time is running out, we cannot change "a person" into "an institution", because we have to specify the institutions if we really want to change the wordings. As I explained during the Second Reading debate, how can I say which institutions will be incriminated offhand? It is impossible for any changes to be made now. In spite of that, we must endeavour to distribute criminal liability in a more reasonable manner. At least, subjective and objective elements must be incorporated into the provision.

Madam Chairman, I would like to move an amendment to clause 11(4). I do not know whether it is now timely to move the amendment since Members are now focusing on commenting clause 11. Clause 11 is really fantastic in the sense that subclause (1) provides for the making of report to the relevant authorities (or an authorized officer). Under subclause (4), however, where a person suspects that a disclosure has been made, he must keep this confidential. In addition, he must not disclose it to another person. He might be criminalized if the relevant investigation is prejudiced as a result of the disclosure. So under what circumstances should he keep silent on what he knows? Subclause (4) makes it clear that confidentiality has to be maintained if one knows or has reasonable grounds to suspect that a disclosure has been made. May I ask how

we can ascertain one has reasonable grounds to suspect if a disclosure has been made? No one actually knows when one will be held liable. For these reasons, I propose that the expression "has reasonable grounds to suspect" be deleted entirely. In other words, it is not enough for holding someone who has reasonable grounds to suspect liable. He must "know" that a report has been made, and in that case, he should be prohibited from disclosing what he knows to another person to prevent the investigation from being prejudiced. The provision is barely acceptable subject to these requirements being met.

For the abovementioned reasons, Madam Chairman, I would move two amendments. I hope Members can support them. Thank you.

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

MR ALBERT HO (in Cantonese): Madam Chairman, throughout the entire Bill, I find clause 11 the most disturbing. This is because the spirit of the provision has truly deviated from our general principles. Under common law, members of the public are not liable to report certain crimes or crimes suspected to have occurred. Clause 11 should be considered a rare exception in our laws. I find it extremely worrying. This is the first point.

The second point is, every citizen will be made to bear the responsibility proposed in clause 11, which seeks to hold all citizens duty-bound to monitor terrorists and terrorist activities. We can thus see that a person who is aware of certain situations or terrorist activities will be held criminally liable should he fail to report what he knows. May I ask if there is really a need to do so? Do we really need this provision to make every citizen a watchdog? I really have great doubts about it.

An amendment has once been proposed by an international judicial organ. It was mentioned that if one deems it necessary to make a report, the report must be related to suspected terrorists or terrorist activities. The wordings employed were "must be in possession of some property". The provision in question is not drafted like this, probably because of the time constraint. Neither have we examined in detail what possessed property really refers to. Must it be terrorist property? No matter how the provision is drafted, I am still worried by an undesirable exceptional scenario when the provision is put into implementation.

As a result, every citizen will be required to bear the responsibility to monitor terrorism, as I mentioned earlier. The amendment proposed by the Secretary has slightly improved the situation for at least it is stated clearly that an employee shall be deemed to have fulfilled his obligation as long he has disclosed what he knows to an overseer. Nevertheless, I still hold the view that the provision should be tightened. Actually, I can perceive that this provision is very likely to target mainly at some professionals since they might have the chance to come into dealing with terrorist property. Can the Government confine the provision to certain financial institutions or professionals by some other means?

Ms Audrey EU once suggested the Government to consider using codes of practice. It has indeed been the practice of the Hong Kong Monetary Authority, the Hong Kong Association of Banks, and individual professions to implement guidelines through their codes of practice. Can the desirable results be achieved in this way? I think we can consider this idea. The results might be even more effective.

Under such circumstances, I find it impossible to support clause 11. Even though the provision might really be discussed and implemented in future, any eventual amendments may still be far from adequate. I believe a lot of places need to be tightened if we really need to enact a provision similar to clause 11, in order to fulfil our obligations to the United Nations. I would like to raise the point in advance that we definitely need to revisit clause 11 when a bill is submitted in the second phase to see how it can be tightened. Of course, this is not confined to clause 11. However, as I mentioned before, clause 11 is one of the provisions with profound implications.

On the other hand, the professional privilege of the legal profession will also be affected. However, the problem has been resolved in clause 2, and the scope of implication is very small too. After the passage of the Bill, every citizen will bear huge responsibility. This is what we must address. Therefore, I hope Honourable colleagues can vote against clause 11 standing part of the Bill.

MISS CYD HO (in Cantonese): Madam Chairman, it is true that I feel something was beyond my reach while I took part in the debate on the Committee stage amendments. Miss Margaret NG was actually out of town when drafting her amendments. She had to rely on the diligent staff of her office who helped

send the latest amendments prepared by the Government to her and receive the amendments she sent back. We have all tried our very best to carry out the scrutiny work. I think this provision should be re-drafted if we can come up with other suggestions or found time to deliberate it carefully. What we can do now is to provide the groundwork and make sure the provision is not too bad.

As pointed out by Mr Albert HO just now, the provision actually seeks to ask every one of us to bear the reporting responsibility. To start with, I find its scope of implication most disturbing. Subsequent to clauses 6, 7, 8 and 9, as well as the possibility in which people can be implicated as provided for in other provisions, terrorists will be isolated and detached from the rest of society. Let me repeat, they will feel "even worse than dead". The addition of this provision will turn all people into informers on terrorists. I have the feeling that we are going back to the old days when certain movements were staged on the Mainland, in which implication, report, destruction of mutual trust between people caused the entire society to collapse. People could no longer build up mutual trust.

The application of the provision can almost be described as ridiculous. It is not stated clearly as to how people "know" as appeared in "where a person knows". What happens if the news is disseminated by the media? Let me tell a joke. Hundreds of thousands of people might "know". Should they report to the police? Will there be enough police manpower or authorized officers to handle the reports?

The Secretary will definitely tell us not to worry too much and not to let our imagination go too far. I think this can really happen. While clause 10 provides for the prohibition of the media to disseminate false news, this provision requires people to disclose what they know. There is also another provision demanding confidentiality. Madam Chairman, I really have no idea whether there are any conflicts between these provisions if they are read together, and whether concurrent compliance can be possible.

Madam Chairman, I support Miss Margaret NG's amendment with great reluctance. My reluctance stems from our agreement that her amendment has not gone far enough, not because she has not done a good job.

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

MR ERIC LI (in Cantonese): To start with, Madam Chairman, on behalf of the accountancy sector, I would like to thank the Government for moving its amendments. As the legislation on combating money-laundering activities has already been discussed, I would not repeat our arguments here. The Government's amendments seek mainly to make the anti-terrorism legislation consistent with the anti-money laundering legislation. The former is certainly new to us; the latter has however existed for a considerable period of time. Various professions have actually formulated and implemented their own codes of practice for quite some time. This explains why the Secretary said earlier that we have grown relatively accustomed to them. Judging from that angle, we are supposed to be pleased to accept Miss Margaret NG's amendment. I can also see that she is doing it out of good intentions. To a certain extent, her proposal can help relieve our workload. It is indeed hard for us not to welcome her idea. Moreover, the onus of proof is an even harder issue. From this angle, we can see what is good to us. However, as pointed out by a number of Members, due to the shortage of time for scrutiny, we have been unable to give careful consideration to certain areas.

As regards Miss Margaret NG's amendment, I would like to say a few words on the areas I think we must consider carefully before we can indicate our support or disapproval. First, the Bills for combating terrorism and money-laundering activities are drafted in the same manner. From our experience, it is often hard to draw a line between money-laundering property and terrorist property. If the two Bills are drafted differently, whereas the property dealt with by us is found to fall in between the two, are we going to adopt two different sets of standard or guideline? Will it lead to confusion, misunderstanding or undue complication in the profession? We must therefore first look at the matter carefully.

The second point is concerned with the amendment. Some provisions in the anti-terrorism legislation are going to have particularly profound impact on professionals and employees in the profession for reporting under the provisions can immunize us against possible civil lawsuits by our clients. Should the provisions remain in its present form, we will easily be tempted to invoke the legislation for the purpose of protecting ourselves. This is because we are supposed to report what we believe or know. However, if the objective element of "reasonable grounds" is added, we will need to examine the matter very carefully. Yet we have not had the chance to examine what the so-called "reasonable grounds" really means. Will it be possible for our clients to sue us

on "reasonable grounds"? For instance, if we really report on one of our clients, he will ask: "Did you have reasonable grounds to report me? If not, I will sue you." Under such circumstances, the problem might become even more complicated. As a result, the protection we enjoy in law when making the report will diminish. To a certain extent, this is something good. However, we can also see that problems might arise. Given the lack of time for scrutiny, and coupled with the fact that we have not been able to examine the provisions in detail and seek legal advice, we find it very difficult to decide whether the result will turn out to be good or bad. As pointed out by Miss Cyd HO, it might not be possible for us to gain a full picture and have a thorough understanding if several provisions are read together. Judging from the two angles mentioned earlier, though I accept that Miss Margaret NG's amendment is well intentioned, and can even make life easier for us, I can hardly give her concrete support at this stage.

Miss Margaret NG, Mr Albert HO and Miss Cyd HO raised the same question concerning whether the ordinance should cover "every person". It is indeed very reasonable for them to do so. Just now, Miss Margaret NG raised another proposal of confining the provision to the accountancy sector. I was so shocked that I nearly fell from my chair. (*Laughter*) The introduction of the anti-terrorism bill instantly lifted the spirit of the sector. The Secretary should be aware of this since we were going to dispute her arguments. Of course, I was somewhat joking in making the remark. The sector is indeed prepared to bear a certain degree of social responsibility. In conclusion, we will be willing to consider if the amendment to the Bill can take into consideration all grounds or the due responsibilities of various professional sectors. The amendment must not give us the feeling that a certain profession is being targetted by a certain provision, and that something terrible will happen if members of the profession do not act accordingly. This is definitely not what we want. I believe it is worthy for us to consider such amendments or reviews if all professions, such as lawyers, chartered secretaries, boards of directors, and people related to corporate governance or those who may possibly come into dealing with such property, are covered.

Thank you, Madam Chairman.

MR JAMES TO (in Cantonese): Madam Chairman, I trust there will be a second wave to the Bill. I hope the Government can reconsider the matter so that there can be a direction to follow if a review is truly conducted in future.

First, the Bill and other laws have something in common. There is one scenario we might need to think over again. What will happen if the Organized and Serious Crimes Ordinance and the Drug Trafficking (Recovery of Proceeds) Ordinance are applied to the media? Clause 10 of this Bill is related to the media, so what is the case with clause 11? It is conceivable that the media often search everywhere for sources of news to substantiate their reports. Yet they are not obliged to report to the Government even if they discover a murder case. Nevertheless, as a good citizen, every one of us should respond to the appeal made by the television programme "Police Report" by reporting crime to the police in order that the culprits can be brought to justice. Yet we must note that the media have no statutory responsibility to report. Neither will they be convicted and jailed even if they choose not to do so. It is also conceivable that newspapers, electronic media, and weekly magazines are not allowed to report what they happen to dig out because they are not supposed to reveal the truth of everything they know. They can only report what they know to the police. Furthermore, they cannot publish the related stories after the report has been made. To a certain extent, the media act like a spy for the Government when they dig out the dark side or truth of society. They must report what they know because they are covered as well. Should the media be exempted? Of course, it will be argued that if the media publish information concerning money laundering activities or terrorist property immediately after it is known to them, the offenders or terrorists will definitely run away. This makes it impossible for the police to bring the offenders to justice quickly. If the media choose not to do so, however, they may run into conflicts with their fundamental duties. I hope the Government can reconsider the matter.

Secondly, many Honourable colleagues share the view that members of the community will feel insecure if this provision is passed. I can provide some information concerning the Drug Trafficking and Organized Crimes Ordinance, that is, the one passed this morning after a 20-month deliberation period. We were told by the Government that a number of prosecutions had been made over the past 11 years. However, only one prosecution was successful since the offender had pleaded guilty. If the offender pleaded not guilty, the Government might end up having nil successful prosecution. According to the Government, it is very difficult to prove "believe" or "suspect". Should the relevant legislation remain unchanged, provisions making use of these elements can be described as practically useless. This is what the Government said in a certain Bills Committee meeting. I was reminded by Mr Albert HO that it was supposed to be a tragic thing for any person to be prosecuted, arrested or

suspected. However, the crux of the issue is that, as pointed out by me several hours ago, it is most important for us to let the United Nations know progress has been made in this aspect.

MS AUDREY EU (in Cantonese): Madam Chairman, it is really funny sitting here listening to all those speeches delivered by Honourable colleagues. However, I cannot laugh because people outside this Chamber might be teasing us. I hope Honourable colleagues can reflect on what they have done. A moment ago, we voted in support of the resumed debate on the Second Reading of the Bill. Now it seems like we have returned to the Bills Committee stage when the Bill was being deliberated. It is really surprising that we could still find some colleagues standing up and explaining at this stage why certain amendments were needed. Some colleagues (they are all members of the Bills Committee) even complained that they had not studied certain provisions and went on to give their comments on the provisions they consider good and those considered bad. They even added that they needed to have time to consider the matter before they could give their support. I find it really surprising that some Members have chosen to make such remarks at this stage. I hope Honourable colleagues can learn from this lesson and, in future, refrain from supporting the resumption of the debate on the Second Reading of the Bill before thorough discussion has been held in the Bills Committee. It is not advisable for issues to be discussed at this stage whereas they should have been thoroughly discussed in the Bills Committee. It is noted that those who rose to speak are all members of the Bills Committee. Thank you, Madam Chairman.

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

(No Member responded)

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I just wish to make a brief explanation. Concerning the liability of all the people, the wording of the provision is "Where any person" in fact, anti-money laundering legislation such as the existing Organized and Serious Crimes Ordinance and the Drug Trafficking (Recovery of Proceeds) Ordinance have already adopted these wordings. Therefore, we can see that these wordings are not in contravention of the proposal of the Financial Action Task Force on

Money Laundering (FATF), that is, "If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect". Therefore, I think there is entirely no problem with the wordings of this provision.

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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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 Kenneth TING, Dr David CHU, Dr Raymond HO, Mr Eric LI, Dr LUI Ming-wah, Mr NG Leung-sing, Mrs Selina CHOW, Mr CHAN Kwok-keung, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Mr Andrew WONG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr YEUNG Yiu-chung, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Mr Ambrose LAU, Miss CHOY So-yuk, Mr Timothy FOK, Mr TAM Yiu-chung, Dr TANG Siu-tong, Mr Abraham SHEK,

Miss LI Fung-ying, Mr Henry WU, Mr Tommy CHEUNG, Dr LO Wing-lok, Mr IP Kwok-him, Mr LAU Ping-cheung and Mr MA Fung-kwok voted for the motion.

Miss Cyd HO, Mr Albert HO, Mr LEE Cheuk-yan, Dr David LI, Mr Fred LI, Miss Margaret NG, Mr James TO, Mr CHEUNG Man-kwong, Mr LEUNG Yiu-chung, Mr SIN Chung-kai, Dr YEUNG Sum, Miss Emily LAU, Mr Andrew CHENG, Mr SZETO Wah, Mr LAW Chi-kwong, Mr Michael MAK, Mr Albert CHAN, Mr WONG Sing-chi, Mr Frederick FUNG and Ms Audrey EU voted against the motion.

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

THE CHAIRMAN announced that there were 54 Members present, 33 were in favour of the motion and 20 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Miss Margaret NG may not move her amendment to clause 11, which is inconsistent with the decision already taken.

CLERK (in Cantonese): Clause 11 as amended.

CHAIRMAN (in Cantonese): 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): Heading before clause 12 and clause 12.

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move an amendment to heading before clause 12 and deletion of clause 12, as set out in the paper circularized to Members.

Schedules 2 and 3 of the Bill empower law enforcement agencies to collect evidence and information in order to seize and detain property suspected of being terrorist property. The provisions of Schedules 2 and 3 are modelled on the provisions of the Schedule to the United Nations Sanctions (Afghanistan) Regulation, that is, the power vested in law enforcement agencies does not surpass powers conferred on them by other legislation.

Members of the Bills Committee considers the enforcement power laid down in Schedules 2 and 3 too wide, which may allow the executive to abuse search on and detention powers in the name of combating terrorism, and may disturb the life of the general public and the day-to-day operation of organizations. The Administration has readily accepted good advice and proposed the deletion of Schedules 2 and 3. Consequently, law enforcement officers could only rely on other legislation which empower them to exercise the power concerned.

Consequential to the deletion of Schedules 2 and 3, wordings concerning "evidence" in the heading before clause 12 will be deleted accordingly. Consequently, it is also unnecessary to retain provisions under clause 12 concerning the coverage of Schedules 2 and 3.

These amendments have been discussed and endorsed by the Bills Committee. I implore Members to support their passage.

Proposed amendments

Heading before clause 12 (see Annex IX)

Clause 12 (see Annex IX)

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 motion passed.

CHAIRMAN (in Cantonese): As the amendments to clause 12, which deal with deletion, have been passed, clause 12 is deleted from the Bill.

CLERK (in Cantonese): Heading before clause 12 as amended.

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 13.

MISS MARGARET NG (in Cantonese): Madam Chairman, my amendments to clause 13 are found to be problematic since I have altogether moved two amendments. Under the first amendment, clause 13(1) should be deleted and substituted with "The Court of First Instance may, if satisfied on an application made by or on behalf of the Secretary for Justice that any property specified in the application is terrorist property order, subject to subsection (2), the forfeiture of property.". This is a consequential amendment to the one I previously moved with respect to the definition of "terrorist property". However, as the latter amendment on definition has been negatived, the former amendment will be in conflict with other provisions. May I seek leave from the Chairman to withdraw, without giving notice, this part of amendment and move an amendment only to subclause (4)?

CHAIRMAN (in Cantonese): Yes, you may.

MISS MARGARET NG (in Cantonese): Madam Chairman, the amendment to subclause (4) deals with the onus of proof, that is, the onus of proof required for the forfeiture of terrorist property. The Secretary for Security and Mr Albert HO will move amendments to this part later. Madam Chairman, should I move my amendment now or later?

CHAIRMAN (in Cantonese): Mr Albert HO has withdrawn his amendment. In accordance with the Rules of Procedure, the Secretary for Security shall now move her amendment.

MISS MARGARET NG (in Cantonese): Fine. Thank you, Madam Chairman.

CHAIRMAN (in Cantonese): Secretary for Security, you may move your amendment to clause 13(4).

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 13(4) be amended, as set out in the paper circularized to Members.

Clause 13(4) as it stands provides that the standard of proof for the forfeiture of terrorist property is "the balance of probabilities". The Bills Committee is of the view that the standard should be substituted by "the standard of proof applicable to civil proceedings in a court of law" to allow the Court of First Instance to decide whether or not to grant an order for the forfeiture of property on the merits of each application. We have accepted the proposal of the Bills Committee and therefore move an amendment to clause 13(4). The amendment has been discussed in the Bills Committee and endorsed by most members. I implore Members to support its passage.

The amendment proposed by Miss Margaret NG is, in our view, neither reasonable nor practicable because her amendment proposes to change the standard of proof for the forfeiture of terrorist property to a criminal one. This would force criminal prosecution procedures unreasonably on proceedings about forfeiture of a civil nature. I consider Miss NG's amendment would render the forfeiture provision inoperative and would thus implore Members to oppose her amendment.

Proposed amendment

Clause 13 (see Annex IX)

MISS MARGARET NG (in Cantonese): Madam Chairman, I propose to change the standard of proof to one applicable to criminal proceedings. This standard is certainly very high. However, given the broad definition of "terrorist property", I agree with the Hong Kong Bar Association that, in some cases, the consequence of forfeiting a person's property can be as serious as, or even more serious than, that of convicting him.

This explains why it is necessary to examine the source of property to be forfeited. The first point I would like to raise is related to clause 5. Under this clause, the Secretary may freeze any property when she "has reasonable grounds to suspect" that it is terrorist property. No additional evidence is required to illustrate the offence committed. The property can be forfeited after a

considerable period of time. Under such circumstances, innocent people will easily be implicated. Therefore, a strict standard of proof must be adopted.

Madam Chairman, some colleagues asked me why such a high standard is set in relation to the forfeiture provision, whereas only the standard of proof applicable to civil proceedings is required for the revocation of other court applications. Actually, different standards of proof are applicable to civil proceeding, mainly dependent on what needs to be proved. The more serious the consequence of the case about which proof is required, the higher the standard of proof required by the Court. Even the standard of proof applicable to civil proceedings can be very high. While the order for revoking the permission granted by court to the Chief Executive in relation to the specification of terrorists or terrorist property is only temporary, the forfeiture of property is permanent in nature. The latter is therefore more serious than the former.

Furthermore, there are "imperative" grounds to do so. If the Chief Executive must observe the standard of proof applicable to criminal proceedings when making applications to court under clause 4, he will find it impossible to specify a certain person to be a terrorist within a short period of time, thus making it difficult to achieve the goal of the UNSCR 1373. In order to achieve this goal, it is "imperative" for the onus of proof to be set at the usual standard applicable to civil proceedings. Forfeiture of property, however, is not essential to the implementation of UNSCR 1373. A very strict standard of proof must therefore be observed before property can be forfeited. What can be done if the property cannot be forfeited? We must then examine whether the property is terrorist property. If there are grounds to believe that it is terrorist property, the Chief Executive can be requested to specify so and deal with it by other means. Since forfeiture of property is not indispensable to UNSCR 1373, and private property will be jeopardized as a result, it is fit to raise the standard of proof.

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

MR ALBERT HO (in Cantonese): Madam Chairman, with the exception of this one before us, which I feel difficult to support, we agree to all the amendments proposed by Miss Margaret NG this evening.

I have raised some questions to her earlier. It is most important that "balance of probabilities" was originally adopted in the Bill. Now that the Secretary has amended it so that the standard of proof applicable to civil proceedings is adopted instead. As Honourable Members pointed out earlier, and according to the information provided by the Legal Adviser of this Council, the standard of proof applicable to civil proceedings can be very high. The probability is not necessarily 50%. Depending on the seriousness of a case, sometimes it can be higher. For instance, a very high standard will definitely be set by court if it is to prove certain persons are suspected of civil fraud, or to effect permanent forfeiture under this provision. Nevertheless, case law has shown that the standard is definitely lower than the one applicable to criminal proceedings. As Members should all be aware, under the standard applicable to criminal prosecutions, forfeiture of property will not be allowed even if there is only one reasonable doubt. Though the standard applicable to civil proceedings can be very high, it is definitely below the one applied for criminal prosecutions.

So what difficulty do I find? After going through the entire Bill, Members will realize that clauses 4A and 5 mainly deal with the specification of persons as terrorists. The persons affected, however, may appeal to court to revoke the specification or the freezing order issued under clause 5. Though the Government needs not resort to the standard of proof applicable to criminal prosecutions, these provisions would still have profound impact on an individual, particularly his reputation. Not only will he find himself in total isolation, his business will collapse and his prospects will be destroyed completely as well. Though I understand there is a limit to the freezing period, the person affected will still face a serious consequence. If the standard applicable to criminal prosecutions is considered to be unnecessary even under those circumstances, I find it hard to understand why this standard is needed for the purpose of forfeiting property. It is really hard for me to accept applying this standard to forfeiture.

If the standard of proof required under clauses 4A and 5 is high, and the one under clause 13 in relation to the exercise of the power of forfeiture is nearly as high, the standard applicable to criminal prosecutions will not be needed for the sake of consistency. If Members really feel the standard of proof should be as high as the one applicable to criminal prosecutions, the standard of proof under clauses 4A and 5 must not be lower than this. For these reasons, I cannot support this amendment proposed by Miss Margaret NG this evening.

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

(No Member responded)

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

(The Secretary for Security indicated that she did not wish to speak)

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

(Members raised their hands)

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

(Members raised their hands)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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

CHAIRMAN (in Cantonese): May I ask if two Members have pressed the "present" button only? Fine. Will Members please check their votes. If there are no queries, voting shall now stop and the result will be displayed.

Mr Kenneth TING, Dr David CHU, Mr Albert HO, Dr Raymond HO, Mr Eric LI, Dr David LI, Mr Fred LI, Dr LUI Ming-wah, Mr NG Leung-sing, Mrs

Selina CHOW, Mr James TO, Mr CHEUNG Man-kwong, Mr CHAN Kwok-keung, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Mr SIN Chung-kai, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Dr YEUNG Sum, Mr YEUNG Yiu-chung, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Mr Ambrose LAU, Miss CHOY So-yuk, Mr Andrew CHENG, Mr SZETO Wah, Mr Timothy FOK, Mr LAW Chi-kwong, Mr TAM Yiu-chung, Dr TANG Siu-tong, Mr Abraham SHEK, Miss LI Fung-ying, Mr Henry WU, Mr Tommy CHEUNG, Mr Albert CHAN, Mr WONG Sing-chi, Mr IP Kwok-him and Mr MA Fung-kwok voted for the motion.

Miss Cyd HO, Mr LEE Cheuk-yan, Miss Margaret NG, Mr LEUNG Yiu-chung, Mr Andrew WONG, Miss Emily LAU, Mr Michael MAK, Dr LO Wing-lok, Mr Frederick FUNG and Mr LAU Ping-cheung voted against the motion.

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

THE CHAIRMAN announced that there were 53 Members present, 42 were in favour of the motion and 10 against it. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

CHAIRMAN (in Cantonese): As the amendment moved by the Secretary for Security has been passed, Miss Margaret NG may not move her amendment to clause 13(4).

X X X X X X X

X X X X X X X

SECRETARY FOR SECURITY (in Cantonese): Madam Chairman, I move that clause 16 be further amended in order to add clause 16A to the Bill, as set out in the paper circularized to Members.

Clause 16A mainly provides for the mechanism of application for compensation, and the criteria adopted are modelled with reference to the existing compensation arrangement under the Organized and Serious Crimes Ordinance and the Drug Trafficking (Recovery of Proceeds) Ordinance. That is, if the applicant has suffered loss as a result of serious default on the part of the Government, the Government should make compensations. The proposed compensation mechanism operates in parallel with the existing compensation mechanism under common law, that is, it will not affect the right of the relevant person to claim damages from the Government under common law. In accordance with the principle of common law, the Government shall make compensation only if a person has suffered loss due to the negligence on the part of the Government.

I am aware that some Members do not agree with the compensation arrangement proposed by the Government and criticize it as a flower in a mirror or the moon in the water, which is pure illusion. Therefore, some Members suggest that instead of "serious default" on the part of the Government, the Government should make compensation if a person has suffered loss as a result of "default" on the part of the Government. Some Members even suggest that as long as someone has suffered loss as a result of default on the part of the Government, the Government should make compensations.

I fully understand the concerns of Honourable Members, and I appreciate that their intention is to protect the interest of the aggrieved person who has suffered loss. However, according to the proposal of Members, the Government should make considerable changes to the existing compensation

policy, which will have inestimable financial implication to the Government and cause substantial deviation from the compensation criteria under common law and far-reaching implications to the compensation arrangement of all subsequent civil litigations. After consulting the relevant Policy Bureau and seeking legal advice, I deem it too difficult to accept the proposal of Members at the present stage. However, I undertake to continue the review with the relevant Policy Bureau and department as soon as possible and report to the Legislative Council in six months after the legislation is put into effect.

Anyway, a mechanism in place is better than none, I therefore implore Honourable Members to understand the situation of the Government, support this protection provision, and support clause 16A proposed by the Government, with reference to the compensation mechanism under other legislation.

Proposed amendment

Clause 16 (see Annex IX)

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

MISS MARGARET NG (in Cantonese): Madam Chairman, Members may know that I have originally proposed a clause 16A related to the compensation mechanism. I think that the two requirements in the Secretary's amendment are unreasonable. First, it requires a person concerned to prove that he is innocent throughout the period; second, it requires proof that there is serious default on the part of the Government.

Madam Chairman, as you have not given me permission to propose an amendment, I should not explain the legal justification at this stage and I would only discuss the amendment of the Government. The biggest problem is that the requirements of the compensation mechanism proposed by the Government are even more rigorous than common law. Although the Secretary has just indicated that she does not intend to change the common law principles, is it legally practicable? If there are very clear express provisions in statutes that are different from common law, the Court would handle cases in accordance with such statutes. Thus, the common law principles would be narrowed down, which is not what the Secretary wants to see. We cannot look up what the

Secretary has said today when problems arise. According to the consistent principles of the Court, if there are explicit provisions, it is not necessary to go through what the Secretary said in advocating the passage of the legislation. If the common law will obviously be narrowed down, has it gone against the original intention of the Secretary in adding a clause on compensation? My failure to propose an amendment today would give rise to a lot of difficulties in future. The Secretary has just said that a further review would be conducted later, I can only hope that the requirements would be relaxed rather than maintained at that time.

Madam Chairman, the Secretary has also indicated that the compensation mechanism has existed under other laws. I know that the Secretary has referred to the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance. Although she has said that the provisions on compensation are the same as those under this clause, they are actually different. Under this clause, compensation is not made because property has been frozen by the Secretary. The Secretary must first file an application with the Court for the issue of a restraint order and, at the time of filing the application, she must promise to make compensation once there is default. What are the functions of the compensation mechanism under the two laws mentioned above? Under these laws, many people have enormous powers of investigation and the compensation provisions are particularly pinpointed at people who suffer loss in the course of investigation. There was no compensation mechanism under the United Nations (Anti-Terrorism Measures) Bill and a mechanism is now proposed to be added to it. Therefore, they are two entirely different matters.

Madam Chairman, in respect of this clause, I am afraid the case just mentioned by the Secretary would be doing evil out of good intentions. Madam Chairman, though I cannot propose an amendment today, I have to object to this particular clause. I have discussed the matter with Ms Audrey EU earlier on. Ms Audrey EU has said very optimistically that, if the clause is passed, the serious default may most probably violate the Basic Law and the Court would naturally remove it. If some clauses fail to come into operation because they have violated the Basic Law, we can sometimes remove them, and we would then have a compensation mechanism. In my view, it is too risky to do so. If the Court really thinks that the clause is already very explicit, we would be in great trouble indeed.

Therefore, Madam Chairman, I will vote against the clause later for safety's sake.

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

MR HOWARD YOUNG (in Cantonese): Madam Chairman, as mentioned during the Second Reading debate, the Liberal Party attempted to propose an amendment to this clause. We definitely welcome a mechanism for compensation because of the Government has wrongfully frozen property and caused a person to suffer direct loss, it should make compensations. When the Bills Committee discussed the Bill and when we subsequently discussed the matter with the Secretary, we had cited the example of the recent news reports on the YU Man-hon incident. We pointed out that the Government also wished to settle the issue by making compensations. If a person suffers loss as a result of the Government's default, he should naturally be given compensation. In proposing the amendment, we did not say that all incidents would involve serious default but we should judge the seriousness of the default which might be a matter of opinion. As it would have a charging effect on public coffers, we could not propose the amendment without the Chief Executive's consent. But as I have said, the Liberal Party thinks that it is not necessary to seek the Chief Executive's consent to propose the amendment at this stage. We have been told that the Government is aware that we are very much concerned about the matter, thus, it would reconsider the matter six months after the legislation has come into operation. For this reason, it would not affect our thinking in respect of whether or not we support the clause.

MS AUDREY EU (in Cantonese): Madam Chairman, during the resumption of the Second Reading debate, I already expressed my views on clause 16A indeed, so I am not going to repeat my remarks here.

Madam Chairman, I agree with the Secretary that a provision on compensation is better than none at all. The Blue Bill did not contain the clause, but the Secretary has accepted the views of the Bills Committee and added clause 16A to the Bill. However, Members of the Bills Committee are unanimous in their view on the issue of serious default and they all think that there is something wrong with the drafting of "serious default". The Secretary has just said that the Government hopes that the provision would be similar to the common law principle, that is, once there is negligence, a claim for compensation can be made. As Miss Margaret NG has just said, we lawyers generally call it the *PEPPER vs HART* theory, that is, remarks made in this Council can be cited to interpret the

law. However, Miss Margaret NG has also said that, if the wordings in the legislation are clearly different from common law, for instance, "negligence" is used under common law but "serious default" is used in the Bill, then there is certainly a difference. For this reason, we cannot say, on the basis of the Secretary's remarks, that the objectives of the Government and Members of this Council are consistent with common law. Yet, since the Secretary has just said so and promised to reconsider the matter within six months and submit the matter for discussion in this Council, and since the Secretary has indicated that the Government's intent is identical to the criteria for compensation under common law, I am willing to support the amendment to clause 16A at this stage.

MR JAMES TO (in Cantonese): Madam Chairman, the views of the Democratic Party are identical to those of Ms Audrey EU. However, we have decided that we would not vote for the amendment, we would abstain from voting.

Moreover, we also wish to remind the Secretary that, since we have very strong views on the clause, they may affect how we vote on the Bill and even how we vote during the Third Reading. Of course, if the amendment proposed by the Secretary is passed, we would have no alternative but to support the Third Reading.

But I do not know what the Secretary thinks about the effective date. In that case, I think that clause 16A on compensation should not come into operation because it has to form a complete package with clauses 4, 4A and 5 and it sets a very high standard of proof for compensation. However, we cannot accept such a package. Therefore, I can give the Secretary advance notice that, when we consider the subsidiary legislation related to the effective date, we would stop the clause from coming into operation because we think that it should come into operation during the "second wave", that is, when subsidiary legislation is tabled and we have thoroughly considered this point. It is because I think these several clauses are a package.

However, the most interesting point that I appreciate most is that the Liberal Party to which Mr Howard YOUNG belongs was very much concerned about this point at the meetings of the Bills Committee. They had proposed an amendment but failed to push it through. If this clause is passed under such circumstances, I hope that the Liberal Party would specify like us that, without a

good package, it would not support the passage of the subsidiary legislation to be made by the Government in respect of the effective date.

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

MISS CYD HO (in Cantonese): Madam Chairman, the original Blue Bill is silent on compensation and this clause has been added after our discussion. This clause on compensation and the clauses preceding it form a package. The preceding clauses are rather loose, for instance, in regard to forfeiture. The amendment proposed by Miss Margaret NG has just been negated and Members do not accept the forfeiture of property requiring the criminal standard of proof. However, the subsequent clauses are very strict. Besides, we passed the original clause 9 an hour or so ago and it would give rise to a lot of problems. The Secretary has just said that she agrees and intends to conduct a review again, but it may not be financially affordable. If a looser compensation mechanism is adopted now, the Secretary fears that it may not be financially affordable. In this connection, I think the decision to reduce civil service pay has also been made at the expense of justice.

The law dictates what we should or should not do something, rather money. If we agree that compensation should be made but the fiscal deficit does not allow us to do so, we should set stricter requirements for proof so that people would not suffer loss so easily, and they would then have greater confidence. However, certain parts of the preceding clauses have deviated from common law, for instance, the reporting of an offence as we have just discussed. The Secretary fears that establishing the mechanism would deviate from common law.

We can hardly support it if there is an imbalance between the two sides. I hope the Secretary would submit the clauses for review to this Council as soon as possible. Since we do not have to discuss the policy address in October, we may focus our discussion on this point.

DR YEUNG SUM (in Cantonese): Madam Chairman, a compensation clause is better than none at all but the criteria for compensation can hardly be met. So, there would virtually not be any compensation even though there is a mechanism

for compensation. It is just like flowers in a mirror or the moon in the water — an illusion. But the Secretary has repeatedly emphasized during our scrutiny of the Bill that the Government would study in detail the method of compensation and it would give us an answer later. Let us just wait and see.

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

(No Member responded)

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)

Miss Margaret NG rose to claim a division.

CHAIRMAN (in Cantonese): Miss Margaret NG has claimed a division. The division bell will ring for one minute.

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

CHAIRMAN (in Cantonese): Dr David LI, are you prepared 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 Kenneth TING, Dr David CHU, Dr Raymond HO, Mr Eric LI, Dr LUI Ming-wah, Mr NG Leung-sing, Mrs Selina CHOW, Mr CHAN Kwok-keung, Miss CHAN Yuen-han, Mr CHAN Kam-lam, Mrs Sophie LEUNG, Mr Andrew WONG, Dr Philip WONG, Mr WONG Yung-kan, Mr Jasper TSANG, Mr Howard YOUNG, Mr YEUNG Yiu-chung, Mr LAU Kong-wah, Mr LAU Wong-fat, Ms Miriam LAU, Mr Ambrose LAU, Miss CHOY So-yuk, Mr TAM Yiu-chung, Dr TANG Siu-tong, Mr Abraham SHEK, Miss LI Fung-ying, Mr Henry WU, Mr Tommy CHEUNG, Dr LO Wing-lok, Mr Frederick FUNG, Mr IP Kwok-him, Mr LAU Ping-cheung, Ms Audrey EU and Mr MA Fung-kwok voted for the motion.

Miss Cyd HO, Mr LEE Cheuk-yan, Miss Margaret NG, Mr LEUNG Yiu-chung, Miss Emily LAU and Mr Michael MAK voted against the motion.

Mr Albert HO, Dr David LI, Mr Fred LI, Mr James TO, Mr CHEUNG Man-kwong, Mr SIN Chung-kai, Dr YEUNG Sum, Mr Andrew CHENG, Mr SZETO Wah, Mr LAW Chi-kwong, Mr Albert CHAN and Mr WONG Sing-chi abstained.

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

THE CHAIRMAN announced that there were 53 Members present, 34 were in favour of the motion, six against it and 12 abstained. Since the question was agreed by a majority of the Members present, she therefore declared that the motion was carried.

X X X X X X X