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

Verbatim transcript of meeting
held on Friday, 25 May 2001, at 8:30 am
in Conference Room A of the Legislative Council Building

Members present	**:**	Hon SIN Chung-kai, (Chairman) Hon Margaret NG, (Deputy Chairman) Hon NG Leung-sing Hon Jasper TSANG Yok-sing, JP Hon Abraham SHEK Lai-him, JP Hon Henry WU King-cheong, BBS Hon Audrey EU Yuet-mee, SC, JP
Members absent	**:**	Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Dr Hon David LI Kwok-po, JP Hon James TO Kun-sun Hon Bernard CHAN Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP Hon Ambrose LAU Hon-chuen, JP
Public officers attending	**:**	Miss Vivian LAU Principal Assistant Secretary for Financial Services Miss Emmy WONG Assistant Secretary for Financial Services Mr Arthur YUEN Division Head, Banking Supervision Department, Hong Kong Monetary Authority Ms Sherman CHAN Senior Assistant Law Draftsman

		Ms Beverly YAN Senior Government Counsel
		Mr Michael LAM Senior Government Counsel
Attendance by invitation	**:**	Securities and Futures Commission
		Mr Andrew PROCTER Executive Director, Intermediaries and Investment Products
		Mr Joe KENNY Consultant
		Mr Andrew YOUNG Legal Consultant
Clerk in attendance	**:**	Mrs Florence LAM Chief Assistant Secretary (1)4
Staff in attendance	**:**	Mr LEE Yu-sung Senior Assistant Legal Adviser
		Mr KAU Kin-wah Assistant Legal Adviser 6
		Ms Connie SZETO Senior Assistant Secretary (1)1

主席：

今天我們會討論第XVI部。請政府的代表進入會議室。各位同事，有關的文件共有3份：立法會CB(1)1267/00-01(01)號文件—政府就第XVI部提供的文件；立法會CB(1)1288/00-01(01)號文件—政府就業界提出的意見所作的回應；第三份文件是立法會CB(1)1333/00-01(01)號文件—法律事務部提供的文件。財經事務局的Miss Vivian LAU會首先作出介紹，接着Mr Andrew PROCTER會加以補充。

Vivian。

財經事務局首席助理局長劉利群女士：

多謝主席，我們今天是討論《證券及期貨條例草案》的第XVI部，主要的討論題目是雜項條文。有關條文主要分為兩部分：一部分是適用於條例草案中多於一部分的條文；另一部分是在邏輯及結構上不可載於條例草案前15部任何一部的條文。如各位參考有關文件的附件，便可發現大部分的條文其實是建基於現有的條文，少部分是新條文。有關文件已重點提出主要的建議，我們也會特別向議員重點地介紹新條文或經修訂的條款。我不再耽誤各位的時間了，請證監會的博學德先生為各位介紹這份文件。

Chairman:

Mr PROCTER.

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

Thank you, Chairman.

Before turning to the major proposals as set out in the paper, I think it would be useful to take members to clause 366, which is on C2313, to very quickly run through the structure of that provision, which is, as members will see, headed "Preservation of secrecy". Subclause (1) sets out the basic requirements and expectations in respect of the preservation of secrecy, and you will see there that it says "Except in the performance of a function under, or for the purpose of carrying into effect or doing anything required under the relevant provisions, a specified person…", which for most purposes means the Commission, "shall preserve and aid in preserving secrecy and give regard to any matter coming to his knowledge". It goes on to say they should not communicate such matters to other persons and should not suffer or permit any other person to have access to relevant records or documents.

So there is a basic requirement that the information provided to Commission Members or those who assist Commission Members should be preserved. What follows then are a series of exceptional cases in which information of that sort can nonetheless be disclosed. In subclause (2) you have examples of that, cases where the information has already been made available to the public, where the disclosure of information is with a view to instituting criminal proceedings. In subclause (2)(c) there are provisions that would allow information to be provided from auditors of listed companies to the SFC in respect of wrongful or fraudulent activities. In subclause (3) there are some further exceptions to the basic rule, and they include, for example, the provision of information in the form of a summary; provision of information in connection with judicial proceedings, and then there starts a series of provisions where specific entities or tribunals are nominated as potential recipients of information, including the Market Misconduct Tribunal, the Appeals Tribunal, the MA and certain government and statutory officers. In those cases there are some conditions that would need to be satisfied before that release could be made. That type of provision continues right through to subclause (a) of 366(3), and finishes with the possibility that information might be released upon consent. Then over in what is subclause (5), there is an explanation of the

conditions that need to be met in certain of those cases, and they particularly include a judgment on the part of the Commission that disclosure would be in the interests of the investing public or in the public interest, or that disclosure would enable or assist the recipient to perform its functions, and is not contrary to public interests. So that is the basic structure.

We then turn back to the paper and to subparagraph 4(a). You will see there that there is a specific reference to the need to open up, to a slightly wider extent, the gateway for sharing information between the SFC and the HKMA. That is a reflection of the fact that under the proposed arrangements as we have discussed them, and as they are still being considered, it would be necessary for a very free flow of information between the SFC and the HKMA in respect of exempt persons in particular.

The paper then goes on to discuss what are subclauses 366(7) and (8), and they have their genesis in some existing provisions of the Securities and Futures Commission Ordinance where there is a very similar and similarly-structured provision, section 59, in respect of secrecy. What subclauses 366(7) and (8) provide is for circumstances where a person has had sight of certain information and it prevents and precludes the possibility of onward release of that information. In other words, it prevents the situation where someone who is not themselves the primary recipient or is not bound by particular provisions might otherwise be tempted to pass information on.

There is a defence provision of a sort in subclause 366(10). The person who receives information may not be aware that the information is subject to the provisions of clause 366; may not be aware that they are prevented or prohibited from passing it on, and so subclause 366(10) provides for the additional establishment of knowledge that the person knew or ought reasonably to have known that disclosure was made under prescribed circumstances, and had no reasonable grounds to believe that the prescribed grounds permitting disclosure had been satisfied.

In the course of receiving market comments on earlier drafts of this section, some concerns were expressed about the difficulty of people obtaining legal advice and obtaining assistance when they were dealing with the Commission; and in particular paragraph 4C refers to comments from the Law Society about certain ambiguities in earlier drafts as they affected people who were the subject of investigation or inquiry by the SFC. Those issues are sought to be addressed in what is clause 366(11), and in particular to permit people to pass information to their legal and other professional advisers. Those people who receive information are themselves then precluded from passing it on or using the information other than for the provision of that legal advice or assistance.

Clause 367 is not discussed in any length in the paper, but that is the clause that provides for the avoidance of conflict of interest. It appears at page C2325. Subclause 367(7) sets out the basic prohibition or the basic need to avoid conflict of interest on the part of a member of the Commission in performing their functions under the relevant provisions, and it provides that a Commission Member should not deal with a matter in respect of transactions which they know are connected with a transaction that is the subject of investigation or proceedings by the Commission under the relevant provisions, or is the subject of other provisions of the ordinance, or which is otherwise being considered by the Commission. In other words, the Commission Members are told not personally to become involved in matters which are the subject of consideration by the Commission. There are some limited exceptions in subclause (2) and they are very limited exceptions, where an interest is already held in securities for the most part, and where certain corporate actions take place which are outside the control of a Commission Member who already holds that interest. Where a conflict situation does arise, however, there is a reporting requirement under subclause 367(3).

Clause 368 deals with immunity, and it follows the existing principles – that is the principles in the existing law – that a person who acts in good faith should be free from civil liability with respect to anything done or omitted to be done in the performance of their duties under the legislation. Our judgment is that that remains the appropriate test, and it is certainly

the test which is consistent with that applied in respect of regulators in other jurisdictions, and the paper notes by way of example the UK and Australia.

There is then in clause 369 a provision that provides immunity in respect of communications with the SFC by auditors of listed companies. 369 provides that auditors of listed companies who choose to report to the SFC a suspected fraud or an event of misconduct in the management of listed corporations enjoy a statutory immunity from civil liability under the common law. The key thing to note there is that there is no obligation on the part of auditors under this provision to report such matters. It is a matter of choice on their part, but the auditor must act in good faith.

There has been a great deal of discussion between the Commission and the Administration and the Hong Kong Society of Accountants in respect of this provision. Particularly, I think the Hong Kong Society of Accountants was anxious to ensure that there was no express or implied obligation on the part of auditors of listed companies to report under this provision; and our understanding is that the Society now accepts that the clause as currently drafted makes it clear that auditors have no such obligation, and indeed they have agreed to work with the SFC to produce a practice note for their members, in order to ensure that members fully understand what it is they can and are permitted to do under this section.

Clause 370 is not discussed in the paper. That relates to obstruction of the Commission. Essentially it replicates an existing provision and provides that anyone who obstructs any other person in the performance of a function under the ordinance is liable to criminal punishment.

Clauses 371 and 372 deal generally with the provision of false or misleading information. These are provisions that were considered by Legislative Council as recently as last year, when the Securities and Futures Legislation Provision of False Information Ordinance was enacted. They are a reflection of the fact that increasingly the regulator is, as a

matter of policy and approach, reliant upon the industry to provide information. The regulator is increasingly less intrusive and more dependent upon disclosure as the basis for regulation, information being made available to the regulator and to the market, in order, for example and in particular, that investors should be in a position to protect their own interests. It was as a consequence of that kind of approach that the legislation was debated and enacted last year.

I take Members firstly to clause 371 on page 2335. That is the provision that relates to false and misleading representations, and you will see there that it would be an offence if a person, in support of an application made to the Commission, makes a false representation, whether it be in writing, orally or otherwise, that is false or misleading in a material particular. They must either know that to be the case or be reckless as to whether or not that is the case. There is a definition of what "representation" means, and that is provided in subclause (3). You will see that it includes representations as to facts, future events and existing intentions and opinions, etc.

Clause 372 is a complementary provision. Clause 371, as I said, relates to information provided in support of an application. Clause 372 relates to information provided in purported compliance with a requirement to provide information – and that is a requirement that might be imposed by, or under, any of the relevant provisions. "An information that is provided to a specified recipient, which is false or misleading in a material particular..." Again we have the double mental element that the person either knows or is reckless as to whether or not the information is false or misleading in a material particular. There are some definitions that are important, which follow.

In Clause 372(3), a person commits an offence in circumstances that would, other than those that would constitute an offence under subsection (1), so not in particular in support of an application, then any record or document which is false or misleading, and which the person knows to be false or misleading, or is reckless as to whether or not it is false and misleading. Importantly in subclause (2)(b), an additional factual element: that there has,

in respect of the provision of that record or document been a prior written warning from the recipient to the effect that the provision of any record or document which is false or misleading, would constitute an offence. So we not only have the mental elements that are provided for in the other sections, but you must precede the relevant act by a warning that there is a potential breach of this section. Then subclause (4) goes on to provide for some extra elements in respect of reliance and intention. The prosecution must prove that the specified recipient has reasonably relied on the record or document, or that the person intended that there be reliance on the record or document.

The next clause, clause 373, is of a quite different type. It relates to the power of the Commission to intervene in proceedings. There is a similar provision in the Australian Corporations Law, although this particular provision contains a number of additional safeguards that do not appear in the Corporations Law of Australia. The provision provides that where there are judicial proceedings or other proceedings which concern a matter provided for in any of the relevant provisions – in other words, under this legislation – or under certain provisions of the Companies Ordinance, or in which the Commission has an interest by virtue of its functions, and the Commission is satisfied that it is in the public interest for it to intervene and be heard, then after consultation with the Financial Secretary, it may apply to the relevant court in order to intervene. Subclause (4) provides that the court may, by order, allow the application, but that may be subject to such terms as it considers just, or obviously it may refuse the application; but it should not make such an order without first giving the Commission and each of the other parties to the proceedings a reasonable opportunity to be heard. None of those additional requirements of consultation or right to be heard are set out in the Australian provisions. They are all additional requirements under this law. Subclause (7) I should explain refers to Order 15, rule 6 of the rules of the High Court. That is a rule that says that the court, in cases of misjoinder, can make a further order directing that a party be removed from the proceedings. In other words, even having made an order subject to conditions or otherwise, the rules of the High Court would allow for a party to be removed if subsequently the court formed the view that participation was not appropriate

or necessary.

This is a provision which the Commission believes would be useful in cases where the Commission has a peculiar interest in the action, and where it has a particular perspective to put on an action, based on its own experience as a regulator; or where, for example, there is the possibility that the parties are not able to fully represent the interests of the wider investing community, or there is a danger that all relevant arguments may not be put before the court. By way of example, some time ago the Commission was asked to intervene in proceedings as they related to the CA Pacific winding-up litigation. There was an issue that arose there as to how assets of clients that were held in CCASS accounts should be characterized, whether they should be characterized as being held on trust for particular clients, or whether they should be part of the general assets of the Administration. There was a temptation to adopt the latter route in the context of the winding-up because that would have made the winding-up procedures far more straightforward and would have avoided a whole lot of tracing requirements under the law of trusts. But the Commission was concerned that the court in fact should decide that this was a case of trust because that was, in the Commission's judgment, necessary to the integrity of the clearing and settlement system. That would be an example of the kind of case where we would have a wider perspective on the set of issues and would wish to be in a position to put our views to the court.

Clause 374 is a very simple clause that says proceedings are not to be stayed merely because of the existence of other proceedings. It of course does not derogate from the court's ability to stay proceedings on ordinary principle, but avoids the possible argument that merely because of a multiplicity of actions, certain conduct or actions on the part of the Commission should be stayed.

Clause 375 deals with standard of proof, and it provides that where it is necessary for the court or the Commission to establish, or be satisfied for purposes of any of the relevant provisions, that some things have to be proved, that standard is on the balance of probabilities.

"The relevant provisions" is an expression defined in Schedule 1 to mean the provisions of this ordinance, or the provisions of two parts of the Companies Ordinance, but essentially relates to prospectuses or the conduct of a company in either purchasing its own shares or assisting someone else to purchase its own shares.

Clause 376, which is not discussed in the paper, provides that the Commission may prosecute in its own name, but only in a court of summary jurisdiction. That is an arrangement which is already in existence under the current law.

Clause 377 is a change from the existing law, and it deals with limitation periods for the commencement of proceedings. It provides that notwithstanding the Magistrates Ordinance, an information or complaint relating to an offence under this ordinance may be tried if the information or complaint is laid at any time within 3 years after the commission of the offence. In one sense this would be seen as an extension, because the current provisions provide that the information has to be laid within 12 months of the discovery of the offence. That has caused two difficulties. One has been in determining when it is, as a matter of fact, that an offence is discovered – and you can imagine that there is a gradual uncovering of relevant facts, and it is not always clear at what point an offence is discovered. Secondly, the 12-month period is just too short a period in respect of some of the types of complex investigations that the Commission has had to take on – and that unfortunately has resulted in some cases where a matter has not been able to be completed within the 12-month period, or where indeed an investigation has not been able to be commenced because it has been clear that it could not be completed within the 12-month period. So the judgment is that the 3-year extension is a much more realistic timeframe within which to allow the Commission to investigate the type of matters it is required to investigate under Part VIII.

The next set of provisions relate to the liability of officers of corporations for offences of the corporation itself, and in particular clause 378. This again was the subject of a lot of discussion and debate as a consequence of the draft provisions set out in the White Bill.

Many of the offences, as members will know from the past weeks of working through the legislation, under this legislation provide for offences that are committed by the corporation itself. Under sections 89 and 101(e) of the Criminal Procedure Ordinance, where an offence is committed by the corporation itself, that other ordinance would provide that the offence is also committed by persons who aid, abet, counsel, procure or induce the commission of that offence, or where the offence is committed with consent or connivance with its officers. What clause 378 does is effectively replicate the provisions of the Criminal Procedures Ordinance, and those two sections in particular, for these purposes; but it does add one additional element, and that is the element of recklessness. Under the existing law and under the law of some other jurisdictions, there is a criminal liability that might attach in cases of negligence, but the judgment here has been made that it is sufficient that criminal liability should attach in cases of recklessness, and that we should not descend to the level of possibly making available a criminal penalty where there is mere negligence. It has to be said, of course, that where it was a case of mere negligence, the Commission would have ample power to take disciplinary action in such a case, and that the range of sanctions that are available for disciplinary action now are wider than they are under the existing law, and particularly in respect of fines. So the outcome, curiously enough, of removing negligence as a basis for criminal liability, is probably not all that significant because a conviction based on negligence would normally have resulted in a fine, and that fining power is now available under the disciplinary sanctions, but you avoid the stigma of criminal conviction in a case of mere negligence.

Under clauses 379 and 380 the Financial Secretary is given certain powers, and under those provisions the Financial Secretary may prescribe that certain instruments or arrangements should be treated as securities, futures contracts or investment arrangements. Investment arrangements, Members might recall, are essentially the collective investment arrangements that the Commission is empowered to authorize under Part IV. Mutual funds, unit trusts are the most common examples, but there are a whole range of other contractual arrangements which might also amount to collective investments. Basically this is a provision that would allow new types of products and services to be characterized as falling within the

Commission's responsibility and jurisdiction; and it would allow that to happen without the need for amendment of the primary legislation. So it allowed for a more appropriate and timely response to changes in the marketplace. That is not always for the purpose of restricting that kind of product. Very often it is necessary, in order to actually facilitate the provision of a new type of product which is not adequately dealt with or not clearly dealt with under the existing legislation, and where those who would wish to offer that product are uncertain as to the circumstances in which they might offer that product in Hong Kong. So it ought to be seen not simply as a restrictive, but very much more as a facilitative provision.

Clause 381 empowers the Chief Executive in Council to prescribe certain transaction levies. These are levies that have been discussed, I am sure, in the context of Part III. This provision is an extension of the existing law because it also allows for the imposition of transaction levies in respect of automated trading services, the new type of quasi-exchange that can be authorized under Part III. As under the existing law, there is a provision that would require review of those levies, where the Commission's reserves are, in simple terms, double the Commission's annual estimated operating expenses. So clause 383 would say that in circumstances where there is that double reserve compared with operating expenses, then the Commission should initiate a dialogue with a view to possibly reducing transaction levies. That in fact is something that has happened several times in the last few years in respect of the levies on the Stock Exchange.

Clause 384 deals with rules made by the Commission, and I think here, Chairman, it would be sensible if I take Members to page 2353 of the legislation, and very quickly run through this provision. The Members know from their earlier scrutiny of the Bill that there are a number of rule-making powers set out in earlier parts, particularly in Parts VI and VII, but elsewhere as well. Clause 384 is a more general provision and it provides that the Commission may make rules for - and then there is a series of possibilities: applications for licensing, an exemption, the issue of licences, the requirement to display licences, the requirement to carry on business in respect of a specified class in a specified manner,

requirements as to experience and training. In subclause (e) there is the provision of corrections and errors in the register, admissibility of evidence in judicial and other proceedings, the way in which documents are lodged or filed with the Commission. Across into (h), there are requirements as to the lodging or filing of documents, circumstances in which records are to be compiled and kept, ways in which payments of auditors are to be made, where auditors are appointed under the ordinance; and then follows stock borrowing and lending, covered short sales, record-keeping requirements for stock borrowing and lending. (m) is about periodic returns; (n) is about the time limits of providing information; (o) and (p) are much more general, incidental powers, in effect providing that where it is necessary for rules to be made, then there is this general power that would allow that to be done. Subclauses (2) and (4) set out some prerequisites for the exercise of those powers, and I particularly draw Members' attention to subclause (8) which provides that where rules under this section provide for a penalty, then the penalty rules or the complementary rules are to be made by the Chief Executive in Council. The clauses that follow might be summarized as allowing for the possibility of partial application of the rules for class application of the rules, for class relief from the application of the rules.

I think all of that, Chairman, leaves open the question of the consultation process prior to the enactment of any of these rules. All of these rules of course would have to be laid before Legislative Council for negative vetting, but I know the question of consultation is a matter that has been raised in earlier discussion, and perhaps we can come back to that, once I have been through this part.

Clause 385 is similar in its contents to the provision relating to rules. It provides in general terms for the possibility that the Commission may make codes or guidelines. It also, though, quite specifically provides in subclause (2) that without limiting the general part of making codes or guidelines, the Commission may make a code known as the Takeovers and Mergers Code, and another code known as the Code on Share Repurchases, which Members will know are key codes to the regulation of public companies in Hong Kong.

I think, Chairman, just very quickly moving through the other provisions which are not touched on in the paper but which I simply draw to the attention of the Members and which are relatively straightforward, clause 386 on page C2365 deals with the service of notices, and it provides for the way in which the effective service of notices can be achieved. But the opening words of 386, "Subject to sections 111, 138 and 363" are key words because 111 and 138 are in respect of approved persons or licensed persons, and they require that people in those categories have obligations to provide the Commission with details as to how they can be contacted. So the provisions in 386 need to be read in that background, so that there is an actual positive obligation on many of the people upon whom we would service notices to tell us where and how we should do that.

Clause 387 simply provides that certain records that are authenticated are admissible without further proof, in proceedings. Clause 388 deals with general requirements for lodging of documents with the Commission. Clause 389 – general provisions for approvals by the Commission, and essentially it says that wherever we can approve something we can do so something to conditions. Clause 390 is an important provision relating to the Gambling Ordinance, because on its widest construction there are some provisions of the Gambling Ordinance that might be said to pick up certain futures contracts or contracts for difference. So it is important that this provides that if something is regulated under this ordinance, then the Gambling Ordinance should not apply.

Then finally in this part there is a provision that refers to the Inland Revenue Ordinance. Section 4 of the Inland Revenue Ordinance is a provision headed "Secrecy Provision" but it specifically allows for certain uses of information by the Commissioner for Inland Revenue. When read together with clause 366, the effect would seem to be that if information is provided to the Commissioner for Inland Revenue, then notwithstanding that 366 on its face might require the Commission's permission to do more with the information. Section 4 of the Inland Revenue Ordinance would provide an automatic gateway for certain

permitted uses of that information by the Commissioner.

Thank you, Chairman.

Chairman:

Audrey.

余若薇議員：

多謝主席。我有數個問題。我會先提出一個問題，然後再輪候提問。

Mr Chairman, the question I would like to ask is a general question. I know many of the provisions, whether in this part or other parts, are taken from the existing law, but then of course many other provisions are new, and very much widen the powers of the SFC. So the general question I want to ask is whether you have considered the existing provisions in connection with the powers which are now very much enlarged. One example I would like to give in this part is, for example, in section 370, which relates to a person who obstructs any other person in the performance of a function. I know this is from the existing law, but then of course the functions of the SFC or the provision of the ordinances is now very much enlarged. I just wondered whether you have done the exercise of considering this sort of existing provision in connection with the widened functions and widened powers. In particular, for example, I am a third party and I am not a person generally subject to the supervision powers of the SFC, but now under Part X, the SFC has very wide powers which can impact upon third parties. For example, if you allege that I hold certain property which is supposed to be handed up to the SFC under Part X, my worry is that if I say I am reluctant to do so because it is my property and it has nothing to do with whatever the SFC is doing, and you use this section against me and say "Look, you are obstructing" any other person – and this does not have to be somebody from the SFC. It can be obstructing any other person in

the performance of a function "... or in carrying into effect any provision of this ordinance commits an offence". I mean, poor me. I will be very, very worried. I really do not want to get into a possibility of committing a criminal offence, so is there any safeguard in that sort of provision? That is one example of considering an existing provision in connection with widened powers.

The other provision – I do not know whether it is analogous – is clause 376, which gives the Commission power to prosecute under any of the relevant provisions. I do not know whether, for example, this has been extended, and what this covers.

Mr Chairman, that is what I would like to ask for the time being. Thank you.

Chairman:

Mr PROCTER?

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

It is a very difficult question to answer in any concrete way. I think the answer, strictly, to the question whether or not we have considered it, is "Yes", and all the criminal provisions in the draft legislation were looked at not just by the SFC and the Administration, but specific advice was taken from Department of Justice staff on all the criminal provisions. So the strict answer is "Yes". In the example you have given, of course that does, notwithstanding that clause 370 replicates the existing law, have effect by reference to sections which are wider. Again you are right in that characterization. It does have that consequential effect.

In respect of clause 376 I think the answer is "No; nothing changes materially

there". The power to try something in a court of summary jurisdiction is basically the same. There are, it is true, some new provisions. There are new criminal provisions, of course, but by virtue of our power to try something in a court of summary jurisdiction, we could try; so yes, there is a wider set. I am not sure that there is anything fundamentally that changes, though, in respect of the character of the offence provisions that we could try in a court of summary jurisdiction that would cause us to reflect on the appropriateness of the Commission having that power. Nothing strikes me in that respect.

Hon Audrey EU Yuet-mee, SC, JP:

Mr Chairman, I note that Mr PROCTER said that this is a very difficult question. I just wondered whether it is possible to ask the SFC to give us an extra paper on the two points. For example, in relation to clause 376, whether he can give us a list of the type of provisions or the type of offences where the SFC would have the power of summary prosecution, so that we can see at a glance what it is, rather than having to look for what are the relevant provisions.

The other thing is in relation to clause 370. I just wonder whether he can give us a sort of comfort paper. I do not know. Looking at it, as I said, it can be used in a way which is quite oppressive to ordinary people. If the SFC says "I am carrying out my function and you have to do this", how am I to know? It is a risk of a criminal offence. Maybe they say they will never use it. I do not know whether it has been used before, but obviously we have to think of checks and balances. An ordinary person will not know whether the SFC, in asking for something, is performing its function. It would be very difficult for ordinary persons to try to contest it, because you are at risk of committing a criminal offence.

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

Taking it in reverse order, I do not know of an instance of using the corresponding provision under the existing law, but obviously we could not give an assurance that it would never be used. If we thought that, we would not have it in here. We think it is a valuable section, and so far as a comfort paper or giving some assurance is concerned, I think the observation that is made about the need for the primary obligation to be rendered certain, so that a general provision like this cannot bite in respect of some vague or ambiguous obligation, I think is right. It must be so.

It would seem to me that the obligation upon all of us who are debating the content of the legislation is to get the primary obligation right, to make sure that there is a degree of certainty in respect of what it is that people are expected to do. That will not in itself be enough, of course, because the performance of the function is the key issue, and the way in which the function is sought to be performed is the key issue; and that is not simply a matter of saying "There is a section that says 'Do X'". It comes down to the way in which particularly the Commission staff purport to use their powers under the section that says "X". So the question of obstruction will not only depend upon particular provisions in the substantive law, but what it is the Commission is asking someone to do in a particular case – and there will be questions of whether or not that is sufficiently certain.

I think, as you would appreciate, the prosecuting discretion and the way in which the court would deal with a case like this would be, I am sure, very much to direct our attention to whether or not the person who is alleged to have obstructed could reasonably have understood what the obligation was. I do not know whether any paper that I would be able to produce would be able to go very much further than that.

I have not dealt with clause 376. Do you want me to deal with that first?

Hon Audrey EU Yuet-mee, SC, JP:

Yes.

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

The obligation under 376 is a very general one that applies to all the criminal provisions in the legislation, so the list would cover every section. That is obviously not very helpful. Maybe I can help in this respect: in fact we have this power now that the kind of provisions the Commission prosecutes are generally provisions of a less serious type that are appropriately tried before a court of summary jurisdiction; and almost invariably they are unregistered dealing type offences, or offences under the Protection of Investors Ordinance, where someone has placed an advertisement without getting it approved. It is generally speaking confined to those unauthorized activity-type offences rather than any of the more serious offences, and it will, generally speaking, be confined to cases where there is no evidence of wrongdoing with a view to secure benefit, or where that has not secured a substantial benefit to the wrongdoer. So it is the more minor type of offences. There is one other type, and that is failures to make proper and timely disclosure under the Disclosure of Interest Ordinance. They are the three categories that typically the Commission prosecutes on a summary basis, but it has to be said that the section is general, and in theory we could prosecute under any of the provisions. There are a couple of extra safeguards. One is that the Director of Public Prosecutions remains the primary entity responsible for prosecution, and the Commission also follows the DPP prosecution guidelines. There is that additional safeguard as to the way in which we exercise our prosecuting discretion and as to how we make judgments about whether or not a particular case is suitable and appropriate for prosecution. I think you had a follow-up.

Chairman:

Margaret.

副主席：

Audrey是否想先提出一個follow-up的問題？

Hon Audrey EU Yuet-mee, SC, JP:

是，我想提出一個follow-up的問題。

I am still, having heard Mr PROCTER, a little bit concerned about section 370 in the first place, because it is "obstructing any other person". It is very wide. It is not necessarily somebody from SFC, and it can be anybody in SFC. It could be a junior clerk in SFC. The functions are undefined, so it could be any function. It does not even have to be something which is stated in the provision itself. It could be something connected with the functions and the power stated in the provisions, so it is impossible for a person who is threatened with clause 370 to know categorically whether the thing requested is part of the function. The worry I have is this: for example, you have a similar provision in relation to obstructing the police in carrying out their duties. But then we know very clearly, for example, that if a policeman asks me to give certain information I am allowed to say "No. I'm not willing to provide the information to you". I can either have my right to silence, or I have no duty to volunteer information to help the police.

Looking at clause 370 I do not know whether the same sort of right of silence or the same sort of right to refuse to provide information to help the police in their duties apply, because - - I know Mr PROCTER says "There is a safeguard". He says "Well, the DPP may not prosecute or the Department of Justice may not prosecute", but I am worried by the stage before that, which is that somebody can threaten me with clause 370, and say "Well, if you don't comply then you may be liable; you are at risk". I do not want to run the risk, so it is a stage before that. That is my worry, and I do not know whether what Mr PROCTER has said

has given me sufficient comfort that this is appropriately drafted to give sufficient safeguards to members of the public who may be threatened with clause 370.

In relation to the other provision which is about summary prosecution, I do not know whether it is possible to give us some sort of rough guidelines or principles as to the circumstances where SFC would exercise its power. My concern again is in relation to a stage before prosecution. The SFC has plenty of powers of investigation, discipline and so on. Of course they can always use this power of summary prosecution, and say "If you don't do this then I may consider prosecuting you under clause 376". It is really that threat, whereas if that power, for example, is taken - - I am not saying that SFC should not have a power of summary prosecution, but my concern is that it is again so wide that you can use it as a sort of parallel, almost as a Sword of Damocles hanging over one's head, and say "If you don't do this, then I might consider clause 376 and summarily prosecute you for a criminal offence". So it is really the sort of principles and guidelines under which the SFC will consider using this particular power.

Thank you, Mr Chairman.

Deputy Chairman:

Regarding Audrey's question on obstruction, I think Audrey may be unduly optimistic about clause 370. The law of obstruction is simple. When it is applied to police, that is something that some of us may have some experience about. Obstruction is to be construed objectively. So the question is whether you had, as a matter of fact, obstructed. An obstruction, as far as police are concerned, is defined widely as making the work of a police officer more difficult. Even if it is marginally more difficult, even if it is done without knowing that it would make it more difficult, even if it is done with good intention, that would constitute obstruction. So if a person is in fact someone performing a function under this ordinance, if his job is made more difficult, objectively speaking, by anyone, then that person

may be liable to a prosecution for obstruction.

All this not being clear that someone is performing a function is no defence. Moreover, this ordinance has two large volumes of duties, one of which is disclosure. All this right to silence and so on falls wide of the mark. If it is said that the SFC person is performing a function of asking you to make a disclosure, and you make his job more difficult, you are open to prosecution under clause 370. So this is the sort of situation. Mr PROCTER said that that has never been used, but is he advised that obstruction is going to have any more narrow meaning under this ordinance than, say, the Police Ordinance?

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

No. I do not have a particular instruction in respect of that matter, but I think we clearly understand the import of the two questions and observations.

Deputy Chairman:

I mean, if you do not, then the ordinary rule applies. To add to Audrey's question, that is precisely what we are looking at.

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

Let us be clear. I do not have advice one way or the other. I certainly accept what you just said as the best information I have, but I do not have advice one way or the other as to how this section would be construed. As I say, we understand the import of what you have just said, and we will have to consider it very carefully.

主席：

他已作出回應。我們可比較《公司條例》即Companies Ordinance、Gambling Ordinance、Building Management Ordinance、and Prevention of Bribery Ordinance，但我不知道有關條文的具體寫法，亦不知道這些條例會否訂有一些更嚴格的constructions。

Deputy Chairman:

Mr Chairman, with the greatest respect, so what? We are looking at this Bill. We are not looking at the other ordinances. Unless I am assured on good ground that obstruction is going to be given another meaning, a narrower meaning, I must assume that the ordinary meaning of obstruction would apply. This is the ordinary meaning of obstruction.

Mr Chairman, if Audrey has finished her questions - -

主席：

Finished? 對於第370條或obstruction，有沒有提問？

余若薇議員：

證監會表示會再研究這個問題。我的意思是需否制訂如此廣泛的範圍。

主席：

是的，就第370條，證監會希望研究後再作回應。

副主席：

主席，這部分採用"妨礙"的字眼，中文一般稱為"阻差辦公"。就警方的情況來說，很多案例也顯示"阻差辦公"的範圍非常廣泛。剛才證監會的回答提到，至目前為止，證監會並沒有提到會收窄"妨礙"一詞在這部分所涵蓋的範圍。由於這條款的範圍這麼廣泛，任何阻礙證監會的工作或對證監會的工作造成任何方面任何程度的困難的人，也可能會被起訴。

余若薇議員：

我希望補充一點。剛才副主席提到我過於樂觀，但就"阻礙"這個字眼方面，我比她更悲觀。我的意思是，對於"阻差辦公"來說，我們知道在法律下，我們沒有責任協助警方辦案或偵查。譬如當你目睹鄰居被行竊時，你不一定要撥999通知警方，或當警方要求你認人時，你不一定要聽從，因為你並沒有這項責任。你不可作假見證，但你卻沒有責任協助警方。

證監會的情況便不一樣。當我們看到這麼厚的兩冊條例草案，便知道證監會擁有很多權力。如果這條採取這樣的寫法，我不知道我有否責任協助證監會進行調查。如果證監會要求我披露某些資料，我是否根據第370條有責任披露這些資料？但即使警察向我調查，我也可以不回答。

副主席：

主席，我們不應這樣分析這個問題。香港法律沒有任何條文要求我們主動向警方提供資料或協助。法律顧問這樣看着我，我便知道在某些情況下，尤其現時有這麼多的刑事條例，我們須要主動向警方提供協助。但這條提到我們有正面的責任提供協助。如果證監會要求你提供協助，而你不肯，你便是"阻差辦公"。所以我們應以同樣方式分析這個問題。正如余若薇議員剛才提到，條例草案訂有很多責任，如果我們不向證監會提供協助，便是阻礙證監會履行它的責任。

主席：

是的，我明白。

Yes?

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

I do not have the benefit of any advice from the Department of Justice on this point, but that is not to say that this point has not been considered. I just wanted to be clear about that, and we will certainly go and think very carefully about the observations which have been made. I think if there were to be any change to this section, there would be a need to think about other ways of ensuring that the Commission could get on with its work and was not obstructed – and I use that in a lay sense – in the ordinary performance of its functions and duties. So we would need to think about this: if this section were assessed to be unacceptable for reasons expressed today or otherwise, we would need to think about ways of linking that notion of obstruction to the functions and powers in a way that did protect us and did avoid the possibility that someone could simply be recalcitrant, uncooperative or difficult, or destructive of documents or information, and so on, in an obstructive way.

主席：

好的。

余若薇議員：

我希望提出有關"人"的方面，在"妨礙其他人"中所指的"人"，也應該收

窄。譬如最低限度，必須規定由證監會某個職級的人提出有關的要求。所以，不但"本條例任何職能"或"本條例任何條文"的範圍需要收窄，"任何人妨礙其他人"中的"任何人"也應該收窄。

副主席：

主席，我可不可以提出另一個問題？

主席：

讓我看看他有沒有回應。 Any further response? No?

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

I do not think I need to say any more. I mean, "any other person" relates to people who are either the Commission staff or who are appointed to do something under the ordinance. It is obviously not the world at large in that context, but I understand the point that is being made.

Chairman:

Margaret?

Deputy Chairman:

Mr Chairman, I would like to ask a different question: Under 366 "Preservation of secrecy". In the paper, the legal adviser has prepared for us, it is pointed out that certain categories have been added. In other words, although there is a general preservation of

secrecy, 366 enables the SFC to disclose to a list of people. These are the exceptions to secrecy, and there are very extensive additions to the existing law as to people they could disclose their information to, particularly under (3). The Commission may disclose information in a summary form, and so on; and if one runs down the list, one sees that half the world is excepted. Not only that; in (b) you see "judicial and other proceedings". In (c) "person who is the liquidator", and then the Market Misconduct Tribunal; then the Securities and Futures Appeal Tribunal, to the Monetary Authority and then in (g) there is a whole new list. "If in the opinion of the Commission, the condition specified in subsection (5) is satisfied, to the Chief Executive, the Financial Secretary, the Secretary for Justice, the Secretary for Financial Services..." and so on – a very long list of people.

If one looks at (5), it is rather circular. Basically it does not give you much of a safeguard, so Mr Chairman, my question is: why is it necessary and what is the justification for adding all that? When all that is added, what assurance does anyone have that the information under pain of penalty disclosed to the CFA will have any secrecy left? Anything you tell to more than three people probably would be spread all over the world. It is only a matter of time. This is a whole list, so in what way is there a preservation of secrecy? What are the safeguards?

I might as well finish my question. I was particularly concerned, in view of the fact that the Chief Executive could direct the Commission to do things. The Financial Secretary preserves a power of some kind of control over the Commission, so in that sort of context, is it not a very unnerving thing that the preservation of secrecy is subject to so much exception?

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

Chairman, I think first that I should be clear that many of the categories that are identified in sub-clause (3), many of the entities and statutory individuals do appear in the

existing law. The Financial Secretary, the SFS, the Monetary Authority, the Insurance Authority, the Registrar of Companies, the Mandatory Provident Fund Authority – they are all in the existing law. I think I would disagree to this extent with the premise of the question, that there has been a substantial extension of the categories to whom information can be disclosed. I think in (3)(a) the reference to a summary is also in the existing law, in section 59(2)(a) in the form of a summary compiled from similar or related information.

I do not think there has been in that respect a substantial extension, and I think also that what we have tried to do in identifying the categories of persons or bodies to which information can be provided is to look at the structure of regulation in Hong Kong and actually make a judgment about where it is necessary. So you cannot, for example, have a situation where you could effectively regulate the MPF and the MPF products that are marketed in Hong Kong, without a capacity for the Commission to share information with the MPFA or the Insurance Authority in that context as well, because of the way in which the marketing of those products and the approval of those products is the joint responsibility of, in the case of approval, two regulators and in the case of marketing, four regulators. There are those sorts of issues that I think are reflected in the list.

So far as the safeguards are concerned, the section 5 safeguard about the public interest is the kind of safeguard that appears in legislation of this sort in other jurisdictions. It is a recognition of the fact that for securities regulators there needs to be an ability to share information with other regulators, in order to effectively regulate the market, particularly cross-jurisdictionally, and there should be a minimum of barriers to doing that; but that there should be safeguards in place that prevent the onwards disclosure of that information by the recipient. That is the kind of structure that is here.

What is set out in this legislation is exactly in line with the relevant principles of the International Organization of Securities Commissions about the sharing of information, and it is very much in line with what appears in other jurisdictions. The fact is that there is quite a

long list of entities named here, but our judgment is that that is an appropriate list if we are to effectively regulate the securities markets in Hong Kong and effectively allow fellow regulators who have shared responsibility, to discharge their responsibilities; and allow, for example, in the case of professional bodies, self-regulatory organizations to play a role as well. So organizations like the Society of Accountants have a key role in regulating their members, and that would be a role which would be made much more difficult, and may be even frustrated if we were not able to share information.

It looks like a long list, but there are sanctions and they are criminal sanctions that attach to a breach of the provisions. I think the experience has been, in respect of section 59 of the Securities and Futures Commission Ordinance, which is really quite similar to this provision, that it works; it is not an excessively long list, and that the kind of sanctions that attach to breach have proved to be robust enough to prevent leakage. There is not a history in Hong Kong of information being leaked by the securities regulators or by others to whom information is provided. You do see that in some other jurisdictions and in some other areas of regulation. You do see quite frequent leaking of confidential information. But that has not been the experience in Hong Kong. I think the section works well and it does reflect what is needed.

Deputy Chairman:

Mr Chairman, just to follow up, in fact I think Mr PROCTER is quite right that it is about the sharing of information, so instead of preserving preservation of secrecy, we might as well have this sharing of information. That may be more appropriate. That would not lull us into a false sense of security. I would like to make the point first that although you say the list is not substantially enlarged, the information now you can coerce is much enlarged, and that makes a great deal of difference. This is the first point.

The second point: let us look at who are the additions to your list. Mr Chairman,

does Mr PROCTER disagree with the Legal Adviser's list? That is the document CB(1)1333/00-01 under clause 366(3). The Legal Adviser list sets further exceptions, for example to cover all judicial other proceedings, and so on. Under (g) we see the Chief Executive, so the Chief Executive is new. I would like to know why. The Secretary for Justice is new. I would like to know why. The Mandatory Provident Funds Schemes Authority is new. Privacy Commissioner for Personal Data; Ombudsman; a recognized exchange controller; a recognized investor compensation company; an unauthorized automated trading service provider. These are added.

First, would Mr PROCTER confirm that the listed Legal Adviser has got it right, and if so, what is the justification under each of these items? This is my point two. Point three is: Mr PROCTER refers to the safeguards under (5). There does not seem to me to be any very specific safeguard. To begin with, the major safeguard is in the interest of the investing public, or in the public interest. You really cannot place it any wider than public interest. (b) is a negative way of putting the same point, that disclosure is not contrary to public interest.

So these are extremely wide. How are we to say that this is not in the public interest? We have had this argument many, many times before, and I think – it s not my personal quote, but Mr PROCTER probably appreciates it – this Council is extremely sensitive to anything being public interest, being a reason. Those are my three points, Mr Chairman.

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

I think, Chairman, as to the first point, the heading of the section, I do not disagree with that. It has a lot to do with the sharing of information. The second point: actually the Legal Adviser's list is not quite correct, and in some respects it may also be slightly

misleading. For example, there are some amendments that have recently been made that would include the Mandatory Provident Fund Schemes Authority. That is already on the list. I have already explained particularly by reference to that authority why shared responsibility would mean that that was necessary.

So far as institutions like recognized exchange controller, investor compensation company and ATS are concerned, they simply reflect the fact that the primary legislation in section 59 is out of date in respect of the way in which these entities are set up and structured. You have the Stock Exchange company, the Futures Exchange company, the Securities Compensation Fund Committee. All those sorts of entities are under the existing law. You now have different structures. You now have the possibility of an exchange controller under legislation, and subsidiary companies that operate exchanges, and you have the possibility of automated trading services under Part III, which are approved, as it were, as exchanges; and again it simply reflects that kind of change.

Someone is just passing me an amended copy of section 59. In fact I am actually wrong about that, because the legislation has caught up with that, and the existing section 59 does pick up things like exchange controller, and I can certainly confirm that it also now includes the Mandatory Provident Fund Schemes Authority. The Secretary for Financial Services is new. I think that reflects the fact that the administration structure is that there is a Financial Secretary and a Secretary for Financial Services, with shared responsibility. So it makes sense, in order that they can jointly discharge their responsibility, that we are in a position to provide to both. The Ombudsman and the Privacy Commissioner I think reflects the seriousness with which we take their duties and responsibilities. Bear in mind that we cannot simply give information to the Ombudsman and the Privacy Commissioner because we think it would be interesting to them, or that they might be curious about it. It has to meet the other tests.

I understand the import of the question and I certainly understand the breadth of the

section 5 gateway, but I think the way in which this section would be construed by a court, and the way in which the Commission ought to approach it, is to start by saying there is a basic prohibition under subsection (1). That is the basic duty and responsibility. These other things are gateways, but they are to be understood and read in the light of the basic prohibition. The basic requirement is that you preserve secrecy.

That is the way in which the public interest and the interests of the investing public is to be understood. They are to be understood in the context of the section, not at large, as it were. Certainly that has been my experience of how this kind of section has been construed in other jurisdictions. I entirely understand the observation about subclause (5), but I would suggest that it does need to be understood and interpreted in the context of subclause (1) and the basic requirement.

I also think that it does reflect the practice in other jurisdictions. It does in its content and its form very closely reflect the kinds of gateways that are provided in other jurisdictions, and it does very closely reflect what is expected internationally of a jurisdiction like Hong Kong, in the sharing of information between regulators both domestically and internationally. It is very much in line with the international standards.

Deputy Chairman:

Mr Chairman, Mr PROCTER has not finished really, because point one, changing the name, is just a joke. He has very kindly responded to that, but the point I was making rather is that you are really not asking people to disclose a wide range of information under secrecy, with the protection of confidentiality; you are asking people to disclose a wide range of information which you will share or potentially share with a wide list of people. This is the point I am addressing. At the end of the day, Mr Chairman, as I said in one of the previous meetings, disclosure is central to supervision. So we are minded to accept that the SFC has to have those powers. But if the disclosure is going to be made to so many people at the same

time, we are in very great difficulties. This is point one.

Secondly, the blanket approach: my general question is that I would really like to see this list tightened up, because we are asking for more information. Therefore I would like some assurance that only people who have a pretty clear and specific reason for accessing this information will be told.

That leads to the unanswered part in my question two. Mr PROCTER has not really finished the list. For example, there is a "judicial other proceedings". Why is that added? Why is the Chief Executive also added? Why is the Secretary for Justice added? Can those be explained? I do not know that he has explained the Mandatory Provident Funds Scheme.

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

I think I did in the context that that is the one I did explain in terms of the shared responsibility that we at the SFC and the MPFA have for approval of offering documents, and the joint responsibility we have for the supervision of those who promote and distribute those products. I do not think you could effectively regulate the industry or that part of the financial industry in Hong Kong, unless we and the MPFA could share information – for example, as a result of inspections – or could share information about our process of reviewing documents. For example, when we get a document in for an MPF scheme the SFC looks at the investment restrictions and disclosure obligations, and the MPFA looks at it in terms of the trustee's responsibilities, which they regulate, and whether or not it meets the investment guidelines under the MPFA regulations. So there is quite a close connection between the two, and there is a memorandum of understanding in that respect.

Again – and I certainly did not mean any disrespect in not going through each of

those points – I do think the list has been compiled carefully and with very much the kind of issues in mind that the question suggests we should have taken into account in compiling the list. We do not think it is an excessive list. We can look at it again.

Deputy Chairman:

What problem did you have in not including, say, the Chief Executive?

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

I will let the Administration deal with the Chief Executive, but in terms of litigation to which we are a party, and it is a litigation to which we are a party, if you contrast that with other jurisdictions - - for example, if we were to be served with a subpoena to produce information in respect to litigation to which we are not a party, we could resist the subpoena under this section. Most other jurisdictions with which I am familiar would actually have to respond to the subpoena. They could set it aside if it was fishing or vexatious, but otherwise they would have to respond to a valid subpoena.

We actually have a narrower responsibility and right in use of proceedings in, say, Australia where they would have to respond to a subpoena. But the view is that if we have become a party to proceedings it is because we have a proper and legitimate interest in it, and that we should be able to provide information for the purposes of those proceedings, or indeed, for example, to ask questions that arise out of information we have available to us. To participate as a party where we were subject to that constraint would mean that we could not effectively participate as a party. I am not sure if you do want me to go through each of these now.

Deputy Chairman:

You may also want to leave the Secretary for Justice to the Administration, but I would like to have these explained. Why was it not necessary before, and now is considered necessary?

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

I have dealt, I think, with the Ombudsman and the Privacy Commissioner in saying that they do have responsibilities in respect of matters. Certainly with the Ombudsman, for example, unless there was an investigation by the Ombudsman, we had certain restrictions. It is simply reflecting the fact that we think we should be subject to scrutiny by those other bodies.

If you start with a basic prohibition, then you have a request from those organizations, and then you make a judgment that disclosure is in the public interest. It is the Commission saying "Yes, we would like to be able to assist them in doing their work in supervising us", in the case of the Ombudsman. To remove that I think would potentially limit the Ombudsman's capacity to oversee the SFC. I guess that would be, from our perspective, a bad thing. It is useful for us to have the Ombudsman to be able to scrutinize the SFC in its performance. I think Miss LAU wants to deal with the Chief Executive and the Secretary for Justice.

財經事務局首席助理局長劉利群女士：

主席，我相信從行政機關的角度來看，我們有責任提供適當的經濟和法律環境，以保持香港作為國際金融中心的地位。這項行政機關的責任，已在《基本法》第一百零九條列明。如果各位議員已閱讀我們為各位提供的文件，便會發現在我們於5月初發出的一份文件提到，有議員在較早前提出有關條例草

案第II部，關於行政長官有權向證監會發出書面指示的問題。在該份文件內，我們已很清楚地解釋行政長官及行政機關的責任。

如果我們參考第366條有關保密的條款，正如Mr PROCTER也曾解釋，該條的construction，即結構，是證監會的同事對於在履行職責時接觸到的資料，基本上須承擔一般的保密責任。正如議員剛才提到，第366條第(5)款的保障條文相當有限，但如果證監會在調查過程中取得的資料，可協助CE、FS或SOJ執行職務，而並不違反有關公眾利益的原則，證監會按照該條款確實擁有discretion，即證監會有權將這些資料向行政長官、財政司司長及律政司司長披露。所以，對於剛才余議員提問這條與第II部有沒有抵觸的問題，我們在文件內已充分地解釋。第II部所訂有關行政長官發出書面指示的權力，是一項備用的權力。

主席：

我仍然不太明白。《證券及期貨事務監察委員會條例》第59條訂明有關保密的責任。任何人調查某宗個案時均須把獲悉的事情保密。他只可在很特殊的情況下，才可向某些人披露有關事情。但條例草案現時的寫法很general。若行政當局希望詢問某些事情，有關人士便須作出general的披露。據我估計，若有關人士向行政長官或向香港金融事務管理局披露一些市場的特別現象，一些general的現象，不會造成很大的問題。但將來的政治體制可能會改變，這可能是我的判斷。將來會有很多政治任命，情況會較以往複雜。若證監會調查某人，其後將這些事情向某君披露，披露這些特別個案的事情，跟披露一般的市場現象或市場調查資料，會否很不同？第366條所訂的，是一般性的披露。

副主席：

舉例來說，現在的財政司司長是財政界人士。他將來或許會再次投身財經界。他不可能不知道已經知道的事情。這條沒有提到，證監會在有需要的情

況下才須作出披露，而是提到一般而言，所有主要官員及最高層的官員均有權知道證監會在這條法例下要求其他人士披露的事情。

換句話說，證監會要求其他人士作出披露時，該人應知道，所有的政府高層人員都可以知道他披露的事情。這條不是指證監會須基於特定的原因作出披露，而是指該會基於一般性的原因或公眾利益的理由須作出披露，當然，高級官員知道多一些事情，便會較易辦事，便會對公眾有利益。這樣的原因也很容易得以符合。

我是不接受第II部有關行政長官有權發出書面指示的條款，因為在這樣的情況下，證監會尚有甚麼獨立性可言？證監會只是executive arm of the government吧了。政府高層只是以證監會作為套取消息的渠道而已。

主席，對不起，這實在是十分關鍵的問題。整體來說，所謂監管，是指獨立監管。為甚麼市場要向證監會披露一些可影響市場運作的關鍵性的資料呢？全因為市場相信證監會是獨立的機構。而證監會需要的資料，純粹是用作監管市場。有關披露不是一般性的披露，不是跟政府最高層的人員作出sharing of information。這使我很難接受整個監管制度。主席，我今天不打算再作爭議。

財經事務局首席助理局長劉利群女士：

主席，我希望澄清一件事。第366條並不是賦權行政機關向證監會取得資料，我必須清楚解釋這點。我覺得證監會的獨立性並沒有被削弱。因為該條只是倒過來說，即在符合該條subsection (5)的情況下，證監會才可向剛才提到的主要官員披露資料。

副主席：

換句話說，不是官員要求證監會提供資料，而是證監會主動向官員提供資料。不但這樣，這條條例同時訂明，如果證監會不自動提供資料，行政長官在任何時間也可基於公眾利益的理由，要求證監會提供資料。怎談得上獨立性？證監會有何獨立可言？在世界其他地方有否法例授權當局隨時提出這些要求？

財經事務局首席助理局長劉利群女士：

我剛才也曾解釋，第366條並沒有賦權主要官員向證監會取得資料。但若證監會覺得情況符合有關條款的條件，該會有權披露這些資料。但該會亦可以不作任何披露，視乎情況而定。這便是第366條的情況。

至於第II部有關行政長官向證監會發出書面指示方面，我也曾解釋，這是一項備用的權力，亦從來未經行使。制訂這項權力的目的，基本上是在某些情況下，如果證監會真的不能履行其職能，而市民對政府作為行政機關亦抱有期望時，行政機關便可行使最後的備用權力，指示證監會作出符合公眾利益的事情。我不希望將第366條和較前部分的第11條一併討論。

副主席：

對不起，主席。我們不能不一併討論這兩項條款，因為這便是行政長官的權力所在，也是有關符合公眾利益的條款。

主席：

條文雖然訂明，如果證監會的要求得以滿足，證監會便可作出披露。但事實上，如果在這條款中指明的官員去信證監會，表示希望瞭解某些事情，證監會便要考慮該會有否權力作出披露。而跟據這項條款，證監會是可以作出披露。

由誰觸動這項披露故然重要，但根據這項條款，若證監會發現財政司司長要求瞭解某些事情時，該會便要向他披露。若這條款獲得通過，而證監會覺得財政司司長不應知道該些事情時，該會便較難拒絕財政司司長的要求。

財經事務局首席助理局長劉利群女士：

我剛才也曾提出，若證監會認為情況符合條款訂明的條件，披露有關資料已是符合法例的要求，這做法應該沒有問題。

至於主動性的問題，基本上，該條款並沒有訂明，但凡行政機關要求證監會提供資料，該會便須作出披露。第一，該款並沒有賦權行政機關取得資料。第二，即使行政機關要求證監會提供資料，證監會亦須考慮有關要求是否符合訂明的條件。若該項要求不符合有關條件，該會便不應提供有關資料。

副主席：

主席，作為高級官員的，當然會表示有關要求符合第(5)款有關公眾利益的條件。當代表市民的高級官員表示有關要求符合公眾利益時，證監會怎能認為有關要求不符合公眾利益？如果證監會不提供資料，該官員便可引用第11條，指示證監會提供資料。情況便會變成"賞酒不吃，吃罰酒"了。這樣的情況下，有誰會相信證監會是獨立的機構？在證監會不是獨立的情況下，該會憑藉甚麼要求其他人士提供對市場敏感的資料呢？

所以，我現在希望爭取的，是證監會的獨立性，不但是該機構本身的獨立性和在法律上的獨立地位，也是在其他人士及公眾心目中的獨立地位。我們需要設很多的防線，將行政機關的權力和證監會的權力分開。為甚麼政府對這麼簡單的事情也不能明白呢？請妳告訴我，其他地方的高級官員是否也可隨時要求有關機構提供資料。有關機構有否權力向該等高級官員作出披露？高級官

員有否這樣的power of direction呢？

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

Sorry. It took a long while to translate. Putting to one side for a moment the question of the Chief Executive and the power to direct, there are a couple of other things that have come up in the last few questions and answers that I think are important in the context. One is that you gave an example of one who comes to an official position from industry and can go back to it. Obviously that is an issue and that is one of the reasons why you have a provision that makes it a criminal offence to make onward disclosure or to use that information for another purpose in that context. If, hypothetically, someone did come from industry and occupy one of these positions, or indeed if someone in one of these other entities received information from us and used it for another purpose, whether maliciously, for their own benefit or for whatever reason, they would render themselves liable to criminal penalties. So it is not simply left in a vacuum.

I think the other thing to keep in mind in terms of these provisions – and again, just leaving to one side for a moment the one about the Chief Executive – is that these are the kinds of provisions that apply to other securities regulators in other jurisdictions. They may not be exactly similar in terms of expression, but the effect is the same, and there is also the international expectation. It would be bad for Hong Kong, I think, to remove this kind of opportunity to share information with other regulators. So we would have to be very careful about restrictions that prevented the SFC cooperating with other regulators. It would very much frustrate the way in which we were able to do our job, and reciprocity of those arrangements is a characteristic of them in the securities market context.

The third thing is that I think we have to be careful about the debate, because – I do not mean any disrespect to the Legal Adviser – I think the comparison of the two lists is a

little more subtle than is suggested by his table. For example, if you look at that question of judicial proceedings, it is true that the new Bill says we can share information in the context of judicial or other proceedings other than criminal. The existing law says we can do it in civil proceedings.

It is different but it is not fundamentally different. The existing law, for example, provides that we can share information with the Financial Secretary and the Secretary for Financial Services, for example. Yet that has not, even though that has been the law for several years, I think – and I say this really from the perspective of someone who is a participant – has not eroded the independence of the Commission. So it is there; it is proved to be an appropriate gateway in some circumstances; it is not used very often, but it has not eroded the independence of the Commission.

The question of whether other regulators have the power to share this kind of information obviously varies from regulator to regulator, but I think for example the Mandatory Provident Fund Schemes Authority Ordinance has a very similar provision. There are differences between us and the Monetary Authority. I am not sure if Mr YUEN is able to tell us now what those differences are, but the relationship between the monetary authority and the Financial Secretary is a different one from the relationship between the SFC and the Financial Secretary. The Financial Secretary is much more involved in the work of the monetary authority directly, so there are certainly direct gateways for sharing of information there.

Certainly comparatively what is proposed here is not very different. I think the complexity does come in in respect of this directions power, and the sort of scenario that was described, of our ability to share information and the gateway, and the fact that we might then be subject to a direction, I think is open on the construction of the sections. Nothing I have seen in respect of our power to share information with the Financial Secretary or the Secretary for Financial Services would suggest that that is going to compromise the independence of the

Commission. It just is not working that way at the moment, but there are some differences certainly now with what is proposed.

財經事務局首席助理局長劉利群女士：

主席，我希望作出補充。我們比任何人更希望保持及促進證監會作為獨立監管機構的角色。我們一直在討論證監會作為獨立機構與行政機關之間在角色方面的問題。有關制衡應達到哪個程度呢？這些制衡會否令證監會的獨立性受損呢？其實我們也在考慮怎樣才可取得最合適的平衡。

但大家也要考慮，我們作為行政機關，本身也有責任提供適當的經濟及法律環境，以保持香港作為國際金融中心的地位。這是《基本法》要求我們承擔的責任。我們也要滿足市民對我們提出的要求。即我們基本上也需要在很特殊及例外的情況下，如果監管機構作出一些影響公眾利益的事情，我們也應擁有最終的權力，向監管機構發出direction。我覺得我們已經在這兩者間取得平衡。

副主席：

主席，我不希望妨礙其他議員，但如果其他議員沒有提問，我希望作進一步的提問。

主席：

有議員希望提問，胡經昌議員。

胡經昌議員：

我仍是跟進第366條。我很同意兩位議員剛才所提出的意見。其實這部

分涉及很多權力的問題。我認為除了這部分外，還有很多其他部分的草擬方式也是過於廣泛。我也曾多次提出這項意見，我希望這次可簡單地提出我的意見。

第366(3)(h)條，特別是第(h)(ii)款提到所謂"專業"或"半專業團體"披露資料的問題。我相信專業團體行事時，一定會採取保密的措施。但對於半專業團體，政府當局心目中有否確認哪些團體屬半專業團體，以及有否確認這些團體的保密準則呢？政府如何確保這些團體不向外披露所取得的資料呢？載於第C2319頁的第366(6)(b)條提到有關海外規管機構或主管當局方面，訂明"is subject to adequate secrecy provisions"。即若證監會向海外機構提供資料，便表示證監會相信這些海外機構具有足夠保密條文。

我希望提出兩個問題：第一，證監會是否同樣須要信納第(h)(ii)條所提到的半專業團體或專業團體也受保密條文限制，才提供資料？第二，對於這些海外監管機構，規定它們訂有"足夠"的保密條文，是否已經足夠呢？如果我們制訂相當嚴緊的保密措施，我們須否要求這些海外監管機構制定同等的保密條文呢？當我們向海外機構提供資料時，我們如何能確保這些組織或機構的保密程度跟我們的保密程度一樣，而不是只要求這些機構認為它們的保密程度與我們的保密程序相同？因為即使這些機構認為本身已訂有足夠的保密條文，風險也相當大。當局有否制訂機制，指明"足夠"的定義，是有關的保密程度最低限度等同我們的保密程度？如果沒有這個機制，我們一旦把資料提供給海外機構，而由於該等機構無須把資料保密，便向他人披露這些資料，那怎能保障金融資料的保密性呢？

多謝主席。

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

Chairman, I think we have two separate questions. One is the question relating to professional or semi-professional bodies, and what are the safeguards in respect of disclosure to them. The wording that is used in the proposed provision is the same as the wording in the Securities and Futures Commission Ordinance in section 59(2)(i). As to what semi-professional bodies we have in mind, I do not think I can actually think of a good example of a semi-professional body. I think it is really just compendious drafting language to pick up, and avoid the possibility of narrow characterization of something like the Law Society or some other body that acts as a self-regulatory organization, being characterized as not professional or only semi-professional.

The safeguard is that of course it has to be dealt with in rules. You have to actually provide for these bodies to be identified in rules. I think the parallel in other jurisdictions would be with something like the NASDAQ, the US self-regulatory organization that supervises the broking industry. There is a similar institute in respect of Canadian provincial securities markets as well. Those are the kinds of bodies. The Society of Accountants is specifically picked up; the Law Society is not specifically picked up. Presumably if we were to pass information to it as a professional or semi-professional body, then we would have to make sure it was dealt with in rules, and do it that way. I think it is really just a matter of making sure that there is not an unnecessarily narrow construction of the body and its characteristics.

Once they have got it, there are certainly sanctions for misuse, and the sanctions that appear in sub-clause (7) as understood, against subclause (10), would provide for the possibility of criminal conviction where those bodies that received the information used it for an improper purpose or forwarded it to anybody else.

So far as overseas regulatory bodies are concerned, again there has to be a gazettal of those overseas bodies, and the process is that we actually look very closely at the regulations and the laws in those other jurisdictions, and also consider and make a subjective

judgment about the reliability of those other regulators. We do not just rely upon the content of their legislation. We do look to the quality of the relationship we have, their reputation as a regulator, our experience of dealing with them in the past, whether or not we have a memorandum of understanding with them. It is only having looked at all of those objective and subjective issues that jurisdictions are gazetted for these purposes.

In some cases where you would expect regulators would meet the requirements, there are some particular quirks in domestic laws in other jurisdictions which mean that we are not prepared to share information with the regulators in those jurisdictions; and the best example is one that comes up quite often internationally – France. Because the French law requires that any information provided to the COB, which is the French securities regulator, that disclosed or may disclose evidence of a criminal offence in France, is required to be passed to the French police or investigating magistrates. We as a regulator could not restrict its onward disclosure or use. They would be obliged by French law to pass it on. In those kinds of situations where there is peculiar domestic law like that, we do not gazette a country, or we do not freely exchange information with the country. So we make objective and subjective judgments about that other jurisdiction. Where we do judge that it is safe and the other jurisdiction is reliable, and they nonetheless prove to be unreliable, then the availability of criminal sanctions is really neither here nor there. The fact is that in that kind of relationship between international bodies in different countries, you have to rely at some point on the integrity of the other jurisdiction and its regulatory agencies as you have assessed them.

People rely on Hong Kong and make judgments about Hong Kong in exactly the same way. If we cannot as regulators share information on that basis, then we are going to have an increasingly difficult time in regulating the markets. There is just too much happening internationally, too much necessary by way of sharing of information, for us to be able to proceed on another basis.

I did have an example of something you describe, in Australia, where I authorized

release of information to a country in this region, and the very next day it appeared in the major daily newspaper. That country never again got any information from us. That was ultimately the sanction that you could impose. You just could not rely upon them and you could never agree to share information with them. So although notionally there may be some criminal sanctions, practically at that level of international cooperation you have to rely upon their integrity; and if they do not prove to be worthy of that trust, then you do not share information in the future.

胡經昌議員：

主席，對於這條款的草擬方式這麼廣泛，我也很擔憂。基本上，只是證監會認為那些是專業或半專業團體吧了。相信各位也很容易明白甚麼是專業團體，但半專業團體的概念，便較難明白。所以，我希望官方、政府或證監會最低限度讓我們知道，它們認為甚麼團體是半專業團體。原因是：第一，"半專業"的概念是由你們提出的，你們可任意界定何謂"半專業"。你們現在可否向我們提供名單，列明你們界定為半專業的團體。

第二，我仍然很擔憂有關海外機構的問題，因為這些機構是否受足夠保密條文規限，也是由你們決定。你們可否擬備checklist，列明該等機構須符合甚麼條件，才可獲得認可？我主要是擔憂關於adequate secrecy的問題。現在的做法是只是由你們決定這些機構是否受足夠保密條文規限，但實質上這些條文是否足夠呢？剛才你提到證監會訂有程序，確認證監會可向哪些海外機構提供資料。你可否給我們一個checklist，列明證監會根據哪些原則決定向這些機構提供資料，以增加我們的信心呢？現時這份文件並沒有詳細說明這些情況。證監會可否提供這兩份文件？

多謝主席。

主席：

或從另一個角度來看，professional...

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

Just let me answer that one first. What we do before we gazette a jurisdiction for these purposes is to negotiate a memorandum of understanding with them. In a sense the memorandum of understanding would supply Mr WU with a checklist. It sets out the kinds of areas in which co-operation is required, the kinds of powers that we would expect, the kinds of safeguards that we would expect in the other jurisdiction. It recites the environment, if you like, in which information exchange would take place. We can certainly assist in that regard and show you the kind of memoranda that we negotiate.

In fact there are two kinds of memorandum of understanding. One is where we assess whether the other jurisdiction is sufficiently well-regulated where we could share this kind of information; and one where we assess that it is not. Where it is not, we have a much more limited form of co-operation as set out in the memorandum of understanding, which is limited to the disclosure of publicly-available information. It is help, but it is no disclosure of confidential information. There are certainly some jurisdictions where we have made the judgment that they are not reliable enough for us to provide information under what is now section 59.

I entirely understand that the section as drafted and the section as it exists in the existing law looks like a wide section. I just caution members in one respect, and that is the way that internationally these arrangements have been made for many years. It would not be good, in my judgment, for Hong Kong's reputation if we were to significantly narrow the gateways for cooperation and assistance to overseas regulators. In that respect I think we should be careful about that, even though I understand the anxieties that have been expressed

by members.

So far as the professional or semi-professional bodies are concerned, as I said before, I could not think of one that I would characterize as semi-professional. I think it is just language drafted out of an abundance of caution, not by the current drafting but with the existing law put in there many years ago. We can think and see whether or not it is necessary to have the compendious term, or whether or not we can actually think of examples of organizations that would be characterized as professional and others that would be semi-professional, and perhaps come back on that point.

However, the key I think is that no one gets anywhere, however they are characterized, unless they first are assessed and find their way into a rule that designates them for these purposes. So there is transparency and scrutiny of the process of characterizing a body for these purposes.

主席：

我希望提出一點。在法例上也有界定何謂專業或半專業團體。有些團體是在法例上訂明的專業團體，例如工程師學會，或者其他專業團體；但有很多團體也認為本身是專業團體，而沒有法例作為backing的。那麼，屆時真的可能會出現爭拗。例如將來可能會有一個名為Institution of Stockbrokers的團體，並自行作出規管。這團體會否視為專業團體呢？這點是需要考慮的。

我希望以5分鐘的時間討論其他事項。我知道余若薇議員已經舉手表示希望提問，但請妳留待下次會議再提問吧。由於吳亮星議員在這次會議上未曾提問，我希望給他提問的機會。

吳亮星議員：

我也只是希望跟進一些操作性的問題吧。這問題是有關胡經昌議員提到的第(h)款之後的第(i)及(j)款。這兩款也有點含糊。第(i)款提到有關人士須向根據有關條文獲委任為核數師的會計師提供資料。這做法當然沒有問題，亦可以理解。但該款提到"或曾經根據本條例任何條文獲委任的核數師"。"曾經"的意思，似乎是若有關會計師曾一次獲委任為核數師，這名會計師便永遠也有權要求取得所需的資料。這草擬方式是否會造成在時間上毫無限制的情況呢？即若會計師曾一次獲委任為核數師進行一項工作，根據這條條文，他永遠也擁有要求取得資料的權力。那麼，他的地位豈不是比財政司司長及律政司司長還要高嗎？

第(j)款把財政司司長和律政司司長分類為"人"，而把其後的稱為機構。那4個機構，特別是警方，均由數以萬計的人員組成。根據這條款，這些機構也可要求取得資料。即使警方要求一般的銀行提供資料，也須取得法庭發出的warrant。如果警方可理解為一名警員，當警員調查一宗案件，或者當他希望瞭解一些情況時，也可以警方的身份取得資料。這會否構成濫用職權的情況？我希望討論這些問題。

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

On the first question relating to subclause (i), that is not how I would read it, and I think the first clause, "...a person who is or was an auditor", has to be read in the context of the second, that it has to be disclosure for the purposes of enabling the Commission to discharge its function under any of the relevant provisions. So it is not an unrestricted right to give information to someone who is or was appointed as an auditor. It is easy to imagine a situation where someone has been appointed as an auditor under Part VII and has completed their task of reviewing an intermediary, but the Commission still needs to go to that person and ask for further information. The Commission there would be seeking a difference in the discharge of its functions, from someone who was an auditor appointed under a section of this

ordinance. I think that what appears to be a very wide possibility of release of information in the first part of (i) is sufficiently conditioned by the second part of it.

As to the Police, I think the observations that there are a lot of Police and that some have a legitimate interest in getting information from the SFC and some require it is right. We actually, of course, have very close and clear points of liaison between the SFC and the Police. Again, I think the way in which the provision should be understood is that it has to be a release for its proper purpose in the context of the section at the outset. The Commission has to do what it can to preserve secrecy, and it should not communicate information to any other person unless that is necessary in the performance of a function or for the purpose of carrying it into effect, as they are required to do under the ordinance; and it should not suffer anyone to have access to information it has obtained.

Again I would read (j)(iii) in that context. It is saying that of course the SFC is not free to simply provide information to the Police at large. It is in the context of the section that has to be a relevant disclosure for the Police to perform their function; and that requires a judgment to be made about who it is within the Police who gets the information, and indeed whether it is given to them subject to conditions, as it almost invariably would be. It would be difficult, I think, to fashion a section that more precisely identified those within the Police to whom information should be passed, simply because it is such a big organization and there are so many parts of it who may have an interest in information or in liaison with the SFC. Certainly I would read it as much less than a right at large to provide information to the police.

主席：

有沒有跟進？吳亮星議員。

吳亮星議員：

只是一點跟進。我仍然關注到，有關機構索取資料時，負責代表該機構索取資料的人，可以會是職位低微的人員。另外，根據第176條，調查員須把取得的資料，向該條款指明的人士披露。但證監會會否制訂更詳盡的指引，說明調查員須提供資料的對象，以避免調查員披露資料時，會出現濫用的情況？

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

That is a very good question and I should have touched on that before, actually, because you are right that in the absence of some explanation, this could appear to be a power that would allow anyone at the SFC to pass information to anyone at the Police. In fact within the SFC the level of delegation in respect of disclosure is made under section 59. It is only at the top two layers. There are very few staff who are permitted to disclose information under section 59. General staff are just not allowed to do it. For them to do it would be a breach of the section 59 provision. So with respect to divisions where disclosure is most often made, which are intermediaries and investment products and enforcement, the senior directors and the executive directors will sign off on disclosure of information under section 59.

主席：

剛才吳議員的問題是雖然證監會訂有嚴格的內部規定，但問題在於那些機構。我相信其他同事對這方面還有其他問題，但我希望留待下次會議才再行討論。

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

That of course would be covered by the provisions which make it a criminal

offence to misuse the information – the people who get the information in the other organization.

Deputy Chairman:

I think it is not worry about its misuse but rather the chance that there could be universal sharing.

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

I misunderstood it. In fact that is precisely the kind of condition that we attach to disclosure under the section. We say "You can use it for this purpose but not for other purposes".

主席：

還剩下一些時間，請各位留步。我們會首先討論第XVI部，如果還有剩餘時間，便會討論第XVII部。

我希望向大家報告，到目前為止，我們已舉行了24次會議。接着下來，我們會進行clause by clause的審議工作。根據現行的時間安排，我們需要以十多次會議的時間，進行clause by clause的審議工作，因為政府也會在我們進行clause by clause審議時，提交委員會審議階段修正案。

到目前為止，秘書處擬備了5份會議紀要，是去年12月至1月期間的會議的紀要。由於這些會議涉及較為技術性的問題，並較為複雜，根據我們目前的人力資源，擬備一般性的會議紀要的工作，可能會較為困難。秘書處現正考慮採用verbatim reporting的方法，即逐字紀錄。現向各位提出這項建議。進行

逐字紀錄可節省我們的成本。或許這不涉及成本的問題，問題是我們有否足夠人力資源擬備40多次或接近50次的會議紀要。

這是個特別的做法，希望各位考慮。一般來說，Select Committee進行public hearing時，也會採用verbatim reporting的做法。就一般的會議，則提交minutes。這個做法與一般Bills Committee或其他會議的紀要不同。這做法有好處，亦有壞處。

因為今天的時間比較短促，我希望提出這個idea，讓各位先作考慮。

副主席：

主席，可否請委員會秘書解釋，這兩個做法的後果會怎麼樣，使各位可瞭解問題所在？

主席：

請委員會秘書介紹這個做法。我相信我們無需今天決定。

法案委員會秘書林葉慕菲女士：

我們也曾粗略地計算成本。以把verbatim reporting的工作外判計算，每盒錄音帶的收費大約是1,000元，即每小時1,000元。根據我們的粗略計算，60次會議合共為120小時，即大概支出為12萬元。與另聘人手比較，這款額大概相等於一名Senior Assistant Secretary一個半月的工資。由於我們的會議相當頻密，次數亦很多，一名高級主任也可能不可在一個半月的時間內，應付60份minutes的工作量。

一方面我們希望能盡快向議員提供會議紀要作為參考，另一方面，稍後

當局提出CSA時，有些議員亦可能需要參考以往的討論內容。我們衡量各方面的情況和成本後，決定作出這個提議，供議員考慮。其實秘書處已全力協助議員審議這兩條條例草案。

副主席：

主席，我可否提出一些意見？

主席：

好的。

副主席：

我覺得有兩個不對的地方。由於這60次會議之間的時間差距很少，會議中談論的內容也是相當技術性的問題，秘書處一般的支援不足以應付，絕對不足為奇。但問題應如何解決呢？採取逐字紀錄的方式，其實是很荒謬的做法。因為你剛才提到，對於條例草案的審議工作，不會作逐字紀錄。但據我對剛才的解釋的瞭解，如果不採用逐字紀錄的方式，便需要採用撮要的方式擬備會議紀要。若採用撮要的方式，便不可把工作外判，因而需要由秘書處本身的人手承擔。但由於秘書處的人手根本無法承擔這些工作，於是便要採用既直截了當，又可能可節省成本的方式，把工作外判。所以才提議作逐字紀錄。

但事實上，採取逐字紀錄的方式，可否達到有關要求呢？因為如果每次會議紀錄的內容也很多，我們在翻查紀錄上同樣會出現問題。我們可否考慮更革命性的做法？既然現時已把會議的過程錄音，可否完全不需要書面紀錄？由於我們大概也知道每次會議就某部分內容的討論，各位可否考慮一個做法，即由秘書處擬備會議的大綱，若任何人需要就某件事情翻查在會議上的討論時，秘書處才將有關內容撮錄？

主席：

我希望各位能考慮所有的options。我們現在面對的是一個新的問題。我希望政府也可以提供input。政府需要審閱四、五十次會議的紀要，是很繁重的工作。我作為主席，也要clear這些minutes。所以各方面也會很吃力。我只是提出這個問題，請各位加以考慮，希望我們能在下次會議作出決定。

坦白說，一般Bills Committee每月只舉行兩次會議，而我們現時每星期舉行兩次會議，會議的頻密程度是一般Bills Committee的4倍。現在秘書處向我們提供的人手，可能已較向其他Bills Committee提供的人手多， 但仍不能滿足在工作上的需求。

副主席：

我們至目前為止，共舉行了多少次會議？

主席：

我們共舉行了24次會議。

副主席：

總共完成了多少次會議紀要？

主席：

至今總共完成了5次會議的紀要。請各位考慮應如何處理這個問題。

Audrey。

余若薇議員：

主席，我希望提問，剛才我提到有關第376條的問題，即證監會在甚麼情況下會考慮循簡易程序定罪的問題，證監會是否可提供有關該會所考慮因素的資料？證監會可否擬備文件，說明該會在甚麼情況下，才會考慮使用這項權力，使我們可瞭解這個情況？由於有關權力的範圍很廣泛，我們也希望瞭解這個情況。

多謝主席。

主席：

這問題很清楚，是牽涉很具體的檢控問題。

多謝各位。

m2786